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SOUTHERN REPORTER, VOLUME 48.

JUDGES

OF THE

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¹ Resigned Feb. 5, 1909.

² Appointed Chief Justice Feb. 12, 1909.

³ Term expired Jan. 18, 1909.

⁴ Elected Jan. 18, 1909, to succeed Justice Haralson.

⁵ Appointed Feb. 12, 1909.

⁶ Ceased to be Chief Justice Jan. 5, 1909.

⁷ Became Chief Justice Jan. 5, 1909.

⁸ Died Nov. 10, 1908.

⁹ Appointed Nov. 14, 1908.

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FINKLEA v. STATE. (No. 13,441.)

(Supreme Court of Mississippi. Jan. 11, 1909.)

1. CRIMINAL LAW (§ 385*)—EVIDENCE—DIFFICULTIES BETWEEN ACCUSED AND WIFE.

In a prosecution for burglary and larceny, evidence of a conversation between witness and accused, in which he told accused that he (accused) had been charged with burglary and that his wife was responsible for the charge, and evidence that there was considerable feeling between accused and his wife at that time, was incompetent, and tended only to inflame the jury against accused.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 385.*]

2. WITNESSES (§ 52*)—COMPETENCY—CONFIDENTIAL RELATIONS—WIFE AGAINST HUSBAND.

In a prosecution for burglary and larceny, accused's wife was not a competent witness against him.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 183; Dec. Dig. § 52.*]

Appeal from Circuit Court, Noxubee County; R. F. Cochran, Judge.

"To be officially reported."

J. E. Finklea was convicted of burglary and larceny, and appeals. Reversed and remanded.

Appellant was convicted of burglary and larceny, and on appeal assigned among other errors (1) the action of the court in permitting the state to make proof of his wife as a witness against him on the trial; (2) in permitting witness Sennett to testify as to the conversation had with defendant in reference to the trouble with and feeling toward his wife. Sennett testified that, in a conversation had between himself and defendant, he had told defendant that he had been accused of burglary, and that his wife was responsible for the charge against him. His testimony also shows that there was considerable feeling between defendant and his wife at this time. She appeared before the grand jury, and her name appears on the indictment as a witness for the state. On the trial she was offered as a witness against him in the presence of the jury, but was not permitted to testify.

J. E. Rives, for appellant. H. H. Brooks, Jr., and Geo. Butler, Asst. Atty. Gen., for the State.

WHITFIELD, C. J. The testimony of the witness Sennett as to the conversation between him and the defendant about the defendant's wife was clearly incompetent in any view. The only effect it could have was to have inflamed the jury against the defendant. We think, also, that it was very improper to have introduced the wife of the defendant as a witness against him. She was, of course, manifestly incompetent, and her introduction, under the circumstances of the case, may have had a damaging effect on the jury.

We, however, do not reverse the case for this; but the first error is fatal, and for that reason the judgment is reversed, and the cause remanded. See Raines' Case, 81 Miss. 489, 38 South. 19; Thompson's Case, 84 Miss. 758, 36 South. 389.

(34 Miss. 145)

JARVIS v. ARMSTRONG et al.
(No. 13,598.)

(Supreme Court of Mississippi. Jan. 25, 1909.)

1. HOMESTEAD (§ 118*)—INCUMBRANCE—JOINDER OF WIFE.

A husband's deed of trust to secure the purchase money of a homestead is valid without the wife's signature.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 204; Dec. Dig. § 118.*]

2. HOMESTEAD (§ 118*)—INCUMBRANCE—JOINDER OF WIFE.

A husband's deed of trust to secure payment of a debt for money advanced to him for the construction of a house converted into a homestead is valid without the wife's signature.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 204; Dec. Dig. § 118.*]

Appeal from Chancery Court, Union County; J. Q. Robins, Chancellor.

Action by Mrs. Della Armstrong and others against J. S. Jarvis. From a decree for plaintiffs as to a part of the demand set up in defendant's cross-complaint, he appeals. Reversed.

Stephens & Stephens and May, Flowers & Whitfield, for appellant. Le Roy Kennedy, for appellees.

HARPER, Special Judge. In June, 1904, one J. H. Armstrong purchased certain lots in the town of New Albany, Miss., for which he agreed to pay \$800, paying \$25 cash and giving his notes for the remainder. He was unable to meet these notes as they fell due, and at Armstrong's request they were taken up by appellant, Jarvis. Later Armstrong decided to build a house on these lots, and contracted with one Reed to construct the same; but, as he had no money, it was agreed between Armstrong and Reed and appellant, Jarvis, that Jarvis would guarantee the payments therefor as they fell due, and in accordance with said agreement Jarvis did pay for the construction of the house for Armstrong. About January 1, 1906, Armstrong and his family moved into and occupied the house. While so occupying it, in April, 1906, Armstrong executed a deed of trust to secure Jarvis for the sum he had advanced to pay off the notes due on the lots and the amount paid out by Jarvis to Reed for constructing the house. This deed of trust recites that it was for the purchase money of the house and lots; but the wife, Mrs. Della Armstrong, did not join in this deed of trust. Some time afterwards Armstrong died, and Mrs. Della Armstrong and his children filed this bill to cancel the deed of trust as a cloud upon their title. Whereupon the defendant, Jarvis, answered, setting up the foregoing facts, and making his answer a cross-bill, and asking a foreclosure of his mortgage. To this the appellees, Mrs. Armstrong and her children, demurred specially. The demurrer was sustained as to so much of the demand as arose out of the payment for building the house, and was overruled as to that part of the demand that arose from the payment of the notes for the purchase money of the lots, from which ruling the cross-complainant, Jarvis, appealed to this court.

It has been repeatedly held by this court that a deed of trust given to secure the purchase money of a homestead is valid without the signature of the wife. If that be true, we can see no good or sufficient reason why the same rule should not equally apply as to money advanced to build the very house converted into a homestead. The money, while it may not be technically purchase money, creates and brings into existence the very thing that becomes the homestead. Every reason advanced for the protection of the purchase money as against a homestead right applies with equal force and effect to money used to construct the house; that is, to create and bring into existence the very subject claimed as a homestead. Until such

claims are satisfied, homestead rights cannot attach as against them.

The decree of the lower court is reversed, and the cause is remanded, to be proceeded with in accordance with this opinion.

(94 Miss. 264)

SAMPLE et al. v. TOWN OF VERONA.

(No. 13,711.)

(Supreme Court of Mississippi. Jan. 25, 1909.)

1. STATUTES (§ 105*)—SUBJECTS AND TITLES OF ACTS—CONSTITUTIONAL REQUIREMENTS.

The provisions of Const. 1890, § 71, that every legislative act shall have a title indicating the subject-matter, are mandatory.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 118; Dec. Dig. § 105.*]

2. MUNICIPAL CORPORATIONS (§ 112*)—PROCEEDINGS OF COUNCIL—ORDINANCES—SUBJECTS AND TITLES.

A municipal ordinance adopted without any title, in violation of Code 1906, § 3406, is invalid; the requirements of the Code that the subject-matter must be clearly expressed in the title being mandatory.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 112.*]

3. ELECTIONS (§ 313*)—VIOLATION OF ELECTION LAWS—ILLEGAL VOTING—"ANY ELECTION."

A municipal election is included in the phrase "at any election," as used in Code 1906, § 1122, making illegal voting at any election an indictable offense.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 338; Dec. Dig. § 313.*]

For other definitions, see Words and Phrases, vol. 1, pp. 421-422.]

Appeal from Circuit Court, Lee County; E. O. Sykes, Judge.

"To be officially reported."

J. J. Sample and another were convicted of illegal voting at a municipal election under an ordinance of the Town of Verona, and they appeal. Reversed.

Anderson & Long, for appellants. Geo. Butler, Asst. Atty. Gen., for appellee.

WHITFIELD, C. J. The ordinance under which these appellants were convicted was adopted without any title whatever. Section 3406, Code of 1906, is in the following words: "An ordinance shall not contain more than one subject, which shall be clearly expressed in its title; and an ordinance shall not be amended or revised unless the new ordinance contain the entire ordinance as revised, or the section or sections as amended, and the original shall thereby be repealed." Section 71 of the Constitution of 1890 is in the following words: "Every bill introduced into the Legislature shall have a title, and the title ought to indicate clearly the subject-matter or matters of the proposed legislation. Each committee to which a bill may be referred shall express, in writing, its judgment of the sufficiency of the title of the bill, and this, too, whether the recommendation be that the bill do pass or

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

do not pass." In respect to constitutional provisions of this kind it is said in 28 A. & E. Ency. of Law (2d Ed.) p. 572: "In Ohio the peculiar doctrine is maintained that the provision is merely directory to the Legislature, giving the courts no power to declare an act invalid because violative thereof, and the California court held the same way under a former Constitution in that state. But it is somewhat difficult to conceive how any express constitutional limitation on the power of the Legislature can be regarded as directory only, and certainly such provisions are everywhere else deemed to be mandatory, requiring the courts to pronounce invalid all statutes in violation thereof." Manifestly the provision of our Constitution is mandatory in this regard; and so, also, is section 3408 of the Code of 1906 as to municipal ordinances. The ordinance should have been excluded.

Section 1122, Code of 1906, is in the following words: "Any person who shall vote at any election, not being legally qualified, or who shall vote in more than one county, or at more than one place in any county, or in any city, town, or village entitled to separate representation, or who shall vote out of the district in which he resides, shall be liable to indictment, and, on conviction, shall be fined not exceeding two hundred dollars, or be imprisoned in the county jail not more than six months, or both." A municipal election is included in the language "at any election."

But for the error in admitting this void ordinance the judgment is reversed, and the prisoners discharged.

(34 Miss. 107)

HOUSE v. STATE. (No. 13,007.)

(Supreme Court of Mississippi. Jan. 25, 1909.)

1. HOMICIDE (§ 7*)—MOTIVE—NECESSITY.

It is not necessary to show motive to sustain a conviction of murder.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 7.*]

2. CRIMINAL LAW (§ 1159*)—REVIEW—VERDICT—CONCLUSIVENESS.

A conviction of murder, rendered on conflicting evidence and justified by evidence, will not be disturbed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

3. HOMICIDE (§ 203*)—DYING DECLARATIONS—GROUNDS OF ADMISSIBILITY.

Decedent was shot and so seriously wounded that he could not rise. The attending physician told him that he had but a few hours to live. He stated that he wished to see his parents, that he was going to die, that he believed he was, and would like to see his wife, and that if he had to die he would die brave. Shortly thereafter he made a dying declaration, and he died within two hours. Held, that a proper predicate was laid for the admission of his dying declaration.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 430-437; Dec. Dig. § 203.*]

4. HOMICIDE (§ 215*)—DYING DECLARATIONS—COMPETENCY OF DECLARATION AS EVIDENCE.

A dying declaration, which is the direct result of observation through declarant's senses, is admissible; but a declaration which comes from a course of reasoning from collateral facts is inadmissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 454; Dec. Dig. § 215.*]

5. HOMICIDE (§ 215*)—DYING DECLARATIONS—COMPETENCY OF DECLARATION AS EVIDENCE.

A dying declaration that accused killed declarant without just cause is admissible as a statement of a fact, and is not objectionable as the opinion of the declarant, where everything was known to declarant.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 454-456; Dec. Dig. § 215.*]

Appeal from Circuit Court, Lee County; E. O. Sykes, Judge.

J. D. House was convicted of murder, and he appeals. Affirmed.

Guy Mitchell, Anderson & Long, and Alexander & Alexander, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

POWELL, Special Judge. This is an appeal from the circuit court of Lee county. Appellant was indicted for the murder of Jim Putt, and tried, convicted, and sentenced to the penitentiary for life. We gather from the evidence adduced that appellant and deceased, with a party of some four or five others, had gathered about dark at a small cotton house in an old field, and engaged in a game of craps and the consumption of several quarts of whisky. The gaming and drinking continued until between 3 and 4 o'clock in the morning. During this time several of the party retired from the game to go to their homes for money. Appellant early in the night, getting out of money, pawned his pistol to one Hunter Moore, who was in the game, and some time about 8 o'clock in the morning, being again short of funds, left the house with his brother Porter, ostensibly to get more money. In a few minutes he returned with a double-barreled shotgun, and some of the witnesses say Porter brought a gun also. The state witnesses testify that at this point Dee House, the appellant, called from just outside the door of the cotton house to Jim Putt, who was on the inside, to come out as he wanted to see him, and that when Putt, the deceased, came out and started towards him, the appellant shot him with a gun when he was making no hostile demonstration whatever. The witnesses for the defense denied all this, and claimed that the first shot was from a pistol and fired by some one unknown, other than appellant, and that before appellant fired he said, "Boys, don't come on me." There was a dispute as to the number of shots fired; the state witnesses testifying there were four shots from shotguns only, and the witnesses

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

for the defense saying there was one pistol shot and two shotgun reports. There was also a dispute as to whether the deceased had a pistol or not; but when stripped, no weapon was found on his person, nor was any seen at the place where he fell. No one except appellant claims to have seen deceased shoot at appellant or attempt to draw any weapon upon him; but he claims that deceased did both.

When deceased was shot, all parties fled from the scene of the killing, leaving deceased, who was shot in the stomach, lying upon the ground, where he remained until the doctor came, about an hour afterwards. The deceased lingered for two or three hours, and died. Before he died the attending physician told him he could not live more than five or six hours, after which he made the following statement as a dying declaration: "He said he wanted to see his father and mother; that he was going to die; that he believed he was, and would like to see his wife. He would like to talk to her before he died. He also said, if he had to die, he would die brave. He said that Dee House had killed him, and killed him without cause."

There are 11 errors assigned by the appellant in his assignment of errors; but the court, after a careful examination of the record, find that only the first, fifth, and eleventh errors are worthy of serious consideration, and these are the only errors seriously urged by counsel for appellant.

The first error assigned is that the court erred in not sustaining defendant's motion for a new trial on the ground that the jury found contrary to the evidence. In support of this assignment it is strongly urged that no motive was shown for the killing. It is true that the record in this case does not disclose any adequate motive for the awful tragedy; but, while such disclosure may and often does give tone and color to the actions of the parties, it is not absolutely necessary to show the motive in order to sustain conviction, for sometimes knowledge of the secret motive may die with the dead man, or be locked up in the breast of the slayer. While the facts in this case are much disputed, we are not prepared to say that the jury, who heard all the testimony, saw the witnesses, and knew their manner of testifying, were not fully justified in the verdict rendered.

The eleventh error assigned is that the district attorney, in his closing argument, over the objection of defendant, was permitted to comment on the numerous instructions given for the defense, and to warn the jury of the necessity of its doing its duty to keep the country from running red with blood. In support of this assignment a long excerpt from the speech of the district attorney is copied in the record. This court has always jealously guarded the rights of defendants against unwarranted attacks by

too zealous attorneys for the state, and we have frequently reversed cases for that reason; but in this case, after a most careful reading of his remarks, we are unable to say that the district attorney has transgressed the bounds of legitimate argument or gone beyond the scope of reasonable comment.

The next and last assignment which we shall notice is the fifth in the appellant's assignment of errors, to wit: "The court erred in admitting the dying declaration of deceased over defendant's objections." In support of this assignment two objections are urged: First, that the proper predicate was not laid; and, second, that what was said was not the statement of a fact, but only the expression of an opinion.

First, then, as to the predicate. The deceased had been grievously wounded in the stomach and was unable to arise, though he had dragged himself a few feet from the spot where he first fell. The attending physician had told him, but a short time before the declaration, that he had but five or six hours to live, and in fact he died within two hours. The declaration was as before stated: "He wanted to see his father and mother; that he was going to die; that he believed he was, and would like to see his wife before he died; that, if I have to die, I want to die brave. He said that Dee House had killed him, and killed him without cause." It is ably urged by counsel for appellant that the use of the words "if I have to die" by deceased raises a reasonable doubt of his entire conviction of impending dissolution. Taking into consideration all that deceased said, and the condition under which his declaration was made, we think deceased was fully conscious that his end was at hand, and that his declaration was made under the realization and solemn sense of impending death, and therefore hold that the proper predicate was laid.

The question as to the admissibility of the latter part of his statement, to wit, that "Dee House killed me, and killed me without cause," presents a more serious question. The distinguished counsel for appellant very strongly urge that the expression "he killed me without cause" is not a statement of fact, but only the expression of an opinion, and hence not admissible in evidence. The courts of last resort in the various states are undoubtedly somewhat divided upon this question, as will be seen from an inspection of the very elaborate and able briefs of counsel on both sides of this case, though the large majority hold that the words used in this case, and kindred expressions, are admissible as statements of fact, and not mere expressions of opinion. For an exhaustive collation of authorities on this point, see Wigmore on Evidence, vol. 2, § 1447, and notes thereunder. This court has twice directly passed upon the question at issue. In the case of *Payne v. State*, 61

Miss. 161, Judge Campbell, speaking for this court, says that the statement "that the defendant shot him without cause was a statement of fact, and not an opinion or inference of the declarant," and was admissible. In the case of Powers v. State, 74 Miss. 777, 21 South. 657, this court, speaking through Judge Woods, said: "The evidence of the statement made by the deceased to the accused to the effect that 'you have killed me without cause' was properly admitted as a dying declaration, as well as a statement made to the accused and not denied by him." Inferentially this court adopted the same view in the case of Kendrick v. State, 55 Miss. 436, and Lipscomb v. State, 75 Miss. 559, 23 South. 210, 230.

To us the true and proper test as to admissibility is whether the statement is the direct result of observation through the declarant's senses, or comes from a course of reasoning from collateral facts. If the former, it is admissible; if the latter, it is inadmissible. State v. Williams, 67 N. C. 12; Lipscomb v. State, 75 Miss. 559, 23 South. 210, 230. If the facts, as shown by all the testimony, as in the case of Jones v. State, 79 Miss. 309, 30 South. 759, could not have been known to the declarant, then his statement would necessarily be founded on inference, rather than known facts, and would be an opinion not admissible; but if, as in this case, everything, as shown by all the evidence, was fully known to declarant, we fail to see why his statement that the killing was without cause was not the statement of a fact, and admissible. We prefer to stand with the majority of the courts and with our own previously expressed opinions, and hold that the declaration in this case was one of fact, and not one of mere opinion.

We therefore hold that the judgment of the lower court in admitting this dying declaration was correct, and the case is affirmed.

(94 Miss. 773)

CRENSHAW OIL CO. v. JOHNSON, Sheriff.
(No. 13,463.)

(Supreme Court of Mississippi. Jan. 25, 1909.)

LICENSES (§ 18*)—OIL MILLS—BASIS OF ASSESSMENT—"CAPITAL."

The "capital" on which the privilege taxes on cotton seed oil mills are based, under Code 1906, § 3801, is the property or assets invested and used in the business, rather than the corporate stock.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 47; Dec. Dig. § 18.*

For other definitions, see Words and Phrases, vol. 1, pp. 954-958; vol. 8, p. 7595.]

Appeal from Circuit Court, Panola County; W. A. Roane, Judge.

Action by H. M. Johnson, sheriff, against the Crenshaw Oil Company. Plaintiff had judgment, and defendant appeals. Reversed.

Alexander & Alexander and Shands & Montgomery, for appellant. J. B. Stirling, Atty. Gen., for appellee.

HARPER, Special Judge. The Crenshaw Oil Company operates an oil mill. Its capital stock exceeds \$30,000, which amount it invested in the oil mill business. But for some reason the company did not succeed, and the value of its capital stock greatly depreciated. In the fall of 1907 the sheriff of Panola county sued the oil mill company for \$350 for failure to pay the privilege license of \$175, assessed by section 3801, Code of 1906: "On each cotton seed oil mill, where the capital exceeds thirty thousand dollars, and less than seventy five thousand dollars, \$175." The case was submitted to the judge in lieu of a jury, who according to the special bill of exceptions found as follows: "The evidence shows that the amount originally invested in the oil mill business by plaintiff company exceeded \$30,000. The evidence, which was undisputed, further showed that the aggregate value of all the property, real, personal, and mixed, of said company, now engaged in the oil mill business and so engaged on the 1st day of May, 1907, was \$21,000. In this state of facts the court held the plaintiff liable to the privilege tax, holding that the amount of money originally invested in the business is what is meant by the word 'capital,' and not what was the fair market value of the property at the taxing period, and held that the capital was not affected by depreciation of value of the property which represents the original investment"—and accordingly rendered a judgment against the oil mill company for \$350.

We are of the opinion that the measure of the liability of the appellant is the value of the assets used and invested in the business during May of the year in which the tax is collected, and not the value of the assets originally used and invested in the business. We think this question is virtually settled by the case of Hazlehurst Oil Company v. Decell (Miss.) 33 South. 412. Under the language of this statute we do not think that the value of the capital stock is material or relevant; but it is the value of the capital, or property, or assets invested and used in the business, as distinguished from the capital stock.

The judgment of the lower court is reversed, and the cause remanded, to be proceeded with in accordance with this opinion.

(94 Miss. 769)

STEWART v. PETTIT. (No. 13,664.)

(Supreme Court of Mississippi. Jan. 25, 1909.)

JUSTICES OF THE PEACE (§ 70*)—ACTION—WHEN COMMENCED—ISSUANCE OF SUMMONS—"COMMENCEMENT OF ACTION."

Generally a suit is not commenced until summons has been issued, and under Code 1906,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

§ 728, providing that certain actions shall be commenced by filing a declaration on which a summons shall immediately issue, and that an action is deemed to have been commenced at the filing of the declaration, if a summons issue thereon, etc., an action cannot relate back to the filing of a claim before a justice, but must relate to the issuance of summons, where issuance was delayed at plaintiff's direction.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 231; Dec. Dig. § 70.*

For other definitions, see *Words and Phrases*, vol. 2, pp. 1281-1286.]

Appeal from Circuit Court, Pontotoc County; E. O. Sykes, Judge.

Action by B. F. Pettit against S. S. Stewart. From the judgment of the circuit court, on appeal from justice court, plaintiff appeals. Reversed and remanded.

Mitchell & Mitchell, for appellant. C. A. Bratton, for appellee.

HARPER, Special Judge. Pettit sued Stewart to recover on a contract that became due on January 15, 1904. On January 9, 1907, Pettit presented his claim to the justice of the peace, and asked him to file the same, but directed him not to issue summons until he heard further from him. The summons was not issued, as a matter of fact, until January 28th. There is some conflict and uncertainty in the testimony as to the time when Pettit directed the justice of the peace to issue the summons, appellant contending that the direction was not given until after January 15th; but both concede that it was some days after the filing of the claim, to wit, January 9th.

The general rule seems to be clearly settled that a suit is not commenced until summons has been issued, and hence this suit was barred, unless prevented by our statute on the bringing of suits, which is as follows: "Sec. 728 (870) Code 1906.—Except in cases in which it is otherwise provided, the manner of commencing an action in the circuit court shall be by filing in the office of the clerk of such court a declaration, on which a summons for the defendant shall be immediately issued; and an action shall, for all purposes, be considered to have been commenced and to be pending from the time of the filing of the declaration, if a summons shall be issued thereon for the defendant, and, if not executed, other like process, in succession, may be issued, in good faith, for the defendant."

It will be seen that the statute provides that the commencement of the suit shall date from the time of filing the claim or demand, provided the summons shall be immediately issued. In the instant case the summons was not immediately issued, but was deliberately delayed by express order and direction of the plaintiff. Under such circumstances we are clear that the commencement of the suit cannot relate back to the time of the filing of the claim, but must be referred to the date of the issuance of the summons itself. The

statute must be strictly complied with; otherwise the usual rule of law as to the commencement of suits must govern. Under our view of the law, it makes no difference when the direction for the issuance of the summons was given, as the commencement of the suit must date either from the filing of the instrument itself, or from the actual issuance of the summons in good faith, and with intent that the same should be promptly served.

The judgment of the lower court is reversed, and the cause remanded, to be proceeded with in accordance with this opinion.

(36 Miss. 251)

SLAUGHTER v. MERIDIAN LIGHT & RY. CO. (No. 13,230)†.

(Supreme Court of Mississippi. Jan. 18, 1909.)

1. EMINENT DOMAIN (§ 119*)—ACTS CONSTITUTING APPROPRIATION OF PROPERTY.

The common law cannot be resorted to for ascertaining whether the operation of a street railway is a legitimate use of the street, or imposes an additional burden authorizing the abutting owner to recover therefor; but each state must form its own jurisprudence on the subject under its own Constitution and laws.

[Ed. Note.—For other cases, see *Eminent Domain*, Dec. Dig. § 119.*]

2. EMINENT DOMAIN (§ 101*)—APPROPRIATION OF PROPERTY.

Under Const. 1890, § 17, providing that private property shall not be taken or damaged for public use, except on compensation being first made, there can be no change in a street, by raising or lowering the grade thereof, for ordinary purposes of street use and for greater convenience of the public in the use thereof, without liability to the abutting owner for the consequential damages.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 239; Dec. Dig. § 101.*]

3. EMINENT DOMAIN (§ 119*)—ACTS CONSTITUTING APPROPRIATION OF PROPERTY.

Under Const. 1890, § 17, providing that private property shall not be taken or damaged for public use, except on compensation being first made, a street railway imposes an additional burden on the street, authorizing the abutting owner to additional damages therefor, whether the street is broad or narrow.

[Ed. Note.—For other cases, see *Eminent Domain*, Dec. Dig. § 119.*]

Appeal from Chancery Court, Lauderdale County; J. L. McCaskill, Chancellor.

"To be officially reported."

Suit by Mrs. McKie Slaughter against the Meridian Light & Railway Company. From a decree dismissing the bill, complainant appeals. Reversed and remanded.

G. Q. Hall, Hall & Jacobson, for appellant. Miller & Baskin, for appellee.

MAYES, J. During the year 1906 the Meridian Light & Railway Company obtained from the municipal authorities of the city of Meridian the right to construct and operate a street railway line on certain streets in the city of Meridian, one of the streets being Twelfth avenue. This avenue is only 40 feet

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Opinion withdrawn. See 48 South. 1040.

wide from property line to property line. The sidewalk on one side is 8 feet wide, and the sidewalk on the other side is 9 feet wide, leaving a space for the street proper of 23 feet, down the center of which the railway company has placed its line. When the car is in operation it occupies a space of 8 feet in the center of the street, leaving a space of 6 feet 2 inches between the outer edge of the car and the curb. The standard-gauge wagon is about 6 feet from outer edge to outer edge of hub, according to the testimony, leaving only about 2 inches of space between the car and wagon when passing on the street. It is true that it is shown by the testimony that the city ordinances permit only an 8-foot sidewalk on avenues of this character and width; but this cannot alter the principle in this case. Mrs. Slaughter owns an entire block abutting this street, except about 72 feet owned by another party; Mrs. Slaughter's frontage being about 217 feet on this avenue. On the 12th day of July, 1906, Mrs. Slaughter filed a bill in the chancery court seeking to restrain the railway company from operating its road on Twelfth avenue until they had compensated her for the damage done her property by the operation of the street railway, and, further, for damage claimed because of certain excavations made by the company in placing their line on the avenue.

The property in question had formerly belonged to the mother of Mrs. Slaughter; but, the mother having been killed by a cyclone some time in March, 1906, Mrs. Slaughter had inherited the property and was sole owner. The record shows that there were various protests entered against the placing of this railway on the avenue by the different owners of the property before the track was placed in the street, so that no question of waiver or estoppel is presented in any way. The narrowness of the street makes it difficult and almost impossible for a vehicle to be in the street at the same time with the car, and the street is rendered much less available for ordinary traffic since the occupation of the street by the railroad company. Of this there can be no doubt. The testimony fails to show that Mrs. Slaughter was damaged by any excavations made by the railroad company, and the chancellor so found as a fact, and we think correctly. If Mrs. Slaughter is damaged by any excavations, such excavations as produced the damage were made by the city, and not the railway company. But the testimony shows that by the maintenance and operation of this railway the property of Mrs. Slaughter is depreciated in value in a sum variously estimated at from \$500 to \$1,250. On the hearing the chancellor adjudged that Mrs. Slaughter was not entitled to recover, and dismissed the bill, from which judgment an appeal is prosecuted to this court.

The sole question presented by this record is whether or not a street railway and its

maintenance and operation may be said to be one of the legitimate uses of a street, in contemplation of the parties at the time of the original taking, so as not to impose an additional burden on the street when afterwards placed there, and precluding abutting property owners from claiming additional damage? If such has been the rule heretofore, does not section 17 of the Constitution of 1890 change the rule? The question in this case is presented to this court for decision for the first time. We have before us the holding of all the courts on this subject, and in addition to this we also have what many of the courts did not have at the date they were called on to decide this question; that is, we have a fully developed system of street railways, and the relation of the street railway to the public and its effect on the value of property adjacent to it can now be seen in all its aspects. It is undoubtedly true that the great weight of earlier authority is in favor of the holding that the abutting property owner is not entitled to additional compensation when the street is subjected to street railway uses after the original taking, and that such a use does not impose an additional servitude on a street; but it is not to be forgotten that many of the decisions so holding were made at a time when street railways were not in common use, and under Constitutions that provided compensation only for the taking of property, and not for consequential damage, as does our Constitution.

In order to properly understand this question, it will be necessary to review to a limited extent the history of street railways and the decisions bearing upon this subject. The first street railway of which we have any history was constructed by one John Stephenson in 1831 in the city of New York. This venture proved a failure from a commercial standpoint, and in a short while was abandoned. The enterprise was again resumed in 1845, and from this date it may be said that this system of street traffic became firmly established. The first street railway was operated in Boston in 1856, in Philadelphia in 1857, and in New Orleans in 1861. The first electric street railway was constructed in Cleveland, Ohio, in 1884. It is thus seen that the street railway as now in use in nearly all the cities is a thing of modern origin. The common law cannot be resorted to, for the purpose of ascertaining whether or not such uses of the street can be said to have been within the contemplation of the parties at the time of the taking, because there is no common law on the subject. Each state must form its own jurisprudence on this subject, and the question must be determined under its own Constitution and laws.

It was a known fact that under the Constitution of 1869, providing for compensation to the owner of property for public use, the property owner often suffered damage as a consequence of the taking for which there could be no recovery. When the constitution-

al convention met in 1890 a more liberal and just rule was established, in that by section 17 it was provided that the property owner should be compensated for both the taking and for damaging. Under this section of the Constitution individual rights are guarded completely, and it is now impossible for an individual to suffer damage to his property rights through public uses without full compensation. No narrow construction should ever be given to this clause of the Constitution, adopted, as it was, to more fully secure individual right.

The first construction of this section of the Constitution was in the case of *Vicksburg v. Herman*, 72 Miss. 211, 16 South. 434. Herman owned certain lots in the city of Vicksburg fronting on Belmont and Monroe streets. These streets had originally been dedicated to public use and a grade established thereon. Subsequently a new grade was established by the city, and in so doing the property of Herman was damaged as a consequence. The streets in question had originally been used by the public, and the change in grade was merely for the purpose of improving the street and making it more available for public uses. The court, speaking through Judge Woods, said: "Under our former Constitutions, which provided only for due compensation to the owner for taking private property for public use, it had been long held that, to entitle the private owner to compensation for the taking of his property for public use, there must be an invasion of the property, a trespass upon it, and an appropriation of it to public use. There must have been, formerly, that which amounted to a deprivation of the owner of his property; and merely consequential injuries, resulting from the loss or impairment of some rights incident to the use or enjoyment, there being no invasion of the property itself, were not covered by the constitutional prohibition. Such was the law as understood and applied before the incorporation of the new words we have referred to. The words are without limitation or qualification. They embrace within their inhibition all those attempting to convert private property to public use, artificial as well as natural persons, municipal and other corporations alike; and they cover all damages of whatever character. * * * The citizen must now be held, under this new provision of our fundamental law, to be entitled to due compensation for, not the taking only of his property for public use, but for all damages to his property that may result from works for public use. He is now secured in his property, and his use and enjoyment of his property. The burdens formerly borne by the citizen, resulting from damage done his property by a diminution or destruction of his right to use and enjoy his own, were designed by this new constitutional rule to be placed upon those by whose action the diminution or destruction was wrought."

In the case of *Warren County v. Rand*, 88 Miss. 395, 40 South. 481, where the suit was by Rand for damage done his property as a mere consequence of a change of grade in the highway already dedicated to public use, the court held the county liable for the consequential injury. To the same effect was the case of *Williams v. City of Jackson* (Miss.) 46 South. 551. In the case of *King v. Railway Co.*, 88 Miss. 456, 42 South. 204, 6 L. R. A. (N. S.) 1036, 117 Am. St. Rep. 749; Campbell, Special Judge, delivering the opinion of the court said that: "Const. 1890, § 17, makes the right of the owner of private property superior to that of the public, reversing the former rule that the individual might be made to suffer loss for the public. He may still be compelled to part with his property for public use, but only on full payment for it, or any right in relation to it. Before the Constitution of 1890 it was held that a municipality might cut down a street to the injury of abutting owners without any liability to them (*White v. Yazoo City*, 27 Miss. 357), and a river might be turned away from a plantation fronting on it without compensating the owner (*Homochitto River Com'rs v. Withers*, 29 Miss. 21, 64 Am. Dec. 126), and damage could be done to the property from constructing a levee without any right of the owner to be indemnified (*Richardson v. Board of Levee Com'rs*, 68 Miss. 539, 9 South. 351). This was because of the rule that the right of the public was superior to that of the individual. The decisions of this court since the Constitution of 1890 give full effect to the just rule established by its seventeenth section, by maintaining the right of the owner to be fully compensated for any loss of value sustained from any physical injury to his property or disturbance of any right in relation to it, whereby its market value is diminished."

The object in citing these cases is to show that under this section of the Constitution our court has held that although there has been a prior taking of private property for street uses, and the change made in the street or highway is only for the purpose of making the use of the street as such more efficient, and for the greater convenience of the public, and for only the ordinary purposes, yet any new thing done to the street, producing damage to the abutter as a consequence, entitles him to additional compensation, thus giving a broad construction to the Constitution and precluding the idea of damage without responsibility therefor. This holding of the court is in the face of many authors treating the subject of eminent domain. Thus, in *Lewis on Eminent Domain*, § 92, it is held that there can be no recovery for a mere change in the grade of a street or highway. To the same effect is 2 *Abbott on Municipal Corporations*, § 810, and almost all authors writing on this subject. We cite these authorities to show that our own court is

not in line with this holding, but under section 17 of the Constitution has adopted a different rule.

Having shown by our authorities that there can be no change in a street or highway, even where that change is for ordinary purposes of street use and for greater convenience of the public in its use, by raising or lowering the grade thereof, without liability to the abutting owner for consequential damage, the next question we have to consider is: Where there has been no change in the grade in any way, but the street is merely permitted to be used by a street railway, does such use impose an additional burden on the street in such way as to entitle an abutting owner to additional compensation? Can such use of the street be said to be a legitimate use, and in contemplation of the parties at the time of the original taking? At most, the building of a street car line on any street is but a remote possibility, depending upon many things which may never happen, and such a remote responsibility that a landowner could hardly ask that a sum additional to the actual value of the land should be allowed him at the time of the taking. That hacks, wagons, buggies, foot passengers, and all such will make use of the street is a certainty; hence these things, in the very nature of it, are contemplated uses of the street. But the remote possibility that any individual or corporation will at any time deem it financially advisable to construct and operate a street railway on the street is the merest possibility, too remote to be considered as an element of damage when the property is taken. On this subject we will first consider what our own court has had to say.

In the case of *Stowers v. Telegraph Company*, 68 Miss. 559, 9 South. 356, 12 L. R. A. 864, 24 Am. St. Rep. 290, it was held that a municipal corporation could not authorize a telegraph company to construct its line along a public street without making compensation to the owner, holding that it was an additional servitude. In this case, and in the case of *Theobald v. L., N. O. & T. Ry.*, 66 Miss. 279, 6 South. 230, 4 L. R. A. 735, 14 Am. St. Rep. 564, it was also held that this was true, regardless of whether or not the fee was in the public or the abutting owner. In the case of *Telephone Co. v. Cassidy*, 78 Miss. 666, 29 South. 762, the same was held in regard to telephone companies. If it be held that the operation of a telephone company in a street is an additional burden, it is difficult to see on what principle a street railway can escape. The construction of the telephone line is much the same as that of the modern street railway operated by electricity. The operation of the telephone is less dangerous to the public. It affords fewer obstacles to the use of the street by others. It is a matter of just as much or more public convenience. It takes from the street many messengers,

and to that extent, at least, relieves the congestion of traffic. It uses no special track in the street, excluding therefrom all others while moving on same. In short, the interruption to the ordinary use of the street by others is far less interfered with by the telephone than the street railway. In the case of *Theobald v. L., N. O. & T. Ry.*, 66 Miss. 279, 6 South. 230, 4 L. R. A. 735, 14 Am. St. Rep. 564, this court held that a steam railway was an additional burden on the street, entitling the abutter to additional compensation. In delivering the opinion of the court Judge Arnold said: "A street is a public thoroughfare or highway, established for the accommodation of the public generally, in passing from place to place, and for such other incidental uses as are ordinarily made of public streets, such as laying drains, sewers, gas and water pipes, and the like. Public streets are for the use and benefit of all, and no one has any exclusive rights and privileges therein. They are free to all upon like conditions, and subject to use by any means of locomotion which is not destructive of the common uses and ordinary methods of travel. * * * If the street is needed for the purposes of a railroad, or for any other purpose inconsistent with the ordinary uses of a public street, the rights and interests of the abutting owner must be obtained, with his consent, or by the exercise of the right of eminent domain, as in other cases of taking private property for public use. * * * It is apparent that there is difference between the ordinary horse railway and the ordinary steam railway, with reference to their use of a public street; but whether the difference is only one of degree we are not called upon to decide in this case."

The decision above quoted was rendered under the Constitution of 1869, and the court intimated very strongly that there was only a difference in degree between steam and street railways, and no difference in principle. But it is said that this court held, in the case of *Rosenbaum v. Meridian Light & Railway Co.*, 38 South. 321, that the operation of a street railway did not impose an additional burden on the street. We do not so interpret the decision. That case was decided purely on a question of fact, not involving the principle here contended for. This was expressly stated in the opinion. The case of *Hazlehurst v. Mayes*, 84 Miss. 7, 36 South. 33, 64 L. R. A. 805, has no application to this case. The *Mayes Case* simply held that where the city owned its own electric plant, constructed and operated for the purpose of furnishing light to the municipality, the use of the streets for the purpose of maintaining and operating this plant was one of the ordinary uses in contemplation of the parties at the time of the original taking. The case of *Gulf Coast Co. v. Bowers*, 80 Miss. 570, 32 South. 113, merely held that, as the city had the right to

light the streets, it could make a contract with another to furnish the lights, and license the use of the streets for that purpose, without rendering that other party liable to abutting property owners. But there is a great difference between a plant owned and operated by the town for the purpose of lighting same and a street railway owned and operated by an individual or corporation appropriating certain portions of the street to its exclusive use while in operation and conducting the enterprise for purely personal profit. In all ages back streets have been lighted. Such usage is necessary in order to make them safe and complete their use to the public. It may well be said the necessity for lighting streets is a matter of such common knowledge that it must have been within the contemplation of the parties at the time of the taking. None of this can be said of the remote possibility of a car line being established on the street. It is recognized by Cooley and others that, when property is condemned for railway purposes proper, greater damage is allowable than when the property is merely to be used for ordinary street purposes. This being the case, and the obstruction afforded to ordinary uses of the street by a street railway, varying from that of the steam road only in degree, the conclusion seems irresistible that any car line using a fixed right of way on a street, obtaining a use of the street impossible to be shared in common with others, excluding others from the use of the way occupied by it while in operation, imposes an additional burden on the street.

All holdings contrary to this came about through a wrong view of the real classification of the street car. It has been classified with hacks, carriages, wagons, buggies, drays, etc., usually occupying streets. The public use which they subserved and the public necessity for their operation has led to this confusion, and the rights of private individuals have been lost sight of. While a street car is a public utility, it is not to be forgotten that it is operated purely for private gain in most instances; few street railways would be maintained for the public good alone, if private gain was not the controlling consideration. They are not like other vehicles on the street. They have fixed lines over which to run, and when so doing they can turn neither to the right nor to the left. All other transportation in or use of the street must yield to the street car. Its track is appropriated exclusively while in operation, and is not subject to a common use. It must obtain a special franchise before it can occupy a street or highway. This is not the case with any other vehicle using the street. It is readily seen, therefore, that it affords greater obstruction to the common use of the street than any other vehicle. Its exclusive uses of the street and its impediment to a common use of same is well known. Unless the street is very broad, property is more

valuable and brings higher prices on the market near to, but not fronting on, a street railway line. All this shows that a street railway is looked upon as a damage to property fronting thereon, varying in degree according to its proximity. No other traffic in the street produces this effect on property; hence the street railway cannot be regarded as the same as, or classified with, the use of the street by other ordinary vehicles. In broad streets the damage may be slight. In narrow streets it is greater, but the principle is not different.

In Cooley on Constitutional Limitations (7th Ed.) p. 802, it is stated in his text that a street railway is a legitimate use of the street. As authority for this text, dropping into the common error, several earlier cases are cited, decided at a time when street railways were not common, and little understood. We differ from this learned author with much reluctance, but the text was written in 1868, when few cities had any street railway system, and when the decisions upon this subject were meager. But this same authority holds on page 795 that, if the street be a narrow street, the abutter would be entitled to additional compensation. It is difficult for us to understand how it can be held that the use of the street for railway purposes is a legitimate use, one of the ordinary purposes for which it was intended at the time of the taking, and for which the owner has been fully compensated, and yet hold that, because it happens to be a narrow street, the owner having already been fully compensated for all legitimate uses, he can recover additional damages because the street is narrow. It does not seem to us that such reasoning is sound.

In Lewis on Eminent Domain, vol. 1, p. 268, the author says a "review of cases shows how conflicting and irreconcilable are the authorities. The weight of authority is that a street passenger railroad, laid on the surface or established grade of a street, is a legitimate street use, while all other railroads are not. But what rational basis is there for a distinction between freight and passenger traffic? * * * To say that one railroad is a legitimate street use because it carries only passengers, and that another is not a legitimate use because it carries both freight and passengers, is purely arbitrary. It is a distinction which cannot be founded upon the nature and uses of streets. * * * It seems to the writer that there is no rational basis for a distinction between surface roads, and that either all should be admitted as legitimate, or all excluded as illegitimate, street uses. As between these alternatives the latter should be chosen. A railroad involves a fixed and permanent structure in the street, which is more or less of an obstruction to ordinary travel. If one track is a legitimate use, there seems to be no escape from the consequence that any number of tracks is legitimate. It rests simply with the

proper public authorities to determine how many tracks will best subserve the public interests; and so a street might be filled with railroad tracks, and all ordinary traffic excluded therefrom, and yet be held to be devoted to legitimate and proper street uses, and this is a palpable absurdity. For these reasons we think that railroads are not legitimate street uses. This conclusion does not prevent the use of streets by railroads, since property devoted to one public use may be taken for another public use, or a joint use permitted. It simply prevents such use being made without just compensation to abutting property owners." Again, the same author says, on page 282 (section 117a): "Some of the states which hold that railroads of all kinds are legitimate street uses have sought to avoid the harsh consequences of this doctrine by introducing the qualification that for any unreasonable or excessive use of the street the abutter may have compensation." The same author says, on page 286: "These cases, as it seems to the writer, are a virtual confession of error in holding railroads to be a legitimate street use. They illustrate, however, the tendency of courts to work out in one way or another substantial justice to the property owner."

In *Keasbey on Electric Wires*, p. 177, after a review of all the authorities, showing that a large majority of the cases hold that a street railway imposes no additional servitude on the street, the author says: "It is no doubt true that all railroads do affect in some degree the use of a street. They do claim some exclusive use. They divide the street into two parts, and, if it is narrow, they make it impossible to leave a wagon standing at the curbstone. The electric road may have some additional elements of danger and obstruction, and it may well be that the solution of the difficulty is to be found in the suggestion that a person who suffers actual damage shall be entitled to compensation for the injury he sustains."

The authorities are unanimous to the effect that the motive power used is not determinative. The principle is the same in its application, whether the motive power be electricity, cable, or horse power. Mr. Elliott in his work on *Roads and Streets* (section 700), makes the question of additional servitude depend upon the width of the street, a reasoning which we have heretofore seen is not to be sustained. From the authorities already cited it will be seen that the courts and the law writers have been dissatisfied with the holding that street railways imposed no additional servitude. It has been their endeavor to get away from this line of authority, realizing the error of it. While the authorities are unanimous on the proposition that steam railways impose additional servitude, it has not always been so held. In the case of *Morris & Essex Railway Company v. City of Newark*, 10 N. J. Eq. 352, decided in 1855, before experience and mature thought

had taught better, it was held that a steam railway might lawfully occupy a street without imposing any additional burden thereon. The same thing was held in the early history of railroads by other states. All such decisions have long since been departed from and now looked upon as mere curiosities in the law. It is worthy of note that, in order to obviate the rule laid down by many courts that no additional servitude is imposed by the use of the street for street railway purposes, many states have passed statutes making them liable. See note in 2 Am. & Eng. Annotated Cases, p. 537.

In the case of *Detroit Railway Co. v. Mills*, 85 Mich. 634, 48 N. W. 1007, the court consisted of five judges, three of whom held that an additional servitude was imposed upon a street by its use for street railway purposes, and in this case McGrath, J., says:

"The case hinges upon the question as to whether or not the construction and operation of a street railway in a street, and, as incident thereto, the placing of poles therein upon which are to be stretched electric wires, is a new servitude; and I am clearly of the opinion that a street railway, whether operated by animal power, electricity, or steam, is an additional burden; and it seems to me that the exemption of any street, whether narrow or not, is a practical concession to this view. If it is or can be an added servitude in any street, however narrow, it must be in any street, however wide; the only difference being one of degree. If the width of the street is to determine, just what width shall determine the question? If the right exists to grant a franchise in one street, and the exercise of that right concludes the abutting owner, why not in any street? Any fixed right of way in a street is a burden upon that street. Any use of a street, a like use of which is not common to all, is a new servitude. Any use of a street which narrows the street, or which interferes with the use of any part of the street by the public, or confines the public to a use of but a part of the street, is an added burden. Any use of a street which increases the danger of a common use of that street is an additional servitude. Any use of a street which interferes with its use by the public is a use affecting the abutting owners. The value of property upon a street is materially affected by its width, by the portion thereof devoted to public travel, by the facilities afforded for ingress and egress, and by anything and everything that interferes with a common use of the street or the abutting owner's access to it, or which obstructs his view or interferes with the utility or beauty of his premises. He is entitled to every use which is not inconsistent with the public use, and to every use which is not inconsistent with such a use as is common to all. A street railway lays its track upon the surface and in the center of a street. It appropriates just so much of the street to its use, and to

a use which is practically exclusive. It divides a wide street into two narrow streets. The portion of the street occupied by its tracks can only be used with increased danger. It cannot be crossed without danger, nor without the exercise of great care. Wheels and axles of vehicles are being constantly broken by attempting to drive on its way, or along or across its way, and the only answer which the street railway or the municipality makes to the injured party is, 'Keep out of the track.' * * * Cars moving along these tracks have practically the right of way. They turn out for no one's convenience, and are practically moving obstructions in the street, discommoding other vehicles, and adding materially to the hazard of travel. * * * Because of the existence of these tracks, roadways are being constantly widened at the expense of sidewalks and ornamental grounds and ornamentation. If the local Legislature has the right to permit the laying of a single track, why not of two tracks, or of four tracks. * * * It may be conceded that street car service is a public convenience; but the necessities of the public must be supplied at public expense. The Legislature has no right to say that property of the individual may be taken or injuriously affected for the public good without compensation. Public convenience is not to be subserved at the expense or disadvantage of the private citizen. * * * The same cases which hold that a horse railway is a proper use of a street declare that a steam railway is not, and that the occupation of a street by a steam railway is a new servitude; yet the use by the steam railroad is within the same limits as that of the horse railroad. The burden may not be as great in the one case as in the other; but there is no difference in the principle. * * *

"It is urged that this use of streets 'must be supposed to have been contemplated.' Is it possible that a use of a street which is not common to all streets, and which depends upon the desire of a street car company or the will of a common council, must be supposed to have been contemplated? Can this special use, depending upon the question of profit to its promoters, be deemed to be one of the ordinary purposes for which property for a street was taken? Can it be that the use of a street, as a mere outlet for a traffic which in the absence of that use would be distributed over several streets, can be said to be a use contemplated at the opening of that street? It is true that all the traffic of a given territory embracing a number of streets may be directed upon a given street, and a system of transportation adopted which interferes with the other and ordinary modes of travel upon that street, and the other streets relieved at the expense of that street, and yet this system of transportation is not a new burden. In a street opening procedure, the measure of damages is the value of the property taken and the physical

injury to what is left; but in the condemnation of lands for railroad purposes another element of damages is considered, viz., the consequential injury to the remaining estate growing out of the mode and nature of the use. The very existence of these different rules clearly indicates that, in the street opening proceedings, no possible consequential injury was contemplated. * * * This is not a question of whether or not the public shall have street railways or rapid transit; but it is one as to whether the owners of property shall be divested of its beneficial use or enjoyment without compensation, because a private corporation is attracted by the prospective revenue there is in the enterprise, and, upon the plea that it will be a great public convenience, has obtained a franchise to appropriate a portion of the street to its use. * * * The public need and are benefited by steam railroads. The progress of civilization would be checked, and the world at a standstill, without them; but they have never been allowed to acquire private property, except by purchase or condemnation. But here is an electric railway company permitted to take private property without consent or condemnation, and the landowner is powerless to prevent it; and it is doubtful, from the opinions of some of the learned judges who have upheld such proceedings, if he can even seek relief, after the road is laid and operating, in a court of law, for the actual damages he has suffered. In my opinion, no legislative grant, or municipal authority under such grant, can thus deprive an individual of his interest in land, no matter how urgent the wants of the public. The need of the public cuts no figure when the question of compensation to the landowner for the taking of his property is mooted. * * * The individual, in a republican form of government, is the one to be protected and guarded, and in his protection lies the security of liberty to the whole people. If the need of the public demands this kind of a railway for rapid transit, then the public can afford to pay for the privilege of destroying the property of the individual citizen. In no other case that I know of has the home of the individual been permitted by the law to be damaged without recompense, that the public might reap a benefit. If the need of the public is such that it must have this particular method of transit, that need will furnish corporations with the means to repay every private citizen for the loss and damage that his property must suffer to accommodate such public need."

The error into which the courts have fallen, in our judgment, is the error of holding that a street railway was a legitimate use of the street. Such means of street travel differ from all other ordinary uses of the street. There can be no difference between the damage done by a steam railway and a street railway, save in the degree of the damage.

We have no hesitancy in holding that a street railway is an additional servitude on the street, entitling an abutting owner to additional compensation, and it can make no difference in principle whether the street be broad or narrow, except as to the extent of the damage. In the one case it may be great, and in the other so small as not to be material; but the principle is the same. This additional servitude is imposed by each line or switch that may be laid in the street, and is a new, additional servitude, just as the number of tracks are multiplied. We do not intimate what the amount of recovery should be in this case, but leave this question open.

Reversed and remanded.

(35 Miss. 138)

TATE v. STATE. (No. 13,708.)

(Supreme Court of Mississippi. Jan. 23, 1909.)

1. HOMICIDE (§ 340*)—INSTRUCTIONS—SELF-DEFENSE.

An instruction that if one accused of murder met decedent, and with his hand on his pistol made a specified remark to provoke a difficulty, when decedent was doing nothing to cause any apprehension of danger to accused, and that the remark did bring on a difficulty resulting in the death, accused was guilty of murder, though decedent fired the first shot, was reversible error, for cutting off the right of self-defense; accused's guilt not being manifest on the record.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-720; Dec. Dig. § 340.*]

2. CRIMINAL LAW (§ 407*)—DECLARATIONS BY THIRD PERSONS.

Declarations made by codefendant, after the killing in accused's presence, but to the surrounding crowd generally, were not admissible against accused, where accused made no response to the declarations, and was lying on the ground with one arm shot off, with consequent mental and physical suffering.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 898-900, 968; Dec. Dig. § 407.*]

Appeal from Circuit Court, Yazoo County; W. H. Potter, Judge.

Will Tate was convicted of murder, and he appeals. Reversed.

J. F. Barbour, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

WHITFIELD, C. J. This case is a very close one on the facts, and is not, therefore, a case in which we can say that any serious error is not reversible. The first instruction for the state is in the following words: "The court instructs the jury, for the state, that if you believe from the evidence beyond a reasonable doubt that Will Tate met Bunk Dixon in the public road, and that Will Tate, with his hand in his pocket and on his pistol, said to Bunk Dixon, 'Can you play the same game you played last night?' or words to that effect, intending by the use of the remark to invite and provoke a difficulty with

deadly weapons then and there in the public road, at a time that Bunk Dixon was doing nothing that would cause any apprehension of danger to Tate, and that the language so used did then and there invite and bring on the difficulty, in which deadly weapons were used in the public highway, and in which Bunk Dixon lost his life, then Will Tate is guilty of murder; and this is true, even though the jury may believe from the evidence that Bunk Dixon fired the first shot." The language of this instruction, "with his hand in his pocket and on his pistol," is erroneous, for the obvious reason that there is no evidence whatever in the record to show that the defendant had his hand in his pocket on his pistol. But we would not reverse for this inaccuracy alone, since it does not seem to be very material whether he had his hand on his pistol in his pocket, or whether he had his hand on his pistol in his bosom. But the fatal vice in the instruction is that it effectually cuts off the right of self-defense. We have over and over again warned circuit judges against giving this sort of charge, and wherever it is given the case will always be reversed, except where this court can say, looking over the completed record, with confidence, that the defendant's guilt is so overwhelmingly manifest that no other verdict than that of guilt could probably be rendered. We cannot say this in this case, and this charge is, for that reason, reversible error.

In the course of the trial it was shown by the state, by the testimony of the witnesses Julius Reynolds and Hastings Newman, that after the appellant had come back from the pursuit of the deceased, and had fallen on the ground, one Will Reddick, who is also under indictment for this same offense, said, not apparently addressing the remark to the appellant, but to the crowd generally, "I told him to get the drop on the son of a bitch, and not to say anything to him." The witness Newman adds this last statement, "not to say anything to him." Neither of these witnesses testifies that the remark was addressed directly to the appellant. Clint Tate does testify that he heard him make practically that remark to the appellant himself. The appellant made no response to any of these remarks. John Giddeon testifies that he asked Tate, the appellant, where he was shot, and he said in the arm, and that he asked him where was Bunk, and he said Bunk was gone, and that he (Giddeon) then asked the appellant, "Out of all that shooting, didn't Bunk get hit?" and that then Will Reddick, not appellant, said, "I don't know whether either one of us hit him, or not." This witness further says that he was there present, holding his coat up to keep the sun off the appellant, who was lying on the ground, with his left arm shot practically off. Here, then, was the appellant, lying in the hot sun, on the ground, with his left arm shot off, suf-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

fering, of course, intense pain, with his mind necessarily greatly disturbed by his condition, pain, and suffering, in a crowd of negroes, including those named, sought to be bound, because he did not respond to some statements, not addressed to him at all, and one statement which is said to have been addressed to him. These statements were objected to upon the ground that it was not shown with that clearness which is required in criminal cases that the appellant heard these statements, comprehended their damaging import, and understood their nature to be such as to call for denial from him.

We have read carefully all the authorities cited on this proposition, and we are all thoroughly satisfied that the conditions making these statements competent testimony were not met by the evidence disclosed in this record. We recently passed upon this proposition in the case of *Irving v. State*, 47 South. 518. In *Wigmore on Evidence*, vol. 2, p. 1257, it is said: "On the other hand, if on the circumstances it appears that the party was in fact physically disabled from answering, his silence, of course, signifies nothing, and the statement is inadmissible. So, too, if the party had plainly no motive for responding his silence permits no inference; and this is often the case where the statement is addressed to another person, and not to the party himself." In *Kelly v. People*, 55 N. Y. 565, 14 Am. Rep. 342, it is said: "(1) The declaration must be pertinent to the occasion. (2) In the presence and hearing of the parties interested, and under circumstances which render a contradiction or explanation reasonable, if not true. (3) They must be matters the truth of which was known to the accused. (4) A reply would have been natural and proper if the statements were false."

In the case of *People v. Koerner*, 154 N. Y. 355, 48 N. E. 730, the case was this: The defendant was indicted for murder, and convicted; and it appears that the deceased was shot by a pistol in the hands of the defendant in New York City, on Seventh avenue, between Thirteenth and Fourteenth streets. Defendant admitted the shooting, but defended on the ground that the shooting was accidental; that his purpose was to commit suicide, which he attempted by placing the pistol to his head, when to prevent it the girl grasped the pistol and it was accidentally discharged, causing her death. At the time of the killing he was not mentally responsible for his actions. It appears from the evidence that the girl was shot three times, that the relations existing between her and the defendant were of an affectionate kind, that the defendant had asked her to marry him, and that an engagement existed between them, but the parents were opposed thereto. During the progress of the trial a Dr. Harrison was permitted to testify that after the shooting the defendant, while lying upon the sidewalk, was sham-

ming unconsciousness. It was the doctor's opinion that the defendant was conscious, and could hear, but that he was simply shamming. The court permitted a witness to testify about a conversation which took place between the witness and a police officer, over the objection of the defendant. It was admitted on the theory that the silence of defendant amounted to an acquiescence in the statements made by the officer, and therefore binding upon him. The court said "that a party's acquiescence, to have the effect of an admission, must exhibit some act of voluntary demeanor or conduct. When the claimed acquiescence is in the conduct or in the language of others, it must plainly appear that such conduct or language was fully known and fully understood by the party before any inference can be drawn from his passiveness or silence. Moreover, the circumstances must be such as would properly and naturally call for some action or reply from one similarly situated. If he is silent when he ought to have replied, the presumption of acquiescence arises; but it is clearly otherwise when his silence is of such a character as not to justify such an inference. Thus, when a person is asleep, or intoxicated, or deaf, or a foreigner not able to understand the language employed, he cannot be prejudiced by statements made by others in his presence; nor is such silence an assent, unless the statements were such as to properly call for a response. The court in this case goes further and uses this language: "There is only one safe rule in a case of this kind, namely, statements in the presence of the defendant are only competent when he is in a position to hear and understand. *McKee v. People*, 36 N. Y. 113; *Lanergan v. People*, 39 N. Y. 39. If this condition is a matter of dispute, the statements in his presence are incompetent."

And in the case of *State v. Epstein*, 25 R. I. 131, 55 Atl. 204, the facts were as follows: July 26, 1901, the defendant, in company with Abraham Zarinsky, the person killed, went to the attic in which Zarinsky had his bedroom. Some trouble occurred during the night, and Zarinsky was robbed of \$200. The defendant was charged with robbing him and having struck him on the head with a bottle, which afterwards produced his death. The defendant during the difficulty was also wounded. Both the wounded man, Zarinsky, and the defendant, were carried in a patrol wagon to the police station. Zarinsky was seated in a chair, at that time apparently not seriously injured. The defendant appeared the most seriously injured, and was lying on the floor near Zarinsky, and in the presence of a police officer. While seated thus Zarinsky made a statement of how the defendant had knocked him in the head and robbed him, and to some extent gave a detailed account of the difficulty. The court held that under

the circumstances of this case the evidence was not admissible, and used this language: "Even in those cases where it is held that evidence of charges made against him is admissible, the courts unanimously hold that it must plainly appear that the statements made were fully understood by the party before any inference can be drawn against him by reason of his silence. In the case at bar, therefore, we think most of the testimony in question should have been excluded in any event, for it not only does not plainly appear that most of the language used at the police station by Zarinsky to others was understood and appreciated by the defendant, but, on the contrary, we think it very clear that he did not understand the same and was not in a physical condition to enable him to understand it. He had jumped from the attic window to the ground, a distance of about 25 feet, where he lay in a helpless condition, seriously injured, until he was taken up bodily by the policeman, and placed in a patrol wagon, and taken to the station. He was laid on the floor in a helpless condition, and was suffering severe pain from the injury which he had sustained by the fall. In view of all these facts, we are clearly of the opinion that it is error to admit the testimony, except in so far as the accusations made were expressly replied to by the defendant. We are also of the opinion that it was error to admit the statements made in the presence of the defendant immediately after his fall from the window, except as to the one to which he made some reply. Such a fall must have left him in a dazed and semiconscious condition at the best, and it cannot be said with any show of reason that his silence while in such a condition, when charges and accusations were made against him, could be of the least weight as to determining his guilt as to the crime now charged against him."

Greenleaf, in his work on Evidence (volume 1, par. 199), says: "Nothing can be more dangerous than this kind of evidence. It should always be received with caution, and never received at all unless the evidence is a direct declaration of that kind which naturally calls for contradiction." Chief Justice Shaw said, in *Larry v. Sherburne*, 2 Allen (Mass.) 34: "It is true there are cases where the party may be affected in his rights by proof of a silent acquiescence in the verbal statement of others; but such evidence is always to be received, and applied, with great caution, especially where it appears, as in this case, that the statements were made not by a party to the conversation, but by a stranger."

It must be perfectly clear, from these citations, as applied to the facts of this case, that the testimony fell far short of showing the conditions under which this testimony would be admissible, and its admission was

fatal error. We notice at this time no other assignments of error than those passed on specifically.

Reversed and remanded.

(94 Miss. 584)

UNDERWOOD TYPEWRITER CO. v.
TAYLOR. (No. 13,403.)

(Supreme Court of Mississippi. Jan. 11, 1909.)

JUSTICES OF THE PEACE (§ 159*)—APPEAL—
BOND—TIME FOR APPROVAL.

A failure to obtain the approval, within the required time, by a justice of the peace of a bond given on appeal is not excused, though due to the absence of the justice; and the appeal must nevertheless be dismissed.

[Ed. Note.—For other cases, see *Justices of the Peace*, Dec. Dig. § 159.*]

Appeal from Circuit Court, Montgomery County; J. T. Dunn, Judge.

Action in a justice's court by the Underwood Typewriter Company against W. A. Taylor. There was a judgment for defendant, and plaintiff appealed to the circuit court, which court dismissed the appeal, and plaintiff appeals. Affirmed.

The Underwood Typewriter Company entered suit in the court of a justice of the peace against Taylor, and on November 23, 1907, judgment was rendered for defendant, and on November 27, 1907, the plaintiff filed an appeal bond, with sufficient securities. The agreed statement of facts shows that the appeal bond was sent to the justice of the peace by registered mail on November 27, 1907, but on that day the justice of the peace left his home and county, and went into an adjoining county, leaving no one to receive and approve appeal bonds. He returned November 29, 1907 and immediately receipted the appeal bond, changed the date to November 29th, filed the same, and sent the record to the circuit clerk. It is agreed that, had the justice of the peace been at home or in his beat on November 27th, he would have received, approved, and filed the appeal bond on that date. When the case was called for trial, the defendant made a motion to dismiss plaintiff's appeal bond, because not approved by the justice of the peace within five days from the rendition of the judgment. The court sustained the motion and dismissed the appeal, and defendant appealed to the Supreme Court.

M. B. Grace, for appellant.

FLETCHER, J. We are controlled in this case by *Murff v. Osburn*, 24 South. 873. In that case the justice of the peace left home on the day after the rendition of judgment, and was continuously absent from home until the five days had expired, during which time the losing party made repeated visits to the office of the justice with his appeal bond; and yet this court held that his ap-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

peal was properly dismissed. Here the bond was sent by mail four days after the adverse judgment was rendered, and, as in the Osburn Case, the absence of the justice prevented its timely approval. This case is not like *Redus v. Gamble*, 85 Miss. 169, 37 South. 1010, where the justice acted arbitrarily in rejecting a solvent and sufficient bond filed in time, nor like *Winner v. Williams*, 82 Miss. 669, 35 South. 308, where the bond was actually filed within the five days, but not approved in writing.

We do not feel warranted in overruling *Murff v. Osburn*, and the case is therefore affirmed.

MURPHY et al. v. LARSON. (No. 13,466.)
(Supreme Court of Mississippi. Jan. 25, 1909.)

Appeal from Chancery Court, Harrison County; T. A. Wood, Chancellor.

Action between Joseph Murphy and others and Louisa Larson. From the judgment, Murphy and others appeal. Reversed and remanded.

W. R. Harper, for appellants. Ford, White & Ford, for appellee.

MAYES, J. By consent of both parties this cause is reversed and remanded. The court decides no question involved in the cause.

ELLIS v. WATKINS. (No. 13,574.)
(Supreme Court of Mississippi. Jan. 26, 1909.)

Appeal from Chancery Court, Forrest County; T. A. Wood, Chancellor.

Action between G. W. Ellis and T. O. Watkins. From the judgment, Ellis appeals. Dismissed.

Stevens, Stevens & Cook, for appellee.

PER CURIAM. Appeal dismissed.

MATTHEWS v. HOLBERG MERCANTILE CO. (No. 13,655.)
(Supreme Court of Mississippi. Jan. 26, 1909.)

Appeal from Circuit Court, Jones County; D. M. Miller, Judge.

Action between S. S. Matthews and the Holberg Mercantile Company. From the judgment, Matthews appeals. Affirmed.

J. S. Sexton, for appellee.

PER CURIAM. Affirmed.

WELLS, Sheriff, et al. v. STEPHENS.
(No. 13,596.)
(Supreme Court of Mississippi. Jan. 25, 1909.)

Appeal from Chancery Court, Union County; J. Q. Robins, Chancellor.

Action between W. M. Wells, sheriff, and others and E. J. Stephens. From the judgment, Wells and others appeal, and Stephens brings cross-appeal. Affirmed on both appeals.

C. Lee Crum, for appellants. H. D. Stephens, for appellee.

PER CURIAM. Affirmed on direct and cross-appeal.

WESTERN UNION TELEGRAPH CO. v. BRADFIELD. (No. 13,590.)

(Supreme Court of Mississippi. Jan. 18, 1909.)

Appeal from Circuit Court, Warren County; J. N. Bush, Judge.

Action by J. J. Bradfield against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Smith, Hirsch & Landau, for appellant. Dabney & Dabney, for appellee.

PER CURIAM. Affirmed.

JONES v. ST. LOUIS & S. F. R. CO.
(No. 13,678.)

(Supreme Court of Mississippi. Jan. 25, 1909.)

Appeal from Circuit Court, Monroe County; E. O. Sykes, Judge.

Action by J. M. Jones, Jr., against the St. Louis & San Francisco Railroad Company. Judgment for defendant, plaintiff appeals. Affirmed.

Frank S. White & Sons and Wiley H. Clifton, for appellant. W. F. Evans and J. W. Buchanan, for appellee.

PER CURIAM. Affirmed.

ST. LOUIS & S. F. R. CO. v. SMITH.
(No. 13,685.)

(Supreme Court of Mississippi. Jan. 25, 1909.)

Appeal from Circuit Court, Lee County; E. O. Sykes, Judge.

Action by E. O. Smith against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. F. Evans, E. T. Miller, and J. W. Buchanan, for appellant. Anderson & Long and W. J. Lamb, for appellee.

PER CURIAM. Affirmed.

BROWNLEE v. STATE. (No. 13,716.)
(Supreme Court of Mississippi. Jan. 25, 1909.)

Appeal from Circuit Court, Tunica County; Sam. C. Cook, Judge.

John Brownlee was convicted of murder, and appeals. Affirmed.

F. A. Montgomery, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

BLAYLOCK v. STATE. (No. 13,682.)
(Supreme Court of Mississippi. Jan. 18, 1909.)
Suggestion of Error Overruled
Jan. 25, 1909.)

Appeal from Circuit Court, Lee County; E. O. Sykes, Judge.

W. W. Blaylock was convicted of murder, and appeals. Affirmed.

Geo. H. Hill, Jr., and Boggan & Leake, for appellant. Clayton, Mitchell & Clayton and Geo. Butler, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

GLOVER v. STATE. (No. 13,687.)
(Supreme Court of Mississippi. Jan. 25, 1909.)
Appeal from Circuit Court, Panola County;
W. A. Roane, Judge.
Joe Lee Glover was convicted of crime, and
appeals. Affirmed.

J. F. Dean, for appellant. Geo. Butler, Asst.
Atty. Gen., for the State.

PER CURIAM. Affirmed.

NARON v. PUTTMAN. (No. 13,632.)
(Supreme Court of Mississippi. Jan. 18, 1909.)
Appeal from Circuit Court, Calhoun County.
Action between B. W. Naron and Thomas
Puttman. From the judgment, Naron appeals.
Affirmed.

Joe H. Ford, for appellant. H. H. Creek-
more and J. L. Bates, for appellee.

PER CURIAM. Affirmed.

WEST v. STATE. (No. 13,401.)
(Supreme Court of Mississippi. Jan. 18, 1909.)
Appeal from Circuit Court, Hinds County;
W. H. Potter, Judge.
W. F. West was convicted of bigamy, and ap-
peals. Affirmed.

Williamson, Wells & Peyton, for appellant.
Geo. Butler, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

W. B. REDUS & SONS v. KELLUM et al.
(No. 13,653.)

(Supreme Court of Mississippi. Jan. 18, 1909.)
Appeal from Chancery Court, Lee County;
W. M. Cox, Special Chancellor.
Action between W. B. Redus & Sons and
Laura Kellum and others. From a judgment,
Redus & Sons appeal. Affirmed.

Anderson & Long, for appellants. Clayton,
Mitchell & Clayton, for appellees.

PER CURIAM. Affirmed.

**ST. LOUIS & S. F. R. CO. v. SWINDLE
et al.** (No. 13,686.)

(Supreme Court of Mississippi. Jan. 18, 1909.)
Appeal from Circuit Court, Lee County; E.
O. Sykes, Judge.

Action by Mrs. N. E. Swindle and others
against the St. Louis & San Francisco Rail-
road Company. Judgment for plaintiffs, and
defendant appeals. Affirmed.

W. F. Evans, E. T. Miller, and J. W. Bu-
chanan, for appellant. Mitchell & Clayton, for
appellees.

PER CURIAM. Affirmed.

FLETCHER, J., took no part.

HARDEN et al. v. BANK OF TUPELO.
(No. 13,732.)

(Supreme Court of Mississippi. Jan. 18, 1909.)
Appeal from Chancery Court, Pontotoc Coun-
ty; J. Q. Robins, Chancellor.

Action between C. W. Harden and others
against the Bank of Tupelo. From the judg-
ment, Harden and others appeal. Affirmed.

Mitchell & Clayton, for appellants. Ander-
son & Long, for appellee.

PER CURIAM. Affirmed.

PEAVEY v. HOUSTON. (No. 13,691.)
(Supreme Court of Mississippi. Jan. 18, 1909.)
Appeal from Circuit Court, Monroe County;
E. O. Sykes, Judge.

Action between Mrs. M. E. Peavey and Robert
E. Houston, administrator of the estate
of J. S. Riley, deceased. From the judgment,
Peavey appeals. Affirmed.

George C. Paine, for appellant. W. H. Clif-
ton, for appellee.

PER CURIAM. Affirmed.

ST. LOUIS & S. F. R. CO. v. PEGUES.
(No. 13,435.)

(Supreme Court of Mississippi. Jan. 18, 1909.)
Appeal from Circuit Court, Union County;
W. A. Roane, Judge.

Action by Allen Pegues against the St. Louis
& San Francisco Railroad Company. Judg-
ment for plaintiff. Defendant appeals. Af-
firmed.

W. F. Evans, E. T. Miller, and J. W. Bu-
chanan, for appellant. C. Lee Crum, for ap-
pellee.

PER CURIAM. Affirmed.

COLLINS v. BANK OF D'LO. (No. 13,436.)
(Supreme Court of Mississippi. Jan. 20, 1909.)

Appeal from Circuit Court, Simpson Coun-
ty; R. L. Bullard, Judge.

Action between E. L. Collins and the Bank of
D'Lo. From the judgment, Collins appeals.
Dismissed.

PER CURIAM. Appeal dismissed.

(56 Fla. 694)

THOMAS et al. v. PRICE et al.

(Supreme Court of Florida. Dec. 2, 1903.)

1. **APPEAL AND ERROR (§ 938*) — REVIEW —
PRESUMPTIONS — PRESENTMENT OF ASSIGN-
MENT OF ERROR.**

As the court should refuse to settle a bill
of exceptions when no assignment of errors is
presented therewith, it must be assumed, in the
absence of an affirmative showing to the con-
trary, that an assignment of error was present-
ed to the judge with the bill of exceptions, at
least where no exception was taken to the set-
tlement of the bill of exceptions on that ground.

[Ed. Note.—For other cases, see Appeal and
Error, Cent. Dig. § 3795; Dec. Dig. § 938.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. APPEAL AND ERROR (§ 662*)—ASSIGNMENT OF ERRORS—FAILURE TO APPEAR IN BILL OF EXCEPTIONS.

The mere fact that a bill of exceptions, duly authenticated, contains no assignment of errors, is not conclusive that none was presented to the judge with the bill of exceptions as required by the rule, even though the rule also directs that such assignment of errors be made a part of the bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2852; Dec. Dig. § 662.*]

3. APPEAL AND ERROR (§ 608*)—TRANSCRIPT—MATTERS TO BE SHOWN BY—SERVICE OF ASSIGNMENT OF ERRORS.

The rule does not require the transcript to show the service of a copy of an assignment of errors on the defendant in error or his counsel.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2873; Dec. Dig. § 608.*]

4. APPEAL AND ERROR (§ 799*)—DISMISSAL—MATTERS DEHORS THE RECORD.

Grounds of motions are not self-sustaining, and, if based upon matters dehors the record, they should be supported by evidence aliunde, or they will fail.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3158; Dec. Dig. § 799.*]

5. EXCEPTIONS, BILL OF (§ 60*)—APPEAL AND ERROR (§ 753*)—STRIKING—WRIT OF ERROR—DISMISSAL—GROUNDS.

The rule directs that the assignment of errors presented with the bill of exceptions shall be made a part thereof; but the mere failure to do so is not sufficient ground for striking the bill of exceptions, duly authenticated by the judge, upon notice and without objection. Nor is it a ground for dismissing the writ of error, especially when the transcript contains an assignment of errors upon matters in the record proper as well as in the bill of exceptions.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 112; Dec. Dig. § 60; Appeal and Error, Cent. Dig. § 3086; Dec. Dig. § 753.*]

6. EXCEPTIONS, BILL OF (§ 60*)—APPEAL AND ERROR (§ 753*)—STRIKING—DISMISSAL.

Where it does not affirmatively appear by the transcript that no assignment of errors was presented to the judge when he settled the bill of exceptions, or that the defendants in error were not served with a copy of the assignment of errors filed with the clerk, motions to strike the bill of exceptions and to dismiss the writ of error on such grounds should be denied, in the absence of proof to support the motions.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 112; Dec. Dig. § 60; Appeal and Error, Cent. Dig. § 3086; Dec. Dig. § 753.*]

(Syllabus by the Court.)

In Banc. Action between G. M. Thomas and others, as individuals and as copartners, and W. H. Price and others. From the judgment, Thomas and such others bring error, and Price and others move to strike the bill of exceptions and to dismiss the writ of error. Motions denied.

Price & Watson and F. B. Carter, for the motion.

PER CURIAM. This cause is presented upon motion to strike the bill of exceptions and to dismiss the writ of error.

The grounds of the motion to dismiss are

that the bill of exceptions was not made up in pursuance of assignment of errors presented to the judge, that an assignment of errors is not made a part of the bill of exceptions, that the transcript does not show service of the assignment of errors on the defendants in error, and that no service of the assignment of errors was made upon the defendants in error. The motion to strike is upon the grounds that the bill of exceptions was not made up in pursuance of assignment of errors presented to the judge and that an assignment of errors was not made a part of the bill of exceptions.

The special rules for the preparation of bills of exceptions and transcripts of the record contain the following provisions: Special Rule 1 (37 South. x): "In all civil causes every plaintiff in error at the time of presenting a bill of exceptions to the judge of the circuit court to be made up and settled for the appellate court, * * * shall present with such bill an assignment of errors specifically mentioning each point that he intends to present in and by such bill of exceptions as grounds for reversal, and such assignment of errors shall be the guide for making up the bill of exceptions, and shall be made a part thereof. A copy of such assignment of errors, * * * shall be served upon the defendant in error or his attorney." Special Rule 2 (37 South. xi): "It shall be the duty of the attorney for the plaintiff in error, when he applies to the clerk for the transcript of the record in any civil cause, to file in the office of the clerk of the court whose judgment is to be reviewed a complete assignment of all errors that he intends to rely upon in the appellate court, * * * and a copy of such assignment of errors * * * shall be served on the defendant in error or his attorney within five days after it is filed with the clerk. * * * Such assignment of errors shall be the guide by which the transcript of the records is to be made up. * * * The clerk shall include in such transcript * * * a copy of the assignment of errors. * * * Any failure or omission on the part of the plaintiff in error to file with the clerk the complete assignment of errors, * * * or serve the defendant in error or his attorney with copies thereof as herein provided shall be cause for dismissal of the writ of error by the appellate court."

Rules of court are adopted by the Supreme Court pursuant to legislative authority, and are intended to facilitate the administration of justice. They are binding upon the court, as well as upon parties to proceedings in the court and their counsel. It is the duty of those who resort to the court, as well as of their counsel, to comply with the rules of court in any matter affecting the procedure in the courts; and it is specially the duty of plaintiffs in error and their counsel to see

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that bills of exceptions and transcripts of the record are properly prepared and presented for authentication in compliance with the rules of court. See section 1740, Gen. St. 1906; *Merchants' Nat. Bank of Jacksonville v. Grunthal*, 39 Fla. 388, 22 South. 685; *Florida Land Rock Phosphate Co. v. Anderson*, 50 Fla. 501, 39 South. 392; *Hoodless v. Jer-nigan*, 46 Fla. 213, 35 South. 656; *Akin v. Morgan*, 50 Fla. 173, 39 South. 534.

It appears by the transcript that the directions to the clerk for making up the transcript and the assignment of errors were filed on October 10, 1908. Both appear in the transcript as required by the rule. The bill of exceptions was settled by the judge September 16, 1908, and does not contain a copy of the assignment of errors as required by the rule.

In the case of *Selph v. Cobb*, 49 Fla. 228, 38 South. 259, it affirmatively appeared by the certificate of the judge that no assignment of errors was presented to the judge as required by the rule when the bill of exceptions was settled, and it was held that the rule had been violated and the bill of exceptions should be stricken; but in that case the writ of error was dismissed, because the errors assigned were confined to the bill of exceptions. It was also held that the judge should refuse to sign a bill of exceptions when no assignment of errors is presented with it.

In this case it does not affirmatively appear from the transcript that no assignment of errors was in fact presented to the judge with the bill of exceptions; and, as the court should refuse to settle the bill of exceptions when no assignment of errors is presented therewith, it must be assumed, in the absence of an affirmative showing to the contrary, that an assignment of errors was presented to the judge with the bill of exceptions, at least where, as in this case, no exception was taken to the settlement of the bill of exceptions on the ground that no assignment of errors had been presented as required by the rule.

The mere fact that the bill of exceptions, duly authenticated, contains no assignment of errors, is not conclusive that none was presented to the judge, even though the rule directs that the assignment of errors presented with the bill of exceptions shall be made a part thereof.

The rule does not require that the transcript shall show the service of a copy of the assignment of errors on the defendant in error, and the directions to the clerk in this case do not demand it.

The ground of the motion that no copy of the assignment of errors was served on the defendants in error is not self-supporting, and no evidence to sustain it is presented here.

There is nothing to show that the bill of

exceptions was not made up in pursuance of an assignment of errors presented to the judge.

Grounds of motions are not self-sustaining, and, if based upon matters dehors the record, they should be supported by evidence allunde, or they will fail.

The rule directs that the assignment of errors presented with the bill of exceptions shall be made a part thereof; but the mere failure to do so is not a sufficient ground for striking the bill of exceptions. Nor is it a ground for dismissing the writ of error, especially when, as in this case, the transcript contains an assignment of errors upon matters in the record proper, as well as in the bill of exceptions.

As it does not affirmatively appear by the transcript that no assignment of errors was presented to the judge when he settled the bill of exceptions, or that the defendants in error were not served with a copy of the assignment of errors filed with the clerk, the burden is upon the defendants in error to prove the grounds of the motion; and, having furnished no proofs, the motions are denied. All concur, except TAYLOR, J., absent on account of illness.

(56 Fla. 570)

STEWART et al. v. STEARNS & CULVER LUMBER CO.

(Supreme Court of Florida, Division A. Dec. 8, 1908.)

1. COMMON LAW (§ 11*)—ADOPTION AND REPEAL.

The principles of the common law, when not modified by express enactments or rules or by the requirements of governmental conditions, are in force as a part of the system of laws and rules of judicial procedure in this state.

[Ed. Note.—For other cases, see *Common Law*, Cent. Dig. § 9; Dec. Dig. § 11.*]

2. MONOPOLIES (§ 10*) — STATUTORY PROVISIONS.

The statutes of the state indicate a policy to extend and confirm rather than to restrict the common-law principles relating to restraint of trade and monopolies.

[Ed. Note.—For other cases, see *Monopolies*, Dec. Dig. § 10.*]

3. CONTRACTS (§ 116*)—LEGALITY OF OBJECT—RESTRAINT OF TRADE.

At common law any contract or agreement that in its operation has or may have a tendency to restrain trade, to stifle competition in trade, to create or maintain a monopoly, or to unnaturally control the supply of or to increase the price of or to curtail the opportunity of obtaining useful commodities, to the injury of the public or any considerable portion of the population of any locality, is regarded as contrary to just governmental principles and inimical to the public welfare, and therefore against public policy.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 542-552; Dec. Dig. § 116.*]

4. CONTRACTS (§ 138*)—EFFECT OF ILLEGALITY—RELIEF OF PARTIES.

Contracts or agreements that violate the principles designed for the public welfare are illegal and will not in general be enforced by

the courts, in consideration of the principle expressed in the maxim, "In pari delicto potior est conditio defendentia." The courts will not in general aid either party to enforce an illegal agreement, but will leave the parties where they place themselves with reference to such illegal agreement, except where the law or public policy requires action by the courts, or where the parties are not in pari delicto, and other exceptional cases.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 681; Dec. Dig. § 138.*]

5. CONTRACTS (§ 153*)—CONSTRUCTION IN FAVOR OF LEGALITY.

All the provisions of a contract should be considered and construed with reference to controlling provisions and principles of law. Until the contrary appears from a contract and the circumstances and object of its making, the assumption is that the contract was made for and will accomplish only a lawful purpose; and no strained or unusual construction should be given to a contract so as to render it unlawful.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 734; Dec. Dig. § 153.*]

6. CONTRACTS (§ 102*) — ILLEGALITY — INTENT.

When it appears from a contract or from its operation or results that in its terms or in its full operation it is unlawful, or its operation accomplishes or in reality tends to accomplish an unlawful purpose, whether so intended by the parties thereto or not, the contract will not in general be enforced by the courts.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 462; Dec. Dig. § 102.*]

7. MONOPOLIES (§ 12*)—USEFUL COMMODITIES — PUBLIC POLICY.

Public policy favors competition in trade, and opposes monopolies and restraints upon trade in useful commodities where the public welfare is injuriously affected. Agreements that in their operation and effect tend to facilitate, stimulate, or promote trade are regarded with favor, where they do not directly or indirectly injure the public.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.*]

8. CONTRACTS (§ 116*)—LEGALITY OF OBJECT—RESTRAINT OF TRADE.

Where an agreement is lawful in itself and is so limited as to time, place, subject-matter, and purpose as that its operation will afford only necessary and proper protection to the parties in the enjoyment of their rights, and will not materially or really injure the public, the agreement may be enforced, even though it relates to and operates upon trade in useful commodities.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 542, 544; Dec. Dig. § 116.*]

9. CONTRACTS (§ 116*)—LEGALITY OF OBJECT —RESTRAINT OF TRADE.

Whether a contract, in effect, unlawfully tends to restrain trade or to a monopoly cannot be ascertained by any accurately defined rules, but must be ascertained from a practical consideration of the circumstances of the case in connection with provisions and principles of law and construction. The validity or invalidity of the contract should be determined by its real tendency with reference to trade and monopoly when in full operation.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 542-552; Dec. Dig. § 116.*]

10. CONTRACTS (§ 117*)—LEGALITY OF OBJECT —RESTRAINT OF TRADE—RESTRICTION NECESSARY FOR PROTECTION.

Where a contract transfers a lawful business, trade, or occupation actually engaged in, or a lawful exclusive right, and, as an incident

thereto, it is agreed that the vendor will not for a reasonable time engage in the same or a similar business within a reasonable territory covered by the business, and such agreement does not tend to restrain trade or to a monopoly to the public injury, it may not be contrary to public policy, and may be enforced if otherwise legal and binding.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 554-569; Dec. Dig. § 117.*]

11. CONTRACTS (§ 117*)—LEGALITY OF OBJECT —RESTRAINT OF TRADE—MONOPOLY.

A contract not transferring a lawful business, trade, profession, or occupation actually engaged in, or a lawful exclusive right, but containing an agreement to relinquish to another a common right not lawfully exclusive, or to refrain from the exercise of a right common to all to engage in a lawful business or occupation, and also containing other agreements that enable the parties, under the circumstances in which the contract will operate, to control or unduly and injuriously influence the trade relations of a considerable portion of a small community as to useful commodities, may be contrary to public policy and unenforceable. Such agreements are not relieved of illegality even if they are ancillary to a lease of a storehouse, if their tendency is to restraint of trade or monopoly to the injury of the public.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 554-569; Dec. Dig. § 117.*]

12. CONTRACTS (§ 117*)—LEGALITY OF OBJECT —RESTRAINT OF TRADE—MONOPOLY.

Where a contract places it within the power of the contracting parties to at least partially control the available supply of commodities useful if not necessary to a considerable portion of the local public, or to unreasonably limit the places where useful articles may be purchased, or to increase the price and consequently to restrain trade, it is substantially injurious to the portion of the public affected thereby, and is an unlawful restraint of trade, and tends to monopoly, rendering the illegal portions, if not the entire contract, unenforceable because contrary to public policy.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 554-569; Dec. Dig. § 117.*]

13. MONOPOLIES (§ 8*) — UNLAWFULNESS — TEST.

To be unlawful a restraint of trade or a monopoly need not be complete, and need not amount to a criminal offense. The test is whether the restraint or monopoly is injurious to the public.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 8.*]

14. CONTRACTS (§ 117*)—LEGALITY OF OBJECT —RESTRAINT OF TRADE—MONOPOLY.

If an agreement in a contract is in effect illegal, limitations as to time, place, or subjects, and expressed or implied provisions that the purpose of the contract or the agreement is lawful, are immaterial.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 554-569; Dec. Dig. § 117.*]

15. MONOPOLIES (§ 13*) — USEFUL COMMODITIES.

The inhabitants of a village have a right to protection from injurious restraint of trade and monopoly in useful commodities in the village without reference to the opportunities afforded for obtaining the commodities in a neighboring town.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 13.*]

16. CONTRACTS (§ 117*)—LEGALITY OF OBJECT —RESTRAINT OF TRADE—MONOPOLY.

Where a contract for the lease of a storehouse formerly used as a commissary by the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

owners of a sawmill who employed a large number of persons in a village contains agreements that the lessor, a corporation, will relinquish its right to establish and maintain a commissary for its employes, will use its influence to induce the employes, loggers, and others to purchase their supplies from the lessees, will issue to its employes merchandise checks against their wages directed exclusively to the lessee, to be redeemed by the lessor through the lessee for cash at par every 30 days if such issue is not illegal, and the lessees will establish a general store of feed, grain, dry goods, drugs, etc., and will accept as cash the merchandise coupons issued by the lessor, and will pay the lessor every thirty days a commission of 5 per cent. on gross sales, the necessary tendency of the agreements under the conditions in which the contract will operate is to restrain trade and to a monopoly to the injury of at least a considerable portion of the public affected by the agreements. The agreements are therefore contrary to public policy and invalid, and will not be enforced by the courts.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 117.*]

(Syllabus by the Court.)

Error to Circuit Court, Santa Rosa County; J. Emmet Wolfe, Judge.

Action by Samuel J. Stewart and another, copartners, against the Stearns & Culver Lumber Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

The declaration in this case is as follows:

"The plaintiffs, by their attorneys, sue the defendant for that the defendant being the owner and operator of a large sawmill at and in the village of Bagdad, in said county and state, and employing a great number of employes in the conduct thereof, on the 18th day of September, A. D. 1903, entered into a contract with the plaintiffs, a copy of which is hereto attached marked 'Exhibit A' and made a part hereof, whereby in consideration of the covenants of the plaintiffs therein contained to establish, maintain, and carry on in a certain specified store building situate in said village a general mercantile business with a stock of general merchandise of the value of ten thousand (\$10,000) dollars or more, and to accept as cash the merchandise checks or coupons to be issued by the defendant to its employes, and every 30 days to pay the defendant a commission of 5 per cent. upon the gross sales of said business, and to maintain a complete and comprehensive double entry set of books for the bookkeeping of said business, with permission to the defendant to audit said books, if desired, once a month, the defendant undertook and agreed that it would continuously for and during the period of three (3) years next ensuing the 1st day of September, A. D. 1903, issue to its employes from time to time, as called for in the ordinary course of business, merchandise coupons or checks for amounts which might be due from it to its said employes, which said checks or coupons were to be directed exclusively to the plaintiffs and redeemed every 30 days by the defendant from the

plaintiffs at par in cash, and to redeem said checks or coupons from and through the plaintiffs only; that the plaintiffs established and maintained the said merchandise business in the said store building with a general stock of merchandise of the kind and value agreed upon for a period of three (3) years next ensuing the date of said contract, and fully kept and performed all their covenants in the said contract contained according to the true intent and meaning thereof, yet the defendant, disregarding its duty in this behalf, and in violation of its said covenants, issued monthly during the three (3) years next ensuing the 1st day of September, A. D. 1903, merchandise checks and coupons to its employes which were not directed to the plaintiffs in compliance with the terms of said contract to the aggregate par value of about five thousand (\$5,000) dollars per month, about half of which said checks and coupons were monthly redeemed by the defendant from and through persons other than the plaintiffs, although no legal restriction had been placed upon the issuance of said merchandise checks and coupons, by reason whereof the plaintiffs have been deprived of the profits they would have made had all of said checks and coupons been redeemed by the defendant from and through the plaintiffs in compliance with the terms of said contract, and by reason of which the plaintiffs have been damaged in the sum of eighteen thousand (\$18,000) dollars.

"Wherefore plaintiffs sue and claim under this count eighteen thousand (\$18,000) dollars.

"(2) The plaintiffs further sue the defendant for that the defendant being the owner and operator of a large sawmill at and in the village of Bagdad, in said county and state, and employing a great number of employes in the conduct thereof, on the 18th day of September, A. D. 1903, entered into a contract with the plaintiffs, a copy of which is hereto attached marked 'Exhibit A' and made a part hereof, whereby in consideration of the covenants of the plaintiffs therein contained to establish, maintain, and carry on in a certain specified store building situate in said village a general mercantile business with a stock of general merchandise of the value of ten thousand (\$10,000) dollars or more, and to accept as cash the merchandise checks or coupons to be issued by the defendant to its employes and every thirty (30) days to pay the defendant a commission of five (5%) per cent. upon the gross sales of said business, and to maintain a complete and comprehensive double entry set of books for the bookkeeping of said business with permission to the defendant to audit said books, if desired, once a month, the defendant undertook and agreed that it would continuously for and during the period of three (3) years next ensuing the 1st day of September, A. D. 1903, issue to its employes from time

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to time, as called for in the ordinary hours of business, merchandise coupons or merchandise checks for amounts which might be due from it to its said employes, which said checks or coupons were to be directed exclusively to the plaintiffs and redeemed every thirty (30) days by the defendant from the plaintiffs at par in cash, and to redeem said checks or coupons from and through the plaintiffs only, and to use its influence to induce its employes, loggers, and others to purchase their supplies of the plaintiffs while the plaintiffs remained in possession of the said store; that the plaintiffs established and maintained the said mercantile business in the said store building with a general stock of merchandise of the kind and value agreed upon for and continuously during the period of three years next ensuing the date of said contract, and paid to the defendant the commission agreed upon, and kept and maintained a complete and comprehensive double entry set of books for the bookkeeping of said business, and permitted the defendant to audit said books once a month when so desired, and fully kept and performed all of their covenants in the said contract contained according to the terms and the true intent and meaning thereof, yet the defendant, disregarding its duty in this behalf, and in violation of its covenants, failed, neglected, and refused to use its influence to induce its employes, loggers, and others to purchase their supplies of said plaintiffs during said period, but, on the contrary, issued monthly during the three (3) years next ensuing the 1st day of September, A. D. 1903, merchandise checks and merchandise coupons to its employes which were not directed to the plaintiffs, to the aggregate par value of about five thousand (\$5,000) dollars per month, and entered into competition with the plaintiffs in redeeming the said checks and coupons so issued as aforesaid; and the defendant redeemed monthly from and through persons other than the plaintiffs about one-half ($\frac{1}{2}$) of the checks and coupons so issued as aforesaid—that is to say, merchandise checks and coupons aggregating at par value about two thousand five hundred (\$2,500) dollars per month, although no legal restriction had been placed upon the issuance of such merchandise checks and coupons by reason whereof the plaintiffs have been deprived of the profits they would have made had all of said checks and coupons been redeemed by the defendant in compliance with the terms of said contract, and by reason of which the plaintiffs have been damaged in the sum of eighteen thousand (\$18,000) dollars.

"Wherefore plaintiffs sue and claim under this count eighteen thousand (\$18,000) dollars.

"(3) The plaintiffs, by their attorneys, further sue the defendant for that the defendant, being the owner and operator of a large sawmill at and in the village of Bagdad, in said county and state, and employing a great

number of employes in the conduct thereof, on the 18th day of September, A. D. 1903, entered into a contract with the plaintiffs, a copy of which is hereto attached marked 'Exhibit A' and made a part hereof, whereby, in consideration of the covenants of the plaintiffs therein contained, to establish, maintain, and carry on in a certain specified store building situate in said village a general mercantile business with a stock of general merchandise of the value of ten thousand (\$10,000) dollars or more, and to accept as cash the merchandise checks or coupons to be issued by the defendant to its employes and every thirty (30) days to pay the defendant a commission of five (5%) per cent. upon the gross sales of said business, and to maintain a complete and comprehensive double entry set of books for the bookkeeping of said business with permission to the defendant to audit said books, if desired, once a month, the defendant undertook and agreed that it would continuously for and during the period of three (3) years next ensuing the 1st day of September, A. D. 1903, issue to its employes from time to time, as called for in the ordinary hours of business, merchandise coupons or merchandise checks for amounts which might be due from it to its said employes, which said checks or coupons were to be directed exclusively to the plaintiffs and redeemed every thirty (30) days by the defendant from the plaintiffs at par in cash, and to redeem said checks or coupons from and through the plaintiffs only and to use its influence to induce its employes, loggers, and others to purchase their supplies of the plaintiffs while they were in possession of the said store as aforesaid; that the plaintiffs established and maintained the said mercantile business in the said store building with a general stock of merchandise of the kind and value agreed upon for and during a period of three (3) years next ensuing the date of said contract and paid to the defendant every 30 days a commission of five (5%) per cent. upon the gross sales of said business, aggregating in all about twelve thousand (\$12,000) dollars, and maintained and kept a complete and comprehensive double entry set of books for the bookkeeping of said business, with permission to the defendant to audit said books once a month when desired, and fully kept and performed all of their covenants in the said contract contained according to the terms and true intent and meaning thereof, yet the defendant disregarding its duty in this behalf, and in violation of its said covenants, failed and refused to use its influence to induce its employes, loggers, and others to purchase their supplies of the plaintiffs during said period, but, on the contrary and in violation of its expressed stipulations in said contract, issued monthly during the three (3) years next ensuing the 1st day of September, A. D. 1903, merchandise checks and coupons to its employes, which were not directed to

the plaintiffs to the aggregate par value of about five thousand (\$5,000) dollars per month, and entered into competition with the plaintiffs in the redemption of said merchandise checks and coupons, and monthly redeemed from and through persons other than the plaintiffs said merchandise checks and coupons, aggregating at the par value of about twenty-five hundred (\$2,500) dollars per month, although no legal restrictions had been placed upon the issuance of said merchandise checks and coupons, by reason whereof the plaintiffs become and are entitled to have returned to them the commission so paid by them to the defendant as aforesaid of twelve thousand (\$12,000) dollars.

"Wherefore the plaintiffs sue and claim under this count twelve thousand (\$12,000) dollars.

"(4) The plaintiffs, by their attorneys, sue the defendant for that the defendant, being the owner and operator of a large sawmill at and in the village of Bagdad, in said county and state, and employing a great number of employes in the conduct thereof, on the 18th day of September, A. D. 1903, entered into a contract with the plaintiffs, a copy of which is hereto attached marked 'Exhibit A' and made a part hereof, whereby in consideration of the covenants of the plaintiffs therein contained to establish, maintain, and carry on in a certain specified store building situate in said village a general mercantile business with a stock of general merchandise of the value of ten thousand (\$10,000) dollars or more, and to accept as cash the merchandise checks or coupons to be issued by the defendant to its employes, and every 30 days to pay the defendant a commission of 5 per cent. upon the gross sales of said business, and to maintain a complete and comprehensive double entry set of books for the bookkeeping of said business with permission to the defendant to audit said books, if desired, once a month, the defendant undertook and agreed that it would continuously for and during the period of three (3) years next ensuing the 1st day of September, A. D. 1903, issue to its employes from time to time as called for in the ordinary course of business merchandise coupons or checks against their wages for amount which would thereafter become due and payable from it to its said employes, which said checks or coupons were to be directed exclusively to the plaintiffs and redeemed every 30 days by the defendant from the plaintiffs at par in cash, and to redeem said checks or coupons from and through the plaintiffs only; that the plaintiffs established and maintained the said mercantile business in the said store building with a general stock of merchandise of the kind and value agreed upon for a period of three (3) years next ensuing the said 1st day of September, and fully kept and performed all their cove-

ing to the true intent and meaning thereof, yet the defendant, disregarding its duty in this behalf and in violation of its said covenants, issued monthly during the three (3) years next ensuing the 1st day of September, A. D. 1903, merchandise checks and coupons to its employes against their wages thereafter to become due and payable, which were not directed to the plaintiffs in compliance with the terms of said contract to the aggregate par value of about five thousand (\$5,000) dollars per month, a large number of which said checks and coupons were monthly redeemed by the defendant from and through persons other than the plaintiffs and the said employes of defendant to which said checks and coupons were issued, and a large number of which it redeemed monthly from said employes before the wages for which they were issued became due and payable, although no legal restrictions had been placed upon the issuance of said merchandise checks and coupons; that, had the said defendant performed its said contract according to the true intent and meaning thereof, the said plaintiffs would have derived large profits from trade which would have come to them from the said employes of defendant to whom said checks or coupons were issued, and from the redemption of said checks or coupons to them by said defendant; that, by reason of the premises, the plaintiffs have been deprived of the said profits they would have made had all checks and coupons been redeemed by the defendant only from the parties to whom they were issued when the wages for which they were issued became due or from and through the plaintiffs in compliance with the terms of said contract, to their damage in the sum of eighteen thousand (\$18,000) dollars. Wherefore plaintiffs sue and claim eighteen thousand (\$18,000) dollars.

"Maxwell & Reeves,

"Attorneys for Plaintiffs."

Exhibit A.

"Memo of agreement made by and between Stearns & Culver Lumber Company, a corporation organized under the laws of Illinois, having their place of business at Bagdad, Florida, party of the first part, and the firm of S. J. Stewart & Bro., a partnership consisting of Samuel J. Stewart and John T. Stewart, of Milton, state of Florida, party of the second part.

"Witnesseth: The party of the first part, the said Stearns & Culver Co., for and in consideration of the covenants hereinafter named, does hereby lease for a term of three years from Sept. 1st, 03, to the said Stewart Bros., the following property, to wit: Store building and store fixtures now located on block 5, village of Bagdad, and facing Water street, now known as the 'Bagdad General Store,' and formerly as commissary of Simpson & Co.

"The said Stearns & Culver Co. hereby

agrees to and does relinquish to the said Stewart Bros. its right to the establishment and maintenance of a commissary as a depot of supplies for its employes, and agrees to use its influence to induce employes, loggers, and others to purchase their supplies of said Stewart Bros., while in possession of the store aforesaid.

"Said Stearns & Culver Co. furthermore agrees to issue to its employes from time to time, as called for in the ordinary hours of business, merchandise coupons or merchandise checks against their wages, which shall be redeemed by the said Stearns & Culver Co. at par in cash to the said Stewart Bros. every thirty days, and to issue such coupons or checks exclusively to said Stewart Bros. If, however, legal restrictions are placed upon the issuance of such coupons or checks, the said Stearns & Culver Co. shall be released from this obligation, and some other method adopted of directing trade to said Stewart Bros.

"It is agreed that said Stearns & Culver Co. shall equip the said store with electric lights, and furnish lighting current without charge, in the same manner and degree as they furnish their own office, but not to any further extent, the replacement of bulbs, etc., to be at the expense of Stewart Bros.

"Such warehouse room as is available for the purpose shall be furnished Stewart Bros. by Stearns & Culver Co. free of charge, but the said Stearns & Culver Co. does not obligate itself to build any warehouse or other building for the said Stewart Bros. except as shall be agreed upon separately from this agreement.

"The party of the second part, the said Stewart Bros., hereby agree to establish and maintain a first-class and up-to-date general store on the premises described above, and to carry therein a stock of not less than \$10,000 or \$12,000, and as much more as good conservative judgment would dictate, of feed, grain, dry goods, boots, and shoes, furniture, drugs, stationery, notions, hardware, etc., and to pay the said Stearns & Culver Co. every thirty days a commission of five per cent. upon the gross sales of said business.

"It is agreed by Stewart Bros. that they will accept as cash the merchandise coupons or checks issued by the said Stearns & Culver Co. to its employes, and directed to them, and handle same in accordance with the regulations of the said Stearns & Culver Co. regarding the handling of said coupons.

"The said Stewart Bros. furthermore agrees to open up and maintain a complete and comprehensive double entry set of books for the bookkeeping of the business of the store before mentioned, and extend permission to said Stearns & Culver Co. to audit these books once each month, if desired, in order to determine the amount of gross sales, which is a part of the consideration of this instrument.

"Should the said Stearns & Culver Co. consider it desirable to change the location of the store referred to in this agreement to some other lot in Bagdad, the said Stewart Bros. hereby extend their permission to such removal, and it will in no wise affect the terms and conditions of this agreement.

"This contract is to remain in force for a period of three years from the first day of September, 1903, unless by failure on the part of either party to perform any or all of the above articles of agreement it should be earlier terminated.

"Witnesseth our hands and seals this eighteenth day of September, A. D. 1903.

"Stearns & Culver Lumber Company,

"By W. A. Galliver,

"S. J. Stewart & Bro.,

"By S. J. Stewart.

"John F. Stewart."

Bills of Particulars.

Bill of particulars to first and second counts:

"To loss of 20 per cent. profit on merchandise checks and coupons, of the aggregate par value of \$90,000, \$18,000."

Bill of particulars to third count:

"To 5 per cent. commissions paid by the plaintiffs to the defendant on gross sales, \$12,000."

The defendant demurred to the several counts of the declaration separately because neither "sets forth any enforceable contract made by the defendant."

After sustaining the demurrer, the plaintiffs not desiring to amend, judgment was entered for the defendant, and the plaintiffs took writ of error, assigning as error the sustaining of the demurrer and the judgment for defendant.

Maxwell & Reeves, for plaintiffs in error.
Blount & Blount & Carter, for defendant in error.

WHITFIELD, J. (after stating the facts as above). The contract upon which the action is brought contains a lease to a partnership of a storehouse formerly used as a commissary in a village where a corporation, the owner of the storehouse, it is alleged, owned and operated a large sawmill, employing a great number of persons. The contract also contains an agreement by the corporation to relinquish its right to establish and maintain a commissary for its employes, to use its influence to induce the employes, loggers, and others to purchase their supplies from the partnership, and to issue to its employes merchandise checks against their wages directed exclusively to the partnership, to be redeemed by the corporation through the partnership for cash at par every 30 days, if such issue is not illegal. The partnership agreed in the contract to establish a general store carrying \$10,000 or more of feed, grain, dry goods, boots, and shoes, furniture, drugs,

stationery, notions, hardware, etc., to accept as cash the merchandise coupons issued by the corporation, and to pay the corporation every 30 days a commission of 5 per cent. upon the gross sales of the business. The partnership alleges that its covenants have been performed, and that the covenants of the corporation have been violated, for which damages are claimed.

The demurrer to the declaration presents the question whether the contract is one that the courts will enforce; i. e., whether it tends to create a monopoly, to restrain trade, or to stifle competition, so as to make it violative of the laws or of public policy of this state.

The principles of the common law, when not modified by express enactments or rules or by the requirements of governmental conditions, are in force as a part of the system of laws and rules of judicial procedure in this state.

There are no express declarations or modifications of the principles of the common law relating to restraints of trade and monopolies in this state, except as have been made by Congress in its authority as to interstate and foreign commerce, and by sections 3160-64, Gen. St. 1906, relating to restraints in sales of fresh meat, and by sections 3233, 3514, 3515, Gen. St. 1906, relating to coercing employes and to criminal conspiracies and to combinations against workmen, and perhaps some other provisions, all of which indicate a policy to extend, and confirm rather than to restrict, the common-law principles relating to restraint of trade and monopolies.

The industrial and governmental conditions here do not require a relaxation of the just principles of the common law in reference to monopolies and restraints of trade; but, on the contrary, the spirit and purpose of our government and institutions, and the commercial conditions of the country, require the maintenance and enforcement of those principles for the protection of freedom in trade and equal opportunities to all under like conditions, so that the welfare of the public or any considerable portion thereof may not be unjustly subordinated to the purposes and advantage of one or more individuals.

At common law any contract or agreement that in its operation has or may have a tendency to restrain trade, to stifle competition in trade, to create or maintain a monopoly, or to unnaturally control the supply of or to increase the price of or to curtail the opportunity of obtaining useful commodities, to the injury of the public or any considerable portion of the population of any locality, is regarded as contrary to just governmental principles and inimical to the public welfare, and therefore against public policy.

Contracts or agreements that violate the principles of public policy designed for the public welfare are illegal, and will not in general be enforced by the courts in consideration of the principle expressed in the maxim, "In

pari delicto potior est conditio defendentia."

The courts will not in general aid either party to enforce an illegal agreement, but will leave the parties where they place themselves with reference to such illegal agreement, except where the law or public policy requires action by the courts, or where the parties are not in *pari delicto*, and perhaps in other cases not pertinent here. See 9 Cyc. 546; Broome on Common Law, 355; McMullen v. Hoffman, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117; Burton v. McMillan, 52 Fla. 469, 42 South. 849, 8 L. R. A. (N. S.) 991, 120 Am. St. Rep. 220; 2 Hughes on Proc. 679; 2 Eddy on Combinations, §§ 688, 737; 1 Eddy on Combinations, §§ 336, 585; Beach on Monopolies, p. 47; United States v. Addyston Pipe & Steel Co., 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122; Chapman v. Haley, 117 Ky. 1004, 80 S. W. 190, 4 Am. & Eng. Anno. Cases, 712.

All the provisions of a contract should be considered and construed with reference to controlling provisions and principles of law. Until the contrary appears, it is assumed that a contract is made for and will accomplish only a lawful purpose; and no strained or unusual construction should be given to a contract so as to render it unlawful. But when it appears from a contract and the circumstances under which it was made, and from its purposes, operation, and results, that in its terms or in its full operation it is unlawful, or its operation accomplishes or in reality tends to accomplish an unlawful purpose, whether so intended by the parties thereto or not, the contract will not be enforced by the courts.

Public policy favors competition in trade, to the end that commodities may be obtained with the greatest convenience and at the lowest possible prices, and opposes monopolies and restraints upon trade in useful commodities that tend to inconvenience or to control the supply or to higher prices, to the injury of the public or any considerable portion thereof in any locality. Agreements that in their operation and effect tend to facilitate, stimulate, or promote trade are regarded with favor where they do not directly or indirectly injure the public.

Where an agreement is lawful in itself, and is so limited as to time, place, subject-matter, and purpose as that its operation will afford only necessary and proper protection to the parties in the enjoyment of their rights, and will not materially or really injure the public, the agreement may be enforced, even though it relates to and operates upon trade in useful commodities.

Whether a contract in its terms or operation is or may be unreasonable because it extends to or may be extended to a longer time or to a greater territory or to other subjects than is reasonably necessary for the protection of the rights of the parties inter sese, and whether the public is or may be appreciably injured thereby, cannot be ascertained

by any accurately defined rules, but must be determined from a practical consideration of the circumstances of every case as it arises in connection with such general principles of law and of construction as are applicable thereto. The validity of the contract should be determined not by what has been done under it, but by what may be done under it, by what will be its real tendency with reference to trade and monopoly when in full operation.

Where a contract in its terms and in its operation transfers from one party to another a lawful business, trade, or occupation actually engaged in, or a lawful exclusive right, and, as an incident thereto, it is agreed that the vendor will not for a reasonable time engage in the same or a similar business within a reasonable territory covered by the business, and such agreement does not unreasonably restrict the available supply of, or access to, or raise the price of any useful commodity, or tend to create a monopoly, it may not be against public policy or unlawful, and consequently may be enforced by the courts if otherwise legal and binding.

But a contract not transferring a lawful business, trade, profession, or occupation actually engaged in, or not transferring a lawful exclusive right, but containing an agreement to relinquish to another a common natural right not lawfully exclusive, or to refrain from the exercise of a natural right common to all to engage in a lawful business or occupation and other agreements that enable the parties, under the circumstances in which the contract will operate, to control or unduly and injuriously influence the trade relations of a considerable portion of a small community as to necessary and useful commodities, may be opposed to public policy, and not enforceable. The fact that the agreements are contained in and are ancillary to a contract of lease of a storehouse does not relieve them of their illegal effect if their tendency is to restraint of trade or monopoly, to the injury of the public.

Where a contract places it within the power of the contracting parties to at least partially control the available supply of commodities useful if not necessary to at least a considerable portion of the local public, or to unreasonably limit the places where useful articles may be purchased, or to increase the price and consequently to restrain trade, it is substantially injurious to the portion of the public affected thereby, and is an unreasonable, and consequently an unlawful, restraint of trade, and tends to monopoly, rendering the illegal portions, if not the entire contract, unenforceable because contrary to public policy.

Where the necessary tendency of a contract is to a monopoly and to a restraint of trade that is appreciably injurious to the public, the monopoly or restraint of trade need not be complete, and the degree of injury to the public inflicted or reasonably an-

ticipated is immaterial. And this is so even though the agreement is ancillary to a lease of property or other lawful main purpose of the contract.

If an agreement contained in a contract is in effect illegal, it is not rendered legal by a direct or implied provision in the contract that its purpose is a lawful one, or by the fact that the illegal agreement is an incident to the accomplishment of a lawful purpose.

The illegality in the agreement or in its operation need not amount to a criminal offense. The test is whether the agreement in full operation will be injurious to the public welfare. If so, it will not be enforced.

The inhabitants of a village have a right to protection from injurious restraint of trade and monopoly in useful commodities in the village without reference to the opportunities afforded for obtaining the commodities in a neighboring town.

Where an agreement in operation has a necessary tendency to restrain trade or to monopoly to the appreciable injury of the public, limitations as to time, place, or subjects contained in the agreement are immaterial.

The validity or invalidity of an agreement that in operation tends to restrain trade or to monopoly is in general determined by the element of whether it is or is not injurious to the public. If injurious in any perceptible degree to any considerable portion of the public, the agreement is contrary to public policy, and will not be enforced. If not so injurious, it may be enforced if otherwise legal and binding. See *Horner v. Graves*, 7 Bing. 735, 20 E. O. L. 810; *Clark v. Needham*, 125 Mich. 84, 83 N. W. 1027, 51 L. R. A. 785, 84 Am. St. Rep. 559; *Crawford v. Wick*, 18 Ohio St. 190, 98 Am. Dec. 108; *Pocahontas Coke Co. v. Powhatan Coal & Coke Co.*, 60 W. Va. 508, 56 S. E. 264, 9 Am. & Eng. Ann. Cas. 667, 10 L. R. A. (N. S.) 208, 116 Am. St. Rep. 901; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666; *United States v. Addyston P. & S. Co.*, 85 Fed. 271, 29 O. C. A. 141, 46 L. R. A. 122; *United States v. E. O. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; *Tuscaloosa Ice Mfg. Co. v. Williams*, 127 Ala. 110, 28 South. 669, 50 L. R. A. 175, 85 Am. St. Rep. 125; *Fullington v. Kyle Lumber Co.*, 139 Ala. 242, 35 South. 852; *Webb Press Co. v. Bierce*, 116 La. Ann. 905, 41 South. 203; 27 Cyc. 898; 20 Am. & Eng. Ency. Law (2d Ed.) 849; 24 Am. & Eng. Ency. Law (2d Ed.) 849; *Nester v. Continental Brewing Co.*, 161 Pa. 473, 29 Atl. 102, 24 L. R. A. 247, 41 Am. St. Rep. 894; *Harding v. American Glucose Co.*, 182 Ill. 551, 55 N. E. 577, 64 L. R. A. 738, 74 Am. St. Rep. 189, and notes; *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, 22 L. Ed. 815; *Merriman v. Cover*, 104 Va. 428, 51 S. E. 817; *Jones v. Clifford's Exec.*, 5 Fla. 510; *Hocker v. Western Union Tel. Co.*, 45 Fla. 363, 34 South. 901; 1 Page on Contracts, §§ 373, 434; 7 Current Law, 787;

Slaughter v. Thacker Coal & Coke Co., 55 W. Va. 642, 47 S. E. 247, 65 L. R. A. 842, 104 Am. St. Rep. 1013; 2 Am. & Eng. Anno. Cases, 335, and notes; *Keene Syndicate v. Wichita Gas, Electric Light & Power Co.*, 69 Kan. 234, 76 Pac. 834, 67 L. R. A. 61, 105 Am. St. Rep. 164; 2 Am. & Eng. Anno. Cases, 949; 9 Am. & Eng. Anno. Cases, 907; *Anderson v. Shawnee Compress Company*, 17 Okl. 231, 87 Pac. 315, 15 L. R. A. (N. S.) 846.

In this case no established business, trade, profession, or occupation, or lawful exclusive right, was transferred with accompanying good will, but the contract contains a lease of a storehouse and an agreement to relinquish a right common to all to establish a general store in a village, coupled with other agreements that in practical operation necessarily tend to substantially restrain freedom of trade and to monopoly, whether so intended by the parties or not.

Assuming that the corporation had the right to establish and maintain a general store, it obviously had no lawful exclusive right to do so in the village named by the contract, and the agreement to relinquish a right common to all to establish and maintain a general store in the village, if of any benefit to the other contracting party, was not necessary to the protection of the rights in the lease of the storehouse. When this agreement to relinquish a right common to all is taken in connection with the agreement as to the exclusive issuing and redeeming by the contracting parties of merchandise checks to a great number of persons in a village, employes of one of the parties, and with the character of goods the checks would purchase, the relation of the contracting corporation to its employes, the great number of the employes operating in a village, the agreement to induce the employes, loggers, and others to purchase their supplies at the one place, and the agreement to pay 5 per cent. commission on gross sales, it is manifest that the inevitable tendency of the agreement, though ancillary to a lease of a storehouse, is to restrain trade, to stifle competition, to increase prices of useful if not necessary commodities, and to create and maintain a monopoly, so as to injure in some appreciable degree at least a considerable portion of the local public whether such result was intended or not. If the restraint of trade or the monopoly the contract tends to effectuate, in its operation, is injurious to the public to any appreciable degree, the limitations, expressed or implied, as to time, place, or objects are immaterial.

A mere influencing of trade in a lawful manner is not necessarily illegal. The issuing by an employer to employes of "merchandise checks against their wages" to be re-

deemed exclusively through a merchandise house of another party as alleged in this case may not ipso facto and necessarily be illegal under all circumstances; but under the circumstances of this case such a course of dealing, whether so intended or not, tends to aid in restraining trade and in maintaining a monopoly to the injury of a large number of persons. It does not appear from the record whether the merchandise checks were to be issued before or after wages were due and payable, nor does it seem to be material in this case. Even if it should appear that the village where this contract operated is near a larger town, it would not redeem the contract, since the freedom of trade may be restrained, and a monopoly assisted to the injury of a local public by curtailing the convenience of the public in procuring supplies of useful commodities. Whether the corporation was or was not able to pay its employes in cash does not appear to be material in this case. No element of partnership express or implied appears from the contract or the declaration if that would relieve the agreements of invalidity.

While the rent for a storehouse may properly be a percentage of the business done in the storehouse, yet in this case the agreement to pay 5 per cent. of gross sales, taken in connection with the other parts of the contract and conditions under which it was to operate and with the claim for commissions paid, indicate that such a percentage covers, not only the store rent, but also profits from a business capable of being so conducted as to in some substantial degree restrain trade and maintain a monopoly to the injury of at least an appreciable part of the public in the locality where the business was conducted, and the intention of the parties is of no controlling force.

The inevitable tendency of the contract operating under the circumstances alleged in the declaration is to restrain trade, to stifle competition, and to a monopoly, to the injury of at least a considerable portion of the public affected by the contract, and the contract is consequently violative of the public policy of the state or the implied principles of law recognized as existing in this state on this subject for the general welfare. This being so, courts of justice will not aid the parties in enforcing the invalid agreements, and the demurrer to the declaration was properly sustained.

The judgment is affirmed.

SHACKLEFORD, C. J., and COCKRELL, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

(56 Fla. 127)

ATLANTIC COAST LINE R. CO. v. DEES
et al.

(Supreme Court of Florida, Division A. Dec. 8, 1908.)

1. APPEAL AND ERROR (§ 961*)—REVIEW—DISCRETION OF LOWER COURT—PHYSICAL EXAMINATION.

Section 3151 of the General Statutes of 1906, relating to the physical examination of the injured party in all actions brought in the courts of this state to recover damages for personal injuries alleged to have been sustained, makes it discretionary with the trial court to require such examination, and an order of such court denying the motion or application of the defendant for such physical examination will not be disturbed by an appellate court unless an abuse of discretion is clearly made to appear.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 961.*]

2. DAMAGES (§ 206*)—PHYSICAL EXAMINATION OF INJURED PERSON—DISCRETION OF COURT.

Where an application is made by the defendant for the physical examination of the plaintiff, in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of the defendant, under section 3151 of the General Statutes of 1906, prior to the trial of the case or before any evidence has been adduced, and the trial court refused such application, without prejudice, however, to renew the same during the trial, thereby evincing a willingness to grant the same if it was made to appear to be necessary to ascertain the real condition of the plaintiff, and such application was not subsequently renewed during the trial, the court may well have concluded that the defendant abandoned it. In such a case no abuse of the discretion expressly vested in the trial court by such statute has been shown. Valid reasons which do not appear in the transcript may have existed why such physical examination should not have been made at the time it was applied for.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 531; Dec. Dig. § 206; * Discovery, Cent. Dig. §§ 92-98.]

3. EVIDENCE (§ 537*)—EXPERT TESTIMONY—COMPETENCY OF EXPERTS.

Where a witness, who has been introduced on behalf of the plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of the defendant, has testified that he is a physician engaged in general practice, has resided in a certain designated town in the state for four years, and that the plaintiff has been his patient for some months past, a proper and sufficient foundation has been laid to warrant the witness being permitted to testify as to what symptoms he found when he was first called to see such patient.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2345; Dec. Dig. § 537.*]

4. APPEAL AND ERROR (§ 971*)—REVIEW—DISCRETION OF TRIAL COURT—COMPETENCY OF EXPERT WITNESS.

When a witness is offered either as an expert or a skilled witness, it is for the trial court to determine whether or not the witness has been shown to possess the requisite qualifications and special knowledge to warrant his so testifying, and the decision of such trial court is conclusive upon this point, unless it appears from the transcript to have been erroneous or to have been founded upon some error in law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3852; Dec. Dig. § 971.*]

5. TRIAL (§ 296*)—INSTRUCTIONS—CORRECTING OMISSIONS.

Where an instruction, as far as it goes, states a correct proposition of law, but is defective because it fails to qualify or explain the proposition it lays down in consonance with the facts of the case, such defect is cured if subsequent instructions are given containing the required qualifications or exceptions. It is not required that a single instruction should contain all the law relating to the particular subject treated therein.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.*]

6. TRIAL (§ 295*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

In determining the correctness of charges and instructions, they should be considered as a whole, and if, as a whole, they are free from error, an assignment predicated on isolated paragraphs or portions, which, standing alone, might be misleading, must fail.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

7. APPEAL AND ERROR (§ 724*)—ERROR—POINTING OUT—SUFFICIENCY.

It is the duty of a party resorting to an appellate court to make the errors complained of clearly to appear, if they in truth exist, every presumption being in favor of the correctness of the rulings of the trial court. Unless the error assigned is so glaring or patent that no argument is needed to demonstrate it, counsel should call the attention of the court to the specific grounds upon which the error is based, stating his reasons therefor, and citing the authorities relied upon to support the same.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2997; Dec. Dig. § 724.*]

8. DAMAGES (§ 34*)—PHYSICAL SUFFERING—AGGRAVATION BY DISEASE.

In an action brought by a passenger against a railroad company to recover damages for personal injuries alleged to have been caused by the negligence of the defendant, and such passenger was, at the time the injuries were received, suffering from some disease or illness which tends to aggravate the injuries, such passenger's previous infirmity will not excuse the defendant carrier from answering in damages to the full extent of all the injuries caused by such negligence, and the fact that such carrier was not informed of the passenger's condition will make no difference.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 43; Dec. Dig. § 34.*]

9. TRIAL (§ 260*)—REQUESTED INSTRUCTION COVERED BY INSTRUCTIONS GIVEN.

A requested instruction, even though it may embrace correct legal principles, is properly refused when such principles have been fully covered by other instructions or charges given in the case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

10. APPEAL AND ERROR (§ 1004*)—REVIEW—VERDICT—AMOUNT.

Where one of the grounds of the motion for a new trial is that the amount of the verdict is excessive, and the trial court has denied such motion, in passing upon an assignment predicated thereon, an appellate court will not disturb the verdict on such ground, unless the amount is such as to shock the judicial conscience, or as to indicate that the jury must have been unduly influenced in some way, or swayed by passion or prejudice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3945; Dec. Dig. § 1004.*]

(Syllabus by the Court.)

Error to Circuit Court, Hernando County; William S. Bullock, Judge.

Action by Stella Dees, joined by her husband, William E. Dees, against the Atlantic Coast Line Railroad Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

R. A. Burford and G. C. Martin, for plaintiff in error. Davant & Davant, for defendants in error.

SHACKLEFORD, C. J. This is an action instituted by the defendants in error against the plaintiff in error, in the circuit court for Hernando county, seeking to recover damages for personal injuries received by Stella Dees, one of the defendants in error, alleged to have been occasioned by the negligence of the plaintiff in error. A trial was had before a jury, which resulted in a verdict in the sum of \$2,500, in favor of the plaintiffs. The defendant seeks to have the judgment entered thereon reviewed and tested here by writ of error, returnable to the present term.

The amended declaration contains two counts, to which the defendant filed the plea of not guilty, upon which the plaintiffs joined issue. Before pleading to the amended declaration, the defendant had interposed a demurrer thereto, which was overruled, and which ruling forms the basis for the first assignment. It is, however, expressly abandoned here, and we do not set forth the declaration, as no point is made thereon.

The second assignment is that "the court erred in overruling and denying the defendant's petition or motion for an order requiring the plaintiff, Stella Dees, to submit to a physical examination made on the 16th day of April, A. D. 1907."

We find that the issues in the case were made up on the 9th of March, 1907, and, according to the bill of exceptions, that at the spring term of such court, on the 16th day of April, 1907, the defendant filed a motion for an order requiring the plaintiff to submit to a physical examination, but, so far as is disclosed, no order was made thereon, and, in the absence of an order denying the same and an exception noted thereto, there is nothing upon which to predicate error, hence this assignment must fail. The bill of exceptions shows the following proceedings:

"Now comes the defendant by its attorneys, R. A. Burford and G. C. Martin, and moves the court for an order requiring Mrs. Stella Dees, the plaintiff in the case, to submit to such physical examination of her person as shall be reasonably sufficient to determine her physical condition at the time of trial, and the nature and extent of the alleged injuries she claims to have received, as alleged in the amended declaration. R. A. Burford & G. C. Martin, Attorneys for the Defendant."

And at the fall term of said circuit court, to wit, on November 11, 1907, said motion

was renewed and again presented, and thereupon, on the 19th day of November, 1907, during a term of said court, said motion came on to be heard, and the court thereupon made the following order, denying said motion: "This cause coming on to be heard on motion of defendant's attorney on the preliminary call of the civil docket for an order for a physical examination of the plaintiff, and the same having been considered by the court, and the court being advised, and no facts or circumstances are shown from which it is made to appear that it is necessary for such examination to be made, when it is considered and ordered that said motion be denied without prejudice to renew the same, if it is made to appear that the same is necessary or expedient in the trial of said cause, and the defendant excepts. In open court, Brooksville, November 19th, 1907. W. S. Bullock, Judge." To which ruling of the court the defendant then and there excepted.

At the spring term of the said court at which the said cause was tried, the said defendant, on the preliminary call of the civil docket, to wit, on April 21, 1908, again renewed the said motion for an order requiring a physical examination of the plaintiff, in the words of said original motion. Thereupon the court again denied said motion in the words of the original order, of date November 19, 1907. To which ruling of the court the defendant then and there excepted.

Upon these two rulings are based the third and fourth assignments, which may conveniently be treated together. The right of the defendant, in an action brought to recover damages for personal injuries, to insist upon a physical examination of the plaintiff in order to determine the nature, character, and extent of such injuries and the power of the trial court to require such examination, has been the subject of much controversy in the courts, and the authorities are conflicting. See 4 Wigmore's Evidence, § 2220, especially the numerous authorities collated in note 9 on page 3022 et seq., and the later cases given in note 9 of the same section in volume 5, the supplementary volume, found on page 222. Also see Watson's Damages for Personal Injuries, § 855. We have examined quite a number of authorities bearing upon the subject, but it is unnecessary for us to go into any extended discussion, for the reason that, unlike most of the other jurisdictions, we have a statute regulating the matter, section 3151 of the General Statutes of 1906, which is as follows:

"3151. Examination of injured party in personal damage cases.—In all actions brought in the courts of this state to recover damages for personal injuries alleged to have been sustained, it shall be discretionary with the trial court, upon motion of the defendant, to require the injured party, if living, either before or at the time of the trial of the cause, to submit to such physical ex-

amination of his or her person as shall be reasonably sufficient to determine physical condition at the time of trial and the nature and extent of the alleged injuries. The physical examination provided shall be made by a physician to be named by the court in the presence of one or more physicians or attendants of the injured party, if the party so desires. The compensation of the examining physician shall be fixed by the court in each particular case, and shall be in the first instance paid by the party petitioning for such examination but shall be taxed up as a part of the costs of the case subject to the final disposition of the same."

This statute seems never to have been construed by this court, but we find that it was originally enacted in 1899, p. 112, forming chapter 4719, and that in the title thereof it was referred to as "An act to require in the discretion of the trial court," etc. As is said in section 655 of Watson's Damages for Personal Injuries: "The general rule is that the defendant has no absolute right to insist upon a physical examination of the plaintiff, the granting or refusal of a motion or application for an order of court requiring the plaintiff to submit to such an examination resting in the sound discretion of the trial judge. From all of which it results that, as in other matters discretionary with trial tribunals, an appellate court will not interfere except in cases of manifest abuse of discretion." This principle has often been recognized and applied by this court in regard to the exercise of judicial discretion by trial judges. See *Wilson v. Johnson*, 51 Fla. 370, 41 South. 395, and authorities there cited; *Adams v. State*, 55 Fla. 1, 46 South. 152; *Stearns & Culver Lumber Co. v. Adams*, 55 Fla. 394, 46 South. 156. If this principle is applicable, even in the absence of a statute, as the above-cited authorities hold, there can be no doubt as to its applicability in the instant case, since the lawmaking power has especially lodged the granting of such an order within the discretion of the trial court, and a clear abuse of such discretion must be made to appear to an appellate court in order to warrant it in disturbing an order denying such application. Other jurisdictions have so held, even in the absence of any statute upon the subject, as an examination of the authorities cited in note 4 to that portion of section 655 of Watson's Damages for Personal Injuries, which we have copied above, and in note 9 to section 2220 of Wigmore's Evidence, to which we have referred, will show.

As will be observed from the first order made by the trial court, which we have copied above, upon the application for an order for such physical examination of plaintiff, it was stated therein that no facts or circumstances had been shown from which it was made to appear that such examination was necessary, therefore it was denied, but without prejudice to renew the same upon a prop-

er showing. No abuse of discretion is made to appear here. At that time, so far as is disclosed by the transcript, all that the court had before it was the application for such order, which we have copied above, and the pleadings. The defendant in its brief contends that it was entitled to the granting of the order for such physical examination, because the amended declaration alleged that "plaintiff, Stella Dees, was grievously bruised, wounded, hurt, and injured, enduring therefrom great bodily pain and suffering and mental anguish," and urges, in support of this contention, "the defendant had no means of determining the extent, nature, and character of the alleged injuries, except as the same might be revealed by a physical examination." This position is not tenable. Such an order as that in the instant case was made by the trial court, which was upheld and approved by the Supreme Court, in *Sidekum v. Wabash, St. L. & P. Ry. Co.*, 93 Mo. 400, text 403, 4 S. W. 701, 3 Am. St. Rep. 549. Also, see the clear and forceful reasoning in the opinion rendered by Mr. Justice McClellan in *Alabama G. S. R. Co. v. Hill*, 90 Ala. 71, 8 South. 90, 9 L. R. A. 442, 24 Am. St. Rep. 764, where the cited Missouri case is approvingly referred to and other authorities are reviewed. The bill of exceptions further discloses that at the term of court at which the case was tried, on the preliminary call of the docket, the defendant renewed its motion, which was denied by the court in the words of the original order. Here again the defendant has failed to show any abuse of discretion. As was well said in *Fullerton v. Fordyce*, 121 Mo. 1, text 10, 25 S. W. 587, 588, 42 Am. St. Rep. 516, "there may be reasons which do not appear on this record why an examination should not have been made at the time it was applied for, and we are unwilling to say that the court abused its discretion in declining to make the order." The defendant was given an opportunity by the wording of the order of denial of renewing such application at any time during the trial, if it thought it advisable to do so, but, so far as is disclosed to us, it did not avail itself of this privilege. The following language from the opinion rendered in *Sidekum v. Wabash, St. L. & P. Ry. Co.*, 93 Mo. 400, text 405, 4 S. W. 701, 702, 3 Am. St. Rep. 549, is very much in point: "The action of the trial court upon such motion, as we have seen, was merely a refusal to grant the same for the time being, and, as defendant did not again renew its application for such order at any other stage of the proceedings, the court may have well concluded that, after hearing the said evidence in the cause introduced by plaintiff, including that of Dr. Bane, which we have given in substance, defendant did not deem it necessary to renew its motion, or to insist thereon, but had abandoned the same." This language was quoted and approved in *Alabama G. S. R. Co. v. Hill*, 90 Ala. 71, text 78, 8 South. 90, text 92,

9 L. R. A. 442, 24 Am. St. Rep. 764. The following additional authorities will also be found to throw light upon the point: Richmond & D. R. Co. v. Childress, 82 Ga. 719, 9 S. E. 602, 3 L. R. A. 808, 14 Am. St. Rep. 189; Owens v. Kansas City, St. J. & C. B. R. Co., 95 Mo. 169, 8 S. W. 350, 6 Am. St. Rep. 89; O'Brien v. City of La Crosse, 99 Wis. 421, 75 N. W. 81, 40 L. R. A. 831; Smith v. City of Spokane, 16 Wash. 403, 47 Pac. 888. Also see 14 Cyc. 364 et seq. These assignments must fail.

The fifth assignment is based upon the overruling of the defendant's objections to the following question propounded to Dr. Samuel C. Woods, a witness for plaintiffs: "What symptoms did you find, doctor?" We find that the grounds of objection interposed to this question were as follows:

"(1) Because no proper foundation has been laid.

"(2) Because it does not appear from the examination of the witness, so far, that he is qualified as an expert, if the testimony is offered for that purpose.

"(3) Because the examination of the witness, so far, has not developed his capacity and knowledge of the matters inquired about."

When this question was propounded to the witness, he had already testified that he was a physician engaged in general practice, had resided at Webster, Fla., for four years, and that Mrs. Dees had been his patient since the 30th day of April, 1907, at which time he was first called to see her. Sections 1165, 1166, and 1167 of the General Statutes of 1906 contain the provisions regulating the granting of certificates to physicians entitling them to practice medicine in this state; and section 3611 of such statutes makes it a crime for any one to practice medicine without having obtained such certificate, and fixes the punishment for a violation thereof. If the witness was not a practicing physician or entitled to practice medicine under the statutes of this state, the defendant could have established that fact either by cross-examination of the witness or by the introduction of other evidence. This likewise applies to the skill, qualifications, and experience of the witness. We do not understand from what is disclosed in the bill of exceptions that the witness was offered as an expert. At any rate, the question so objected to did not call for the expression of an expert opinion from the witness, but simply for a statement of fact as to what he found the symptoms to be. Whether he was offered as an expert or skilled witness, it was for the trial court to determine whether or not the witness had been shown to possess the requisite qualifications and special knowledge to warrant his so testifying, and the decision of such trial court is conclusive upon this point, unless it appears from the transcript to have been erroneous, or to have been founded upon some error in law. Atlantic

Coast Line R. Co. v. Crosby, 53 Fla. 400, 43 South. 318; Schley v. State, 48 Fla. 53, 37 South. 518; Davis v. State, 44 Fla. 32, 32 South. 822. Also see 1 Wigmore's Evidence, §§ 551, 569, and 687. Defendant cites in support of its contention volume 5 of Ency. of Ev. 523 and 524, and relies especially upon the following quoted passage from page 524:

"The admissibility of expert testimony rests, to a large extent, in the discretion of the court; but this does not mean that the court may arbitrarily admit or exclude such testimony, but merely that the court may exercise a sound judicial discretion in each case in applying rules of law governing the admissibility of such testimony. The court will exclude testimony which is manifestly unreliable, and will not allow an expert to answer absurd and useless questions."

We find nothing in this quoted passage in conflict with the principle enunciated by this court. As a matter of fact, the witness was cross-examined at some length by the defendant, and we do not find that any motion was made to have any of his testimony stricken out by reason of his lack of qualifications, skill, or experience to testify as a physician or to answer the different questions propounded to him.

Assignments from the sixth to the thirteenth, inclusive, are all based upon the overruling of objections interposed by the defendant to different questions propounded by the plaintiffs to this same witness, Dr. Woods. In its brief defendant states that practically the same grounds of objection were urged to these respective questions as those we have copied above in treating the fifth assignment, and the argument made in support of such assignment is "adopted to avoid repetition." An examination of the bill of exceptions shows that the statement as to the grounds of objection is correct, and what we have said in disposing of the fifth assignment applies with equal force to these assignments. We are convinced from a careful reading of the entire testimony of Dr. Woods, both his direct and cross-examination, that these contentions of the defendant are not well founded and that the assignments are without merit.

The court gave to the jury the first instruction requested by the plaintiffs, to a portion of which the defendant excepted, and which is as follows:

"First. If it shall appear from the evidence that the plaintiff, Mrs. Stella Dees, was injured upon the train of the defendant company as alleged in the declaration, you will find for the plaintiffs, unless it shall appear from the evidence that the agents of the said defendant had exercised all ordinary and reasonable care and diligence, the presumption being against the defendant, and the burden of proving such care and diligence resting upon the defendant." To the giving of that portion of which said charge reading as follows, "The presumption being

against the defendant,' and without giving any direction to the jury as to when and under what circumstances the presumption would cease, the defendant did then and there except."

This forms the basis for the fourteenth assignment. The defendant relies upon the case of *Atlantic Coast Line R. R. Co. v. Crosby*, 53 Fla. 400, text 470 and 473, 43 South. 318, text 339, 340, contending that the instruction so excepted to in the instant case is infected with the same vice which characterized the first charge given by the court of its own motion in the cited case. To this contention we cannot agree. A comparison of the instruction in the instant case and the charge in the cited case will readily disclose the points wherein they differ. As was also held in the cited case, where an instruction, as far as it goes, states a correct proposition of law, but is defective because it fails to qualify or explain the proposition it lays down in consonance with the facts of the case, such defect is cured if subsequent instructions are given containing the required qualifications or exceptions. It is not required that a single instruction should contain all the law relating to the particular subject treated therein. See, also, to the same effect, *Lewis v. State*, 55 Fla. 54, 45 South. 508. As was also held in *Atlantic Coast Line R. R. Co. v. Crosby*, supra, in determining the correctness of charges and instructions, they should be considered as a whole, and if, as a whole, they are free from error, an assignment predicated on isolated paragraphs or portions which, standing alone, might be misleading, must fail. Also see authorities there cited; *Davis v. State*, 54 Fla. 34, 44 South. 757; *Atlantic Coast Line R. R. Co. v. Beazley*, 54 Fla. 311, 45 South. 761; *Cross v. Aby*, 55 Fla. 311, 45 South. 820; *Lewis v. State*, 55 Fla. 54, 45 South. 998; *Johnson v. State*, 55 Fla. 41, 46 South. 174. On examination, we find that in the charges given by the court of its own motion numbered from 2 to 7, inclusive, which we do not consider it necessary to copy herein, the jury seems to have been so fully instructed as to the effect of our statute, formerly section 1 of chapter 4071, p. 113, of the Laws of 1891, but now section 3148 of the General Statutes of 1906, that we do not see how the jury could have well been confused or misled by the instruction of which complaint is made, even though it may not have been full and complete within itself. Construing it in connection with the other charges and instructions, no error has been made to appear to us. Nothing said in *Jones v. Jacksonville Electric Co.*, 56 Fla. —, 47 South. 1, also cited to us by the defendant, is in conflict with the principles above enunciated.

The fifteenth, sixteenth, and seventeenth assignments are all based upon the thirteenth instruction given to the jury, at the request

of the plaintiffs, as to which the bill of exceptions shows the following:

"Thirteenth. If you find for the plaintiffs, you will, in computing the amount of their damages, consider the injuries which she sustained at the time of the wreck, with all injuries and maladies naturally resulting therefrom, and also the fear and mental anguish which the plaintiff, Stella Dees, experienced at the time of the wreck, and also amounts which the plaintiffs have paid for medical attendance and nursing and for medicine, and for hired help, and also such expense as from the evidence appears to be necessary to restore the plaintiff, Stella Dees, to her ordinary degree of health.' To the giving of which said charge the defendant then and there excepted. And the said defendant did then and there specially object and except to the giving of that portion of the thirteenth charge reading as follows: 'And also amounts which the plaintiffs have paid for medical attendance and nursing, and for medicine and for hired help.' And the said defendant did further then and there except to the giving of that portion of the thirteenth charge reading as follows: 'And also such expenses as from the evidence appears to be necessary to restore the plaintiff, Stella Dees, to her ordinary degree of health.'"

Plaintiffs and defendant have discussed these assignments together, and we shall do likewise. The argument made by the defendant in support of these assignments is slight, and, therefore, we do not feel called upon to enter into any extended investigation concerning them. We have repeatedly held it is the duty of a party resorting to an appellate court to make the errors complained of clearly to appear, if they in truth exist. See *Ropes v. Stewart*, 54 Fla. 185, 45 South. 31, and *Putnal v. State* (decided here at the present term) 47 South. 864, and authorities there cited. We have also repeatedly held that, unless the error complained of is so glaring or patent that no argument is needed to demonstrate it, counsel should call the attention of this court to the specific grounds upon which the error is based, stating his reasons therefor, and citing the authorities relied upon to support the same. See *Hoodless v. Jernigan*, 46 Fla. 213, 35 South. 656, and authorities there cited, and authorities cited in *Atlantic Coast Line R. Co. v. Benedict Pineapple Co.*, 52 Fla. 165, text 173, 42 South. 529, text 532. The contention made by the defendant, as we understand it, is that the instruction permits, even if it does not direct, the jury, in assessing the amount of damages for plaintiffs, to consider improper elements thereof. We cannot agree with the defendant. In computing the amount of damages to which plaintiffs were entitled, the instruction complained of restricted and confined the jury to the evidence adduced in the trial of the

case. Construing this instruction in connection with all the other charges and instructions bearing upon the same point, as we have already seen that we must do under the principles so repeatedly enunciated by this court, we are clear that the jury must have understood that they were bound by the evidence. In view of the amount of the verdict rendered, there was certainly no occasion for the jury to take into consideration anything but the evidence, and we have not the slightest reason to think that they were unduly or improperly influenced in any way. If, as contended by the defendant, the evidence did not show what amount of expenditure would be necessary to restore the injured plaintiff to her ordinary degree of health, if there was no evidence upon that point, then the jury could not well have been misled thereby, and at most it was a harmless error. We do not find wherein Florida Ry. & Nav. Co. v. Webster, 25 Fla. 394, 5 South. 714, and Patterson's Railway Accident Law, p. 472, the only authorities cited by the defendant, support or sustain these assignments. See generally section 1251 of volume 4 of Sutherland's Damages (3d Ed.).

The eighteenth assignment is based upon the fifteenth instruction, given at the instance of the plaintiffs, which is as follows:

"Fifteenth. If you should find from the evidence that the plaintiff, Mrs. Stella Dees, was, at the time of the injury, suffering from any physical malady, and that injuries sustained in the wreck testified to contributed to such malady or inflamed the diseased parts, the plaintiff is entitled to recover for the injuries consequent upon such injury."

To support its contention, the defendant cites Jacksonville, T. & K. W. Ry. Co. v. Peninsular Land, Transp. & Manuf'g Co., 27 Fla. 1, 9 South. 661, 17 L. R. A. 33, 65, and Pensacola & Georgia R. R. Co. v. Nash, 12 Fla. 497, which we have examined, but have failed to find their relevancy to the assignment under consideration. As is said in volume 3 of Hutchinson's Carriers, § 1432 (3d Ed.): "If the passenger, at the time an injury is received through the negligence of its carrier, is suffering from some disease or illness which tends to aggravate the injury, the passenger's previous infirmity will not excuse the carrier from answering in damages to the full extent of the injury as affected by such infirmity; and the fact that the carrier was not informed of the passenger's condition will make no difference." Also see chapter 17 of Watson's Damages for Personal Injuries entitled "Injuries to Persons Diseased, Disordered or in Delicate Health," which contains a full discussion of the subject, and refers to numerous authorities; 13 Cyc. 31; 4th Sutherland's Damages, § 1244 (3d Ed.); Moore's Carriers, 883. From the many authorities cited by the

above text-writers, we select the following: Louisville & N. R. Co. v. Jones, 83 Ala. 376, 3 South. 902; Montgomery & E. Ry. Co. v. Mallette, 92 Ala. 209, 9 South. 363; City of Roswell v. Davenport (N. M.) 89 Pac. 256; Ross v. Great Northern Ry. Co., 101 Minn. 122, 111 N. W. 951. This assignment must fail.

The court refused the fourth instruction requested by the defendant, which is as follows:

"(4) If you believe from the evidence that the wreck or accident in this case was caused by an impaired or defective condition of the metal plate on the truck referred to in the testimony, and that the same was a latent defect not known and not capable of detection by the ordinary means of examination, or by the exercise of all ordinary and reasonable care, then the accident would be one which could not have been reasonably anticipated or guarded against, and you should find the defendant not guilty."

Upon such refusal is predicated the nineteenth assignment. We find that the principle of law embraced in this requested instruction was fully covered by other instructions given at the request of the defendant, and in charges given by the court of its own motion, therefore the same was properly refused. Atlantic Coast Line R. R. Co. v. Crosby, supra, and authorities there cited.

The twentieth assignment is based upon the overruling of the motion for a new trial. This motion contains 13 grounds, all of which, however, have already been discussed and disposed of in the consideration of other assignments, except such as question the sufficiency of the evidence to support the verdict, which such grounds are also made the basis for the two remaining assignments, the twenty-first and twenty-second. These three assignments are but lightly argued by the defendant in its brief, which contains a statement to the effect that they would be discussed fully and at length in the oral argument. We listened attentively to this argument from the respective counsel, and are of the opinion that the contentions of the defendant were fully met and answered. We see no useful purpose to be accomplished by our entering into any discussion thereof, so content ourselves with referring to what we said in Seaboard Air Line Ry. v. Scarborough, 52 Fla. 425, text 449, 42 South. 706, text 714, and Atlantic Coast Line R. R. Co. v. Beazley, 54 Fla. 311, text 422, 45 South. 761, text 796.

Having found no reversible error, the judgment must be affirmed.

COCKRELL and WHITFIELD, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

(56 Fla. 196)

FLORIDA RY. CO. v. STURKEY.

(Supreme Court of Florida, Division B. Dec. 15, 1908. Headnotes Filed Jan. 25, 1909.)

1. TRIAL (§ 295*)—INSTRUCTIONS.

A party has no right to complain of a portion of the charge of the court upon a particular feature of the case, when the charge taken as a whole is more liberal to him than the evidence warrants.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 703; Dec. Dig. § 295.*]

2. NEGLIGENCE (§ 1*) — RAILROADS (§ 370*) — INJURY TO PERSON ON TRACK — "NEGLIGENCE."

"Negligence" is the failure to observe for the protection of another's interests such care, precaution, and vigilance as the circumstances justly demand, and, while railroad trainmen are not usually bound to foresee or watch for the wrongful presence of any person upon the track, yet, if experience has shown that at certain points persons are constantly thus entering upon the track, and it appears that the company has acquiesced in the use thus made of the track, such persons, if injured as the proximate result of the trainmen's failure to use ordinary care to keep watch for them, may recover damages, if the trainmen could have seen them without difficulty had they kept a reasonable watch or lookout, even though in fact they did not see them. Especially is this doctrine applicable to a backing train.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 1; Dec. Dig. § 1; * Railroads, Cent. Dig. § 1265; Dec. Dig. § 370.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4743-4763; vol. 8, pp. 7729-7731.]

3. NEGLIGENCE (§ 101*)—PERSONAL INJURIES — VERDICT.

In this case we see no reason for disturbing the verdict, as the jury evidently apportioned the damages in proportion to what they found to be the negligence of the respective parties as the statute authorizes to be done.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 167; Dec. Dig. § 101.*]

(Syllabus by the Court.)

Error to Circuit Court, Suwannee County; Bascom H. Palmer, Judge.

Action by D. B. Sturkey against the Florida Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Carter & McCollum, for plaintiff in error. Humphreys & Harrell, for defendant in error.

HOCKER, J. In August, 1907, D. B. Sturkey brought an action in tort against the Florida Railway Company in the circuit court of Suwannee county for damages on account of personal injuries sustained by him in consequence of being struck and knocked off the track of said railway at Porter's Station, in said county, whereby he was severely injured, bruised, and wounded, from which injuries he was more or less permanently disabled, so as not to be able to follow his usual vocation of a silversmith. It is alleged and proven that there was a sawmill located at the said station on the line of said road and close to the track which

employed a large number of hands. It is also shown that this track had been used considerably by pedestrians. There was a commissary or store on the opposite side of the track from the mill, and a little north of it, and a crossing over the railroad track about 850 feet south of the commissary and also south of the mill. Mr. Bailey's house, at which Mr. Sturkey had been living for some months, was southwest of the crossing, and not very far from it, on the same side of the railway track as the commissary. Mr. Sturkey was about 60 years old and afflicted with rheumatism. There was a switch and side track for the use of the mill directly in front of it, and a water tank on the main line just south of the switch, and in front of the mill. Mr. Roy Helton owned the mill at Porter's Station. He got logs for his mill by means of log trains. There were three or four log trains a day. The log train carried two car loads of logs a day to Mr. Porter at Live Oak. The train that struck and injured Mr. Sturkey was headed for Live Oak, and, before leaving for Live Oak, it backed down to the water tank for water. In backing down to the tank about 4 o'clock in the evening of the 31st of December, 1906, the log train struck Mr. Sturkey and injured him. Mr. Sturkey had been to the commissary for some baking powder for Mrs. Bailey, and in returning came down the railway track. There was a dirt road direct from the commissary to Mr. Bailey's house, but it was a sandy road, and many persons used the track. Mr. Sturkey had been advised by his friend Mr. Bailey not to walk on the track.

It was alleged in the declaration, and proven, that there was no watchman or lookout on the train that in backing down to the tank struck Mr. Sturkey. The engine was in charge of a fireman who says he blew the whistle and rang the bell when he started to back down to the tank. He says he saw Mr. Sturkey step off the left side of the track, but the cars were piled up so high he could not see him afterwards, and did not know he was on the track. He could have stopped the train in 10 feet by putting on the lever. Mr. Sturkey was walking down this track, and, while he heard the grating of the wheels on the track, did not hear the whistle or bell, although he says his hearing was good. There was proof that the fireman in charge of the engine and train was not very careful in blowing the whistle and ringing the bell.

The plaintiff proved he was badly injured, whereby he lost the use of his right arm, and could not follow his usual vocation, and that he has incurred medical bills and had suffered severely from the injury.

Plaintiff claimed \$10,000 damages, and the jury returned a verdict for \$500, for which judgment was entered. The case is here for review on writ of error.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The first assignment of error questions the following portion of the court's charge to the jury: "Or if you find from the evidence that plaintiff was at the time of his injury carelessly and negligently on said track, or roadbed of defendant, without the knowledge, permission, or consent of the defendant, and was not then and there traveling along or over any public crossing or way, nor over and along any private crossing or way established or used with the knowledge or by the permission of the defendant, and that the defendant at the time of said alleged injury had no manner of knowledge or notice of the presence of the plaintiff upon its roadbed or track, then the plaintiff was a trespasser on said railroad track, and you should find for the defendant."

The court, at the instance of the defendant, instructed the jury that "the law does not require a railroad company to keep a lookout for trespassers; and, if you believe from the evidence that the plaintiff at the time and place of the injury was a trespasser, then the defendant owed him no duty, except that it should not be guilty of any active negligence contributing to the injury, after discovering his peril."

Under the pleadings and proofs in this case, we think that the foregoing portion of the charge excepted to, as well as the instruction given, were more liberal to the defendant than it was entitled to receive. There were 40 or 50 mill hands who walked from their work on this track. Mr. Sturkey was injured 50 or 60 feet from the crossing. Mr. Sturkey says he often saw people travel on the track. He was injured about 40 yards from where people get on and off the train. A good many families lived around the station. Mr. Cross, a witness for the defendant, testified that the mill hands used the track where Mr. Sturkey was hurt, and he had "seen the public walk the track there occasionally." Mr. Bailey testified that he was an examined engineer. He seems to have worked on the main line of the railway. He says that he was familiar with the rules and regulations governing the operations of trains, and that, under such rules, some one is required to be on the rear end of the train to keep watch out when the train is backing, and that this applies to all trains.

Under these circumstances, it seems to us that the principle laid down in the case of *Florida Cent. & P. R. Co. v. Foxworth*, 41 Fla. 1, text 67, 25 South. 338, 79 Am. St. Rep. 149, applies. In that case it is held that the duties of a railroad company with respect to care in operating its trains are dictated and measured by the exigencies of the occasion, or in the light of the conditions of things at the place where, and the time when, an accident happens.

In the case of *Jacksonville Street Rail-*

way Company v. Chappell, 21 Fla. 175, this court held that negligence is the failure to observe for the protection of another's interests such care, precaution, and vigilance as the circumstances justly demand. In the former case the court held that "in railway operation the dangerous practice of 'kicking cars' or making flying switches in populous localities and near public crossings imposes upon the company a duty to station a lookout upon the rear of the cars, the equivalent of which is not accomplished by ringing the bell."

It is said in 2 *Shearman and Redfield on the Law of Negligence* (5th Ed.) § 471, that in running trains backwards a watchman must be put upon the rear car to look out for and warn travelers when approaching a crossing. See cases cited in Note 3. In section 484, *Id.*, it is said: "While trainmen are not usually bound to foresee or watch for the wrongful presence of any person upon the track, * * * nor to foresee the wrongful entry of persons upon the cars, yet, if experience has shown that at certain points persons are constantly thus entering upon the track or cars, such persons, if injured as the proximate result of the trainmen's failure to use ordinary care to keep watch for them, may recover damages, if the trainmen could have seen them without difficulty, had they kept a reasonable watch, even though, in fact, they did not see them. Especially should this rule be applied where the railroad company has acquiesced in the use thus made of its property."

It is very probable that in the instant case, if there had been a lookout or watchman on the backing train or in advance of it, as it was backing, that the plaintiff would have been warned off the track, and would not have been injured. Under these circumstances, we think it was a question for the jury to determine whether the railroad was negligent in not having such a lookout. Therefore we think the defendant has nothing to complain of in the portion of the charge objected to. As before remarked, the charge was more favorable to the defendant company than it was entitled to under our law.

The only other assignment questions the sufficiency of the evidence to sustain the verdict. It is very evident that the jury thought both the plaintiff and defendant were at fault and that they apportioned the damages as they were authorized to do by the statute, which was given them in charge by the court.

We think there was evidence to sustain the verdict.

The judgment of the circuit court is affirmed.

TAYLOR and PARKHILL, JJ., concur.

SHACKLEFORD, C. J., and COCKRELL and WHITFIELD, JJ., concur in the opinion.

(56 Fla. 878)

WEST COAST LUMBER CO. v. GRIFFIN.

(Supreme Court of Florida, Division B. Dec. 19, 1908. Headnotes Filed Jan. 27, 1909.)

VENDOR AND PURCHASER (§§ 233, 242*)—BONA FIDE PURCHASER—UNRECORDED DEED—NOTICE.

Under our recording laws, subsequent purchasers acquiring subsequent title without notice of a prior unrecorded deed will be protected against such unrecorded conveyance, unless the party claiming thereunder can show that such subsequent purchaser acquired his title with notice of such unrecorded conveyance. The burden of showing such notice is upon the party claiming under such unrecorded conveyance, as all the presumptions in such a case are in favor of the bona fides of such subsequent purchaser, and that he acquired his title in good faith and without notice of the prior unrecorded conveyance.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 503½, 604; Dec. Dig. §§ 233, 242.*]

(Syllabus by the Court.)

Appeal from Circuit Court, Taylor County; Bascom H. Palmer, Judge.

Bill by W. D. Griffin against the West Coast Lumber Company. Decree for complainant. Defendant appeals. Reversed and remanded.

See, also, 54 Fla. 621, 45 So. 514.

W. B. Davis, for appellant. L. W. Blanton and H. J. McCall, for appellee.

TAYLOR, J. The appellee, as complainant below, filed his bill in equity against the appellant as defendant below in the circuit court of Taylor county, alleging: That he was the owner in fee of a certain described 360 acres of land in said Taylor county of which he was in possession. That said land was sold on June 1, 1859, by one Neil Hendry to Archibald Griffin, who was then put in possession thereof, and who through various tenants held such possession until his death in 1865, and that his heirs through a tenant have continued in possession thereof, until they sold the same to complainant, and he through a tenant has continued ever since in the possession thereof. The J. E. Hendry and N. C. Hendry as executors of the last will of the said Neil Hendry on December 31, 1895, sold and conveyed said land to one W. B. Stephens by deed which was not recorded until March 3, 1903. No question is raised as to the power of the executors as such to convey the property. That W. B. Stephens sold and conveyed same by deed on April 25, 1900, to J. W. Oglesby, attorney, and that on April 23, 1900, J. W. Oglesby sold and conveyed same to the defendant the West Coast Lumber Company, a corporation who now claims the same by virtue of the foregoing conveyances. That all of said conveyances are clouds upon his title. The bill prays that the said deeds from J. E. Hendry and N. C. Hendry, as executors to W. B.

Stephens, and from Stephens to Oglesby and from Oglesby to the defendant, be canceled as clouds upon his title. The defendant answered the bill, denying specifically every material allegation thereof, and alleged that it purchased the land in good faith, and without any notice of any sort or knowledge that there was any other claim, title, or right thereto in any one else either actual or constructive; that the alleged conveyances, if there ever were any such, from Neil Hendry to Archibald A. Griffin, and from the heirs at law of Archibald A. Griffin to the complainant and one W. S. Blitch, and from W. S. Blitch to complainant, have never been recorded in Taylor county, where said lands are situated, and that defendant otherwise had no notice or knowledge thereof. The cause was referred to a master to take testimony, who took and reported a voluminous amount of testimony both oral and documentary, and at the final hearing on bill, answer, and evidence the court below rendered a final decree finding the equities to be with the complainant, and canceling the deeds by which the defendant claims title to the land as prayed in the bill. From this decree the defendant below has appealed to this court, and assigns the rendition of said decree to be error.

The court below erred in making the decree appealed from. The evidence shows that all of the land in dispute, except about 4½ acres, is wild and unoccupied woodland, uninclosed and unimproved. About 4½ acres of it are inclosed by the fence of an adjacent owner located on the west side of it, whose inclosure runs across the division line between his land and the land in dispute at one point, and thereby takes in said 4½ acres within the field of such adjacent owner, and in this condition has the property remained for many years, except that it is not definitely stated how long the 4½ acres have been thus inclosed. The alleged conveyances from Neil Hendry, the original owner, from whom both parties claim title, to Archibald A. Griffin, and from the heirs at law of Archibald A. Griffin to the complainant and W. S. Blitch, and from W. S. Blitch to the complainant, if there ever were any such conveyances, were never spread upon the records of Taylor county where the lands are situated prior to the purchase by, and conveyance thereof to, the defendant, and there is no attempt even at any proof that the defendant at the time it purchased and acquired title to the property had any sort of notice or knowledge of any of said alleged conveyances. The only visible semblance of possession by the complainant was the 4½ acres inclosed under the fence surrounding adjacent lands of an adjacent owner, who claimed to have said 4½ acres in his possession as the tenant or agent of the complainant. It is well settled here that under our

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

recording laws subsequent purchasers acquiring subsequent title without notice of a prior unrecorded deed will be protected against such unrecorded conveyance unless the party claiming thereunder can show that such subsequent purchaser acquired his title with notice of such unrecorded conveyance, and that the burden of showing such notice is upon the party claiming under such unrecorded conveyance, and that all of the presumptions in such a case are in favor of the bona fides of such subsequent purchaser, and that he acquired his subsequent title in good faith and without notice of the prior unrecorded conveyance, and that the burden is on the party who has neglected to record his prior title to show that the subsequent purchaser has acted in fraud of his rights by purchasing with notice of his unrecorded prior conveyance. *Feinberg v. Stearns* (decided here at the present term) 47 South. 797, and cases there cited.

At the taking of testimony, the complainant introduced in evidence some tax deeds from the state to himself to the lands in controversy antedating the conveyances under which the defendant claims title. The complainant in his bill makes no mention of any such tax deeds—does not in his bill claim thereunder—but expressly in his bill plants his right and claim upon the alleged conveyance from Neil Hendry to Archibald A. Griffin, and from the heirs at law of Archibald A. Griffin to himself and W. S. Blitch, and from the said Blitch to himself. His attempt to show title in himself through these tax deeds was wholly inconsistent with the case made by his bill; since, if he was the owner of the lands under the conveyances as alleged in his bill, it became his duty to pay the taxes thereon as they became due, and said tax deeds, therefore, conveyed him no better title than he had before.

The decree of the court below in said cause is hereby reversed at the cost of the appellee, and the cause remanded, with directions for the entry of a decree in favor of the defendant and dismissing the complainant's bill.

HOCKER and PARKHILL, JJ., concur.

SHACKLEFORD, C. J., and COCKRELL and WHITFIELD, JJ., concur in the opinion.

(56 Fla. 767.)

H. B. CLAFLIN CO. v. KING et al.

(Supreme Court of Florida, Division B. Dec. 11, 1908. Headnotes Filed Jan. 25, 1909.)

JUDGMENT (§§ 780, 785*)—NOTICE OF INTEREST—TRUST DEED—LIEN.

Where lands were conveyed to "W. H. Simmons, Trustee," in one deed, and other lands conveyed to him as "trustee for M. P. Simmons and W. W. Langford in another deed," which

deeds were properly recorded, the use of the word "trustee" in such deeds was sufficient to put a judgment creditor of Simmons and all others on notice that the beneficial interest in the lands conveyed was not in W. H. Simmons, and to put them upon inquiry as to his real status to the property, and, where the facts show that the money for the purchase of said property was furnished entirely by others, a resulting trust in said lands is shown in favor of the persons furnishing the purchase money, and W. H. Simmons has no interest in said lands to which the lien of a judgment creditor will attach.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1346, 1359; Dec. Dig. §§ 780, 785.*]

(Syllabus by the Court.)

Appeal from Circuit Court, De Soto County; Joseph B. Wall, Judge.

Bill by the H. B. Clafin Company against Florida King and others. Decree for defendants, and plaintiff appeals. Affirmed.

J. W. Burton, for appellant. Treadwell & Treadwell, for appellees.

HOCKER, J. Appellees filed their bill in the circuit court of De Soto county against the appellant, alleging, in substance, that they were the owners in fee simple of certain lands which are described, part of which was conveyed to them by William H. Simmons, trustee, and the other part conveyed to them by William H. Simmons as trustee of M. P. Simmons and W. W. Langford; that W. H. Simmons, as trustee for M. P. Simmons and W. W. Langford, derived title to part of this land from Nina H. Graham, who derived her title from the Florida Land & Improvement Company, and that W. H. Simmons, trustee, derived title to the remainder from the Kissimmee Land Company; that in 1903 W. W. Langford and M. P. Simmons purchased these lands and paid the entire purchase price therefor, and that W. H. Simmons did not contribute any sum of money whatever to the purchase price, and that it was intended that the conveyances to W. H. Simmons as trustee for W. W. Langford and M. P. Simmons and as trustee should only invest the title in him in trust for the said Langford and M. P. Simmons; that orators bought the lands from W. W. Langford and M. P. Simmons, who ordered and directed W. H. Simmons to make a deed of conveyance of the same and in pursuance of such instructions he conveyed the lands to orators as such trustee of M. P. Simmons and W. W. Langford, whereby they are now the legal owners of the same.

The bill alleges that on the 12th of April, 1900, the defendant, the H. B. Clafin Company, recovered a judgment against the said W. H. Simmons and others for the sum of \$2,060.61, which has been duly recorded in the public records of said (De Soto) county; that said judgment became a lien against the aforesaid lands while the legal title

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

was in W. H. Simmons; and that it would be inequitable and a hardship upon your orators to have said lien remain a matter of record, so far as these lands are concerned. The bill then prays for a decree that said judgment and execution which has been subsequently issued thereon be not a lien on the said real estate of your orators, and for general relief, subpoena, etc. This bill was demurred to for want of equity, and the demurrer was overruled. The defendant then answered, admitting the judgment in its favor, and its entry in the records of De Soto county as alleged; that the records of said county show W. H. Simmons was during the time said judgment was recovered against him the owner of the legal title to the lands described in the bill; that W. H. Simmons derived title as alleged. The answer, in substance, denies that W. H. Simmons was not interested in said lands, and that he was simply used as a means of conveyance. It denies that he held the title to part of the lands in trust for Mary P. Simmons, or that part of the purchase money was paid by her out of her own money, or anything belonging to her, and that W. H. Simmons did not contribute any sum of money whatever to the purchase price thereof. It denies that it was intended that the title should vest in W. H. Simmons in trust for said alleged beneficiaries.

The answer alleges that defendant has been informed and believes it to be true that said lands were purchased by said W. W. Langford and W. H. Simmons in their own right, and that the portion of the purchase money alleged to have been paid by M. P. Simmons, who is the wife of W. H. Simmons, was paid for with the money, goods, and property of said W. H. Simmons, which had been voluntarily transferred to his said wife since his liability to this defendant was incurred, for the purpose of hindering, delaying, and defrauding this defendant in the collection of his debt against W. H. Simmons, and that to declare a trust in said land for the benefit of his wife would be a fraud against this defendant. The answer then alleges that no trust for the use and benefit of W. W. Langford and M. P. Simmons was created by the terms of the conveyance to W. H. Simmons under the statute of Florida, requiring all declarations and creations of trust, etc., in lands, etc., shall be manifested and proved by some writing signed, etc.; that under the facts no trust arises by implications or construction of law in favor of said beneficiaries.

A replication was filed and testimony on behalf of the complainants was taken; the defendant introducing no testimony.

W. W. Langford testified, in substance, that he was engaged in and familiar with the purchase of the lands described in the bill; that he talked with Mrs. M. P. Simmons, who is his sister, and her husband, about buying the lands; that he was informed they could be bought for 55 cents an acre; that they had

Mr. Simmons in it because he was a good talker and wanted him to talk to John A. Graham, who was a part owner, and agent for the balance; that the money to purchase the land was furnished entirely by him and Mrs. M. P. Simmons, his sister; that it was her individual money; that she derived the money from her father's estate from which she received \$12,000 or \$15,000; that, when the land was sold, the proceeds were equally divided with Mrs. Simmons.

W. H. Simmons testified that he merely acted as agent in the transaction for W. W. Langford and M. P. Simmons; that he did not have a dollar in it, and contributed nothing towards the purchase; that Mrs. M. P. Simmons used her own individual money in the purchase, and that the money was not money given her by him or derived from property given to her by him; that Mrs. Simmons' money was derived from her father's estate and the proceeds of investments; that Mrs. Simmons has never lost anything by investments to his knowledge; and that the deeds to the property were made to him as a matter of convenience.

The foregoing is the substance of all the testimony. Attached to the master's report is a copy of the deed of William H. Simmons, trustee, William H. Simmons, trustee for M. P. Simmons and W. W. Langford, W. H. Simmons, Mary P. Simmons, W. W. Langford, and Martha F. Langford, his wife, conveying the lands described in the bill to the complainants therein.

Upon a final hearing, the circuit judge made a decree finding that the purchase money of the lands in question was furnished by M. P. Simmons and W. W. Langford; that said lands were held by W. H. Simmons in trust for said W. W. Langford and M. P. Simmons, and decreeing that said lands and every part thereof are "free from the operation of the lien of said judgment, and the title to said lands legally and equitably is hereby declared to be in the complainants." This decree is here on appeal for review.

It is contended by the appellant that the demurrer to the bill should have been sustained, and to sustain this contention relies mainly on the case of *Mansfield v. Johnson*, 51 Fla. 239, 40 South. 196, 120 Am. St. Rep. 159. In construing and applying that case, it should be borne in mind that it was a statutory action of ejectment, involving by the pleadings in the case only common-law questions, and that by these pleadings no equitable principle was invoked. Apart from this consideration, however, the facts of that case are unlike those of the instant case. In the former case there was nothing on record at the time *Johnson's* judgment was filed and recorded in Hernando county and became a lien on the lands conveyed by Eubanks, executor to Drew, which contained any suggestion that other persons than Drew had equities in the property. *Mansfield v. Johnson*, 51 Fla. 251, 40 South. 196, 120 Am. St.

Rep. 159. The facts are otherwise here. In one of the deeds to W. H. Simmons he is named "W. H. Simmons, Trustee," and in the other "W. H. Simmons, Trustee for W. W. Langford and M. P. Simmons."

In the case of Johnson v. Calnan, 19 Colo. 163, 34 Pac. 905, 41 Am. St. Rep. 224, it is held: "When the word 'trustee' is inserted in a deed to land after the name of the grantee, and in a subsequent contract relating to the same land he affixes this word 'trustee' to his signature, such word is not merely descriptio personae. It indicates that the grantee takes the title, not in his individual capacity, but in trust for another not disclosed, and parol evidence is admissible to show for whom and for what purpose he was constituted a trustee." The court in its opinion seems to hold that such a trust partly manifested in writing was a sufficient compliance with the statute of frauds requiring declarations of trust conveying an estate or interest in lands to be in writing.

In the case of Mercantile Nat. Bank of Cleveland v. Parsons, 54 Minn. 56, 55 N. W. 825, 40 Am. St. Rep. 299, it was held: "While the fact that a grantee in a deed is described as trustee gives no notice of the name of the beneficiary or of the character of the trust, yet it imposes the duty of inquiring as to its character and limitations upon a party who takes title under the deed; but all that is required of him is good faith and reasonable care in following up the inquiry which the notice given him suggests."

In the case of Marbury v. Ehlen, 72 Md. 206, 19 Atl. 648, 20 Am. St. Rep. 467, it is held that "the addition of the word 'trustee' to the name of a person is notice of a trust, and calls for inquiry and examination." See, also, Railroad Company v. Durant, 95 U. S. 576, 24 L. Ed. 391; Shaw v. Spencer, 100 Mass. 382, s. c. 97 Am. Dec. 107, and note, 1 Am. Rep. 115.

Applying the foregoing principles, we think that the word "trustee" after the name of W. H. Simmons in one of the deeds, and much more the words "trustee for M. P. Simmons and W. W. Langford" in the other, were sufficient to put H. B. Clafin & Co. and every one else on notice that W. H. Simmons did not own the beneficial interests in the lands conveyed to him, and that reasonable inquiry would have developed the facts. Clafin & Co. cannot claim to be innocent creditors or purchasers without notice. Under such circumstances, under the authority of Massey v. Hubbard, 18 Fla. 688, and Holland v. State, 15 Fla. 455, text 519, if Clafin & Co. had levied upon and sold the lands in question, under its execution, the purchaser at such sale would only have taken the title and interest which Simmons had, subject to the equities existing in favor of Langford and M. P. Simmons and their transferees.

In the cases of Caruthers v. Williams, 21

Fla. 485, and Ward v. Spivey, 18 Fla. 847, and other cases therein cited, it is held in substance that where the purchase money for land is furnished by one person, and the deed by agreement taken in the name of another, the latter holds the title under a resulting trust for the benefit of the former.

We do not think the circuit judge erred in making the final decree which has been referred to, and therefore the same is hereby affirmed.

TAYLOR and PARKHILL, JJ., concur.

SHACKLEFORD, C. J., and COCKRELL and WHITFIELD, JJ., concur in the opinion.

(56 Fla. 202)

BROWN v. MARKHAM.

(Supreme Court of Florida, Division B. Dec. 19, 1909. Headnotes Filed Jan. 27, 1909.)

1. LANDLORD AND TENANT (§ 119*)—LEASE—CONSTRUCTION—"TENANT BY SUFFERANCE."

Where a lease of premises is made to the "lessee, his heirs, executors and administrators from the 1st day of February, 1905, for the term of one year then next ensuing, with the privilege of continuing said lease for a further period year by year at the same terms and price hereinafter contained, the said lessee yielding and paying to the said lessor a monthly rental of twenty dollars per month, payable monthly between the first and fifth days of each month," such language creates a lease for one year with the privilege on the part of the lessee of extending it one more year. After that time, if the lessee hold over, without a written extension of the lease, although the monthly rental, is paid the lessor, under the provision of section 4, c. 5441, p. 126, Laws 1905, the lessee is but a tenant by sufferance, and has no right to hold the leased premises after proper notice terminating the lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 429; Dec. Dig. § 119.*

For other definitions, see Words and Phrases, vol. 8, pp. 6903, 6906.]

(Syllabus by the Court.)

Error to Circuit Court, Columbia County; Bascom H. Palmer, Judge.

Action by D. W. Brown against J. L. Markham. Judgment for defendant, and plaintiff brings error. Reversed.

Boozer & Gillen, for plaintiff in error. Roberson & Small and J. B. Hodges, for defendant in error.

HOCKER, J. In May, 1908, the plaintiff in error commenced unlawful detainer proceedings in the circuit court of Columbia county, alleging in his declaration that "J. L. Markham, unlawfully and against his consent, withholds from him possession of certain real estate known and described as follows: The room on the first floor of the Hotel Blanche building in Lake City, Florida, that is located just south of the hotel lobby or entrance with the appurtenances, lying and being in the state aforesaid, wherefore

he prays restitution of his possession and his damages."

The case was tried on the 8th of June, 1908. After submission of the evidence, the judge instructed the jury to find a verdict for the defendant, which was done in the form provided for in section 2160, Gen. St. 1906.

The defendant, Markham, by his attorneys, made the following motion:

"The defendant demurs to the evidence, and moves the court to instruct the jury to render a verdict in favor of the defendant, upon the following grounds:

"(1) Because the plaintiff has not made out a case that entitles him to a verdict.

"(2) Because it appears by the evidence of the plaintiff that the rental contract under which the defendant is occupying the premises in dispute was a valid contract, and has not yet expired.

"(3) Because it is shown that if said contract is valid, and the defendant is occupying the premises from month to month, then the evidence shows that this action was not brought three years from the time the defendant went into the occupancy of said premises.

"(4) Because the plaintiff admits that the defendant was occupying the premises in dispute under a yearly contract, expiring February 1, 1908, and that he accepted the rent for the said premises from the defendant for the month of February, 1908, and thereby continued the contract in force for the ensuing year; that is, from February 1, 1908, until February 1, 1909."

The plaintiff joined issue on the foregoing motion, called a demurrer to the evidence, and upon consideration the trial judge sustained the same and instructed the jury to find a verdict for the defendant. The jury brought in the following verdict:

"Lake City, Florida, June 8th, 1908.

"We, the jury, find that the defendant did not at the time of the filing of the complaint in this cause wrongfully hold possession of the real estate mentioned in the complaint against the consent of the plaintiff; that the said defendant has not so held possession thereof, against the consent of the plaintiff within three years next before the filing of said complaint, and that the plaintiff has not the right of possession of the real estate aforesaid. So say we all.

"W. D. Mizelle, Foreman."

Judgment was entered for the defendant and the complainant dismissed, with costs against the latter. The judgment is here for review on writ of error.

The plaintiff testified, in substance, that the storeroom described in the complaint was his property; that he authorized Mr. Calaway to rent it to Mr. Markham, but did not authorize him to do it in writing; that he moved to Lake City in January, 1907; that Calaway collected the rent until the

latter part of 1906, when the First National Bank succeeded Calaway as his agent, and collected rent of Markham until he came; that, when he moved down to Lake City, he went to Col. Boozer's office to collect what papers he had that Calaway had fixed and had there; that among the lot he found that he (Calaway) had made a contract with Markham that witness had not seen before, and that, as soon as he saw the contract, he went over to Mr. Markham and told him in person he (witness) would not abide by that contract; that Calaway had no authority to make a contract of that kind for him, and that he demanded possession of the store; that he and Markham discussed the matter freely and that Markham authorized him to have another contract prepared. Witness then went to Col. Boozer's office, and had another contract drawn and presented it to Markham who refused to sign it; that he notified Markham he would try to get possession of the store; that Markham was holding this room under the written contract of his agent, Calaway, but witness did not know of it before. The plaintiff then produced and read in evidence the following notice and contract:

"Lake City, Florida, March 31st, 1908.

"Mr. J. L. Markham, Lake City Florida.

"Dear Sir: Please take notice that you are hereby required to quit, surrender and deliver up possession to me of the premises hereinafter described, which you now hold of me as tenant at will, on or before the first day of May, 1908, for the reason that I intend to terminate your tenancy, and to repossess myself of such premises on the date above mentioned, said premises being described as follows, to wit: The room on the first floor of the Hotel Blanche building, in Lake City, Florida, that is located just south of the hotel lobby or entrance, said land being in Columbia county, Florida.

"D. W. Brown, Landlord and Owner."

"This indenture, made this 21st day of January, 1905, between D. B. Brown, of Suwannee county, Florida, hereinafter called the lessor, and J. L. Markham, of Lake City, Florida, hereinafter called the lessee, witnesseth: That the said lessor does hereby lease and demise unto the said lessee the room on the first floor of the Hotel Blanche building, in Lake City, Florida, that is located just south of the hotel lobby or entrance. To have and to hold the said premises unto the said lessee, his heirs, executors and administrators, from the 1st day of February, 1905, for the term of one year then next ensuing, with the privilege of continuing said lease for a further period year by year, at the same terms and price hereinafter contained, the said lessee yielding and paying to the said lessor a monthly rental of twenty dollars per month, payable monthly, between the first and fifth days of each month.

"The lessor hereby agrees to furnish all

materials for putting in the shelving and counters, and to pay the sum of thirty-five dollars towards paying for the work of constructing same, all of which counters and shelving shall be the property of lessor: Provided, that the lessee shall furnish the materials and have his own counter constructed for his soda water fountain, known as a dispensing counter, which shall be the property of lessee, with the privilege of removing same from building when he vacates same. Lessor agrees to keep said room in good condition or repair. The said lessee hereby agrees to take said room and pay the rent for same for the period and under the terms herein contained, and to yield up same at end of his term without process of law; to keep the back ground near and around door clean of rubbish and trash; to repair any damage that he may cause to said property while in his possession. Both the parties hereto agree to all the conditions and terms herein contained.

"D. W. Brown, [Seal.]

"By J. D. Calaway, His Agent.

"J. M. Markham. [Seal.]

"Signed, sealed, and delivered in our presence: D. E. Knight. R. T. Boozer."

On cross-examination the plaintiff admitted that he commenced collecting rent of Markham in December, 1907, and collected three months' rent at \$20 per month; that the bank had collected before that time; that Mr. Boozer prepared the contract which he signed as a witness; that he knew about the time Markham went into the building; that Markham "discussed the renting of the building from me prior to the time he went in it"; that plaintiff was then living in the country, and told Markham he (witness) would instruct Mr. Calaway what kind of a contract or lease to make with him; that witness came in every morning from the country and did not have time to see Calaway who was his agent looking after the property; that he told Markham he would make a contract by the month for one year and instruct Calaway to have such a contract drawn up; that he considered Markham a monthly tenant, and that he did not have a contract at all; that it was not his contract, and he repudiated it; that Markham refused to sign the contract which plaintiff presented to him, and said he was going to hold under the contract from Calaway; that he gave Markham written notice to vacate and he did not vacate; that he never gave Calaway authority to make an instrument in writing in his name; that he served notice on Markham the first part of 1908 to the effect that he (witness) terminated his (Markham's) contract on the 1st of February, 1908; that he selected the 1st day of February, 1908, to give Markham ample time to get another room; that Markham served him with notice he would not vacate; that he accepted the rent of \$20 for February,

1908, under protest, on the night of 5th of March.

This is substantially all of the plaintiff's evidence. Then followed the defendant's motion which has been referred to, the ruling of the court sustaining it, and directing a verdict for the defendant.

The motion of the defendant is in no sense a demurrer to the evidence. It does not contain the evidence as such a demurrer must necessarily do. See *Skinner Manufacturing Co. v. Wright*, 51 Fla. 324, 41 South. 28, and authorities there cited. It is nothing more than a motion for a peremptory verdict.

The first four assignments of error based on the action of the trial court in refusing to allow the plaintiff to answer certain questions are mere academic, as it appears that after the contract was introduced in evidence plaintiff seems to have testified in full upon the questions presented in these assignments.

The fifth, sixth, and seventh assignments question the action of the court in sustaining what is called the defendant's demurrer to the evidence in rendering final judgment for the defendant, and refusing the motion for a new trial.

We cannot agree with the plaintiff that he did not authorize Mr. Calaway to make a written contract with Markham. He says he told Markham he would instruct Calaway to have a contract drawn up. This very clearly implies that Calaway was to make a written contract. Moreover, Mr. Brown, the plaintiff, through his agents, was in possession of this contract from the time it was executed. If he did not read it, that was his own fault. He did actually read it in January, 1907, and collected the monthly rent named in this contract until the 1st of March, 1908. It is true he says he protested he was not bound by the contract, but he knew Markham contended he was bound by it, and refused to surrender the store, claiming to hold it under this contract. This looks like a ratification, even though Calaway had no authority to make the contract. 1 Am. & Eng. Ency. Law (2d Ed.) 1198 et seq.; *Burkhard v. Mitchell*, 18 Colo. 376, 28 Pac. 657; *Reynolds v. Davison*, 34 Md. 682. Assuming, then, that the contract was a binding one, we have next to consider its nature. We do not understand that the defendant in error contends it is more than a lease from year to year at the option of the lessee and terminable at least on his death. It seems to us, however, that the term for which a lease for years is to run should be certain. 5 Bacon's Abridgment, 621, 622, 623, 624, 625. It is said in *Jones on Landlord and Tenant*, § 112, that "a lease for so long as both parties shall please, or for so long as the lessee shall please is said to be a lease at the will of both lessor and lessee. It is at most a tenancy from year to year, so long as both parties please." It is said in 5

Bacon's Abridgment, p. 623; "If a man makes a lease for years without saying how many, this shall be a good lease for two years certain, because for more there is no certainty, and for less there can be no sense in the words." Also on page 624: "If a man makes a lease for a year, and so from year to year, *quamdiu ambabus partibus placuerit*, this is a lease for two years certain at least; and, at most, after three years, this is but an estate at will." In the instant case there is no certain date for the termination of the lease. It was made to the lessee "his heirs, executors and administrators from the 1st day of February, 1905, for the term of one year, then next ensuing, with the privilege of continuing said lease for a further period year by year at the same terms and price hereinafter contained."

Applying the foregoing principles, we think that these words created a lease for one year, with the privilege on the part of the lessee of extending it one more year. Of course, after that time the lessee might hold over, but subject to the provisions of section 4, c. 5441, p. 126, Laws 1906, which is as follows: "That when any tenancy shall have been created by an instrument of writing, and the term for which such tenancy is limited therein shall have expired and the tenant shall hold over in the possession of said premises without renewing the said lease by some further instrument of writing then such holding over shall be construed to be a tenancy at sufferance, and the mere payment or acceptance of rent shall not be construed to be a renewal of the said term but if such holding over be continued with the consent of the lessor then such tenancy shall become a tenancy at will under the provisions of this act." It is evident under this section that the acceptance of the rent is not to be construed as a renewal of the lease for another year from the 1st of February, 1908, as it is not pretended there was an instrument of writing extending it. Brown's testimony shows plainly he did not consent to such a renewal or holding over for another year. Under this section, therefore, Mr. Markham was a tenant by sufferance, and was liable to be ejected in this action, for he had no right to hold the store room after the date fixed in the notice terminating the lease, namely, the 1st day of May, 1908. This action was brought on the 28th day of May, 1908.

We therefore think the court below erred in directing a verdict for the defendant. Judgment reversed.

TAYLOR and PARKHILL, JJ., concur.

SHACKLEFORD, C. J., and COCKRELL and WHITFIELD, JJ., concur in the opinion.

(56 Fla. 235)

FLORIDA FINANCE CO. v. SHEFFIELD.

(Supreme Court of Florida, Division B. Dec. 19, 1908. Headnotes Filed Jan. 30, 1909.)

1. EJECTMENT (§ 9*)—TITLE TO SUPPORT ACTION.

A plaintiff in ejectment must recover upon the strength of his own title, and not upon the weakness of his adversary's. He cannot recover as against one without title, unless he prove title or prior possession.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 18; Dec. Dig. § 9.*]

2. EJECTMENT (§ 12*)—TITLE TO SUPPORT ACTION.

A plaintiff in ejectment cannot recover merely on the strength of a deed to himself, without showing that his grantor had a *prima facie* right to recover, and a mere deed unaccompanied by evidence of the grantor's seisin is not *prima facie* evidence of the grantor's title. He must trace his title back to the ultimate source of title or to a grantor in possession at or near the time of his grant.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 48; Dec. Dig. § 12.*]

3. EVIDENCE (§ 343*)—DEEDS—CERTIFIED COPIES.

Certified copies of deeds should not be admitted in evidence until the party offering them makes it to appear that the original deeds were not within his custody or control.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1318; Dec. Dig. § 343.*]

4. ADVERSE POSSESSION (§ 79*)—TAX DEEDS—DEED VALID ON ITS FACE.

Where the defendant in an action of ejectment, or those under whom he claims, goes into actual possession of land purchased at tax sale under a tax deed regular on its face, but based upon a void assessment, such actual possession for the period of four years prescribed by section 591 of the General Statutes of 1906 prior to the bringing of the action will bar the suit.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 462; Dec. Dig. § 79.*]

(Syllabus by the Court.)

Error to Circuit Court, Taylor County; Bascom H. Palmer, Judge.

Ejectment by the Florida Finance Company, for the use of Fred W. Haward, against J. M. Sheffield. There was a verdict for plaintiff, and, from an order granting a new trial, plaintiff brings error. Affirmed.

H. J. McCall, for plaintiff in error. Hendry & McKinnon, for defendant in error.

PARKHILL, J. On the 1st day of January, 1908, the plaintiff in error instituted an action of ejectment against the defendant in error in the circuit court for Taylor county to recover the N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ and S. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of section 35, township 2 S., range 6 E., containing 80 acres, and mesne profits. The defendant pleaded the general issue. On the 24th day of March, 1908, a trial was had, and the jury rendered a verdict for the plaintiff, being directed by the court so to do. Upon motion of defendant the court granted a new trial, and the plaintiff sued out a writ of error, as au-

thorized by section 1695 of the General Statutes of 1906.

The motion for new trial is as follows:

"Now comes the defendant in the above stated cause by his attorneys, and moves the court to set aside the verdict in said cause and to grant him a new trial therein upon the following grounds, to wit:

"(1) Because said verdict is contrary to law.

"(2) Because said verdict is contrary to the evidence.

"(3) Because the court erred in admitting in evidence over the defendant's objection certified copy of deed from Jno. Alexander Graham to J. W. Lyman, dated June 9, 1890.

"(4) Because the court erred in admitting in evidence certified copy of deed dated January 26, 1901, from J. W. Lyman to G. S. Van Buskirk over the objection of the defendant.

"(5) Because the court erred in admitting in evidence over the defendant's objection final decree of foreclosure dated 11th day of August, A. D. 1898, and signed by John W. Malone, judge.

"(6) The court erred in admitting in evidence over the objection of the defendant master's deed from T. M. Puleston to Florida Finance Company.

"(7) The court erred in admitting in evidence certain transcripts of the tax records.

"(8) The court erred in instructing the jury that it was their duty to return a verdict for the plaintiff in so far as the ownership and right of possession of the land in dispute was concerned.

"(9) And for other good and sufficient reasons."

There was an entire failure in this case to prove plaintiff's title. The plaintiff deraigned its title from John A. Graham, and introduced in evidence, over defendant's objection, a deed from Graham to Lyman, dated June 9, 1890, another deed from Lyman to Van Buskirk, and a deed from Puleston, as master in chancery in foreclosure proceedings against Van Buskirk and others to the plaintiff. There was no evidence to show what right Graham had to convey the land, and the evidence did not show that plaintiff's grantors ever had possession of the land. The evidence tended to show possession in the defendant and those under whom he claimed.

A plaintiff in ejectment must recover upon the strength of his own title, and not upon the weakness of his adversary's. He cannot recover as against one without title unless he prove title or prior possession. *Burt v. Florida Southern R. Co.*, 43 Fla. 339, 31 South. 265. The plaintiff cannot recover merely on the strength of a deed to himself without showing that his grantor had a prima facie right to recover, and a mere deed, unaccompanied by evidence of the grantor's seisin, is not prima facie evidence of the grantor's title. He must trace his title back

to the ultimate source of title, or to a grantor in possession at or near the time of his grant. *Lake v. Hancock*, 38 Fla. 53, 20 South. 811, 56 Am. St. Rep. 159; *Dubois v. Holmes*, 20 Fla. 834; *Florida Southern R. Co. v. Burt*, 36 Fla. 497, 18 South. 581.

The certified copies of the deeds from Graham to Lyman, and from Lyman to Van Buskirk, should not have been admitted in evidence until the plaintiff made it to appear that the original deeds were not within its custody or control. *Bell v. Kendrick*, 25 Fla. 778, 6 South. 868; *Johnson v. Drew*, 34 Fla. 130, 15 South. 780, 43 Am. St. Rep. 172.

The defendant relied upon a tax deed to W. G. Sheffield of May 12, 1902, and on mesne conveyances from Sheffield, and on actual possession of the land by himself and those under whom he claimed for more than four years before this suit was brought. Section 591 of the General Statutes of 1906 provides: "When the purchaser of land at a tax sale goes into actual possession of such land, no suit for the recovery of the possession thereof shall be brought by the former owner or claimant, his heirs or assigns, or his or their legal representatives for the recovery of the possession of such land, unless such suit shall be commenced within four years after the purchaser at such tax sale goes into possession of the land so bought."

The plaintiff introduced evidence tending to show that the tax deed was void because the assessment of the land was void, and claims that the foregoing statute of limitations does not apply for that reason.

Even though the tax deed be void because the assessment of the land was void, if the defendant or those under whom he claims went into actual possession of the land purchased at the tax sale, such actual possession for the statutory period prior to the origin of this suit will bar this suit. The court properly granted a new trial because of his error in striking the tax deed and withdrawing it from the consideration of the jury.

The tax deed under which the defendant claims is not void on its face. It gives the name of the grantee, the number of the tax certificate, the date of the tax sale for unpaid taxes for a stated year, the name in which the property was assessed, the amount paid for the certificate, a description of the land, besides the other recitals prescribed by the statute, and the execution thereof is in the prescribed form. *Cowan v. Skinner*, 52 Fla. 486, 42 South. 730.

Section 591 of the General Statutes of 1906 is a statute of limitations and begins to run, not from the date of sale nor from the recordation of the tax deed, but from the time actual possession of the land is taken under the deed.

In considering the provisions of a similar statute, the Supreme Court of Arkansas had this to say: "But it does not follow because the sale was without notice and void that the plaintiff can now recover. * * * It has

never been seriously doubted that in cases where the purchaser at a sale of land for the nonpayment of taxes takes actual possession of the land purchased, under a proper deed conveying said land to him, the Legislature may prescribe a period of limitation after the expiration of which the title of the original owner is barred. By the adverse possession of the purchaser, the owner is excluded from the possession of his premises, and notified that an adverse claimant, hostile to his interests, holds the land. Public policy no less than justice to the tax purchaser requires that he should bring his suit within a reasonable time, in order that all contested questions may be put at rest while the facts are recent and susceptible of proof." *Cooper v. Lee*, 59 Ark. 460, 27 S. W. 970. See, also, *Cofer v. Brooks*, 20 Ark. 542.

In *Pillow v. Roberts*, 13 How. 472, 14 L. Ed. 228, the Supreme Court of the United States said: "In order to entitle the defendant to set up the bar of this statute, after five years' adverse possession, he had only to show that he and those under whom he claimed held under a deed from a collector of the revenue of lands sold for the nonpayment of taxes. He was not bound to show that all the requirements of the law had been complied with, in order to make the deed a valid and indefeasible conveyance of the title. If the court should require such proof before a defendant could have the benefit of this law, it would require him to show that he had no need of the protection of the statute before he could be entitled to it. Such a construction would annul the act altogether, which was evidently intended to save the defendant from the difficulty, after such a length of time, of showing the validity of his tax title."

Some courts hold that the special statute of limitations only applies where the tax deed is valid upon its face. *Mason v. Crowder*, 85 Mo. 526; *Taylor v. Miles*, 5 Kan. 498, 7 Am. Rep. 558; *Larkin v. Wilson*, 28 Kan. 513; *Wofford v. McKinna*, 23 Tex. 36, 76 Am. Dec. 53; *Kilpatrick v. Sisneros*, 23 Tex. 113; *McGavock v. Pollack*, 13 Neb. 538, 14 N. W. 659; *Sheehy v. Hinds*, 27 Minn. 259, 6 N. W. 781; *King v. Lane* (S. D.) 110 N. W. 37.

Other courts hold that an action cannot be maintained by the original owner of land sold for taxes against one who has been in possession of it for the statutory period, claiming title in good faith under a tax deed, although the deed is void upon its face. *Edgerton v. Bird*, 6 Wis. 527, 70 Am. Dec. 473; *Oconto Co. v. Jerrard*, 46 Wis. 317, 50 N. W. 691; *McMillan v. Wehle*, 55 Wis. 685, 13 N. W. 694.

This court has held that the statute of limitations prescribed by section 61, c. 3413, p. 39, Acts 1883, and section 20, c. 1887, p. 44, Acts 1872, and section 63, c. 1976, p. 27, Acts 1874, will not apply to a suit to set aside a void deed or to recover possession

of land attempted to be conveyed thereby. *McKeown v. Collins*, 38 Fla. 276, 21 South. 103; *Carncross v. Lykes*, 22 Fla. 587; *Grisom v. Furman*, 22 Fla. 581; *Sloan v. Sloan*, 25 Fla. 53, 5 South. 603; *Townsend v. Edwards*, 25 Fla. 582, 6 South. 212. Under these statutes, the limitation ran from the recording of the tax deed. They required no actual possession of the land by the holder of the tax title. As these statutes depended merely upon the recording of the tax deed for a certain period, when the deed fell because it was void, there was nothing left for the statute to rest upon and the statute fell with the deed. But a void tax deed may be color of title. *Townsend v. Edwards*, supra. As the limitation prescribed by section 591 of the General Statutes of 1906 rests upon the actual possession of land purchased at a tax sale, when the tax deed falls because it is void, the statute does not fall with the deed, because it rests upon the possession of the land, and the deed becomes merely the color of title. The statute would not apply if the tax deed were void, and no title by adverse possession was shown. See *Saddler v. Smith*, 54 Fla. 671, 45 South. 718, where the defendant was not in possession, and did not claim title by adverse possession under the void tax deed.

By the enactment of section 64, c. 4322, p. 39, Acts 1895, now section 591 of the General Statutes of 1906, a radical departure has been made by our lawmakers in the policy of quieting tax titles. Under statutes that made the limitation to run from the recording of a tax deed for a stated period, and that required no notice to the former owner by the purchaser's actual possession of the land, speculators flourished to the annoyance and injury of the landowners and taxpayers of the state. And so it would seem our lawmakers designedly adopted the provisions of section 591 of the General Statutes of 1906, encouraging thereby the buyer who in good faith would go into actual possession of the land, and affording by such actual possession of the land a notice of higher order to the delinquent taxpayer of the passing of his right to object to the irregularities and illegalities in the tax proceedings. This legislation may be commended in the language of this court in *Florida Savings Bank v. Britain*, 20 Fla. 507, as the endeavor of the lawmaker "to give some force to a tax title, thereby securing bidders other than those notoriously for speculation; and also advising the citizen that he must pay his taxes, like all good citizens should do or his property will be sold to some purpose."

Much more may be said in support of the policy of a statute that bars the former owner's right to recover by proof of adverse possession for four years by the holder of a void tax deed than may be said in behalf of the statute that bars the former owner's right to recover by proof of adverse possession for

seven years under any other color of title. When the state sells land at tax sale, gives the purchaser a deed regular on its face, takes his money, and requires him to go into the actual possession of the land so purchased for four years, causing the purchaser thereby to improve the land at his expense, before he can claim the protection of the statute of limitations, and the purchaser has complied with all the requirements of the law, the former owner who is in default should not be permitted to oust the purchaser because of the dereliction of the officials of the state. The lawmakers have declared this should not be done, good policy proclaims its wisdom, and the courts should give effect to this legislation.

The court did not err in granting the motion for a new trial; and the judgment is affirmed.

TAYLOR and HOCKER, JJ., concur.

SHACKLEFORD, C. J., and COCKRELL and WHITFIELD, JJ., concur in the opinion.

(56 Fla. 339)

TISCHLER v. ROBINSON et al.

(Supreme Court of Florida, Division B. Dec. 19, 1908. Headnotes Filed Jan. 27, 1909.)

EXECUTION (§ 40*)—PROPERTY SUBJECT TO EXECUTION—EQUITABLE INTEREST IN REAL ESTATE.

An equitable interest in real estate that is recoverable or enforceable only in a court of equity is not subject to levy and sale under an execution at law issued upon a judgment against the owner of such equitable interest, or for the enforcement of a deficiency decree against him in a foreclosure proceeding; and, where such levy and sale are made and a deed executed by the sheriff in pursuance thereof, they are nullities, and vest no title in the purchaser.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 88; Dec. Dig. § 40.*]

(Syllabus by the Court.)

Error to Circuit Court, Duval County; Rhydon M. Call, Judge.

Ejectment by Freda K. Robinson and her husband against Philip Tischler. Judgment for plaintiffs, and defendant brings error. Reversed.

Jno. E. Hartridge, for plaintiff in error.

TAYLOR, J. The defendants in error as plaintiffs below instituted an action of ejectment against the plaintiff in error as defendant below in the circuit court of Duval county, the defendant plead the general issue, and the trial resulted in a verdict and judgment for the plaintiffs, and to have this judgment reviewed the defendant below brings the case here by writ of error.

The court at the trial instructed the jury to find for the plaintiffs, and this instruction is assigned as error.

The court erred in giving this instruction, but, instead, should have instructed the jury under the facts to find for the defendant. The facts in the case were as follows: The plaintiffs claimed title to the property sued for under a sheriff's deed thereto made in pursuance of a sale thereof under an execution issued for the enforcement of a deficiency decree of foreclosure of mortgage in their favor against the defendant Tischler. Tischler's rights and interest in the property thus sold and conveyed by the sheriff under such execution were solely derived from the following instrument:

"Elizabeth A. Henderson, to Philip Tischler. Lease.

"This indenture, made this 25th day of June, A. D. 1889, between Elizabeth A. Henderson, of the city of Jacksonville, Duval county, Florida, party of the first part, and Philip Tischler, of the same city, county and state, party of the second part.

"Witnesseth: That the said party of the first part hath letten and by these presents doth grant, demise and to farm let unto the said party of the second part, his executors, administrators and assigns, all that lot, piece or parcel of land, situate, lying and being in the City of Jacksonville, Duval county, Florida, and more particularly described as follows, to wit:

"Commencing at the northeast corner of lot eight (8) in block eighty (80) new numbering, according to the map of the City of Jacksonville, and running south along the western line of Pine street forty-five (45) feet; thence west one hundred and five (105) feet; thence north forty-five (45) feet; thence east one hundred and five feet to the place of beginning, the said described property being the north forty-five (45) feet of said lot eight (8) in block eighty (80) of the new numbering of the City of Jacksonville, and block thirty-two (32) old numbering.

"With the appurtenances for the term of twenty-five years from the first day of October, A. D. 1889, at the yearly rental of four hundred dollars (\$400.00) to be paid in equal quarterly payments.

"And the said party of the second part doth covenant to pay to the said party of the first part, the said yearly rental as herein specified, namely, in quarter-yearly payments on the first day of January, the first day of April, the first day of July, and the first day of October in each and every year, and at the expiration of said term the said party of the second part will quit and surrender the premises hereby demised.

"And the said party of the first part, her heirs, executors, administrators and assigns doth covenant that the said party of the second part on paying the said yearly rent and performing the covenants aforesaid shall and may peaceably and quietly have, hold and

enjoy the said demised premises for the term aforesaid.

"And it is further covenanted and agreed that if the party of the second part, his executors or assigns shall at any time after the expiration of five years from the date hereof, pay to the party of the first part, her executors, administrators or assigns the sum of seven thousand five hundred dollars (\$7,500.00) and all rent accrued to that time that the said party of the first part will convey the said premises by a deed with apt and proper words unto the party of the second part, his executors, administrators or assigns, or to such person or persons as he or they shall direct in fee simple free from encumbrances, liens or claims of every kind and character whatever. And it is further agreed that the party of the second part, his executors, administrators or assigns will pay all taxes, that shall or may be legally assessed against the property hereinbefore described.

"It is further covenanted and agreed by and between the parties hereto that at the expiration of twenty-five years from the date hereof, if the party of the second part should not purchase and pay for said property as hereinabove provided, that the value of the buildings and other improvements placed or erected on said lot by said party of the second part shall be fixed by three disinterested parties, one to be selected by each party hereto and the third to be selected by the parties so chosen, and one half of the valuation that shall be so fixed by said parties shall be paid by the said Elizabeth A. Henderson, her heirs, executors or assigns to the said Philip Tischler, his heirs, executors, administrators or assigns, and the improvements be and become upon such payment the property of said Elizabeth A. Henderson.

"In witness whereof, we have hereunto set our hands and seals this 25th day of June, A. D. 1889.

"E. A. Henderson. [Seal.]

"Philip Tischler. [Seal.]

"In presence of:

"John E. Hartridge.

"R. M. Call."

This instrument and this sale to the plaintiffs by the sheriff under their deficiency decree and execution were considered by this court in the case of Thalheimer v. Tischler (Fla.) 48 South. 514, and it was there held that such instrument conveyed to Tischler only an equitable interest in the property which he could enforce in a court of equity; and it was held, further, that an equitable asset of a debtor can be reached only by proper proceedings in a court of equity, and is not subject to levy and sale under an execution at law issued upon a judgment recovered against such debtor, or upon a deficiency decree rendered against him in a suit for the foreclosure of a mortgage, and that, where

such levies and sales are made and deeds executed by the sheriff, they are nullities, and vest no title in the purchaser. And it was further held in that case that the sheriff's deed to the plaintiffs herein under which they claimed title to the property in this suit was a nullity, and vested no title in them. The result is that the judgment of the court below in this cause must be, and is, hereby reversed at the cost of the defendants in error, and the cause remanded with directions for the entry of judgment therein in favor of the plaintiff in error, defendant below.

HOCKER and PARKHILL, JJ., concur.

SHACKLEFORD, C. J., and COCKRELL and WHITFIELD, JJ., concur in the opinion.

(58 Fla. 843)

RAWLS et al. v. CARLTON.

(Supreme Court of Florida, Division B. Dec. 11, 1908.)

APPEAL AND ERROR (§ 780*) — DISMISSAL — GROUNDS.

Where two parties defendant file what in reality is a joint answer to a bill in chancery, and on exception by the complainant a part of the answer is stricken out, and one alone of the defendants appeals from this order, and there is no appearance by the other party defendant here, and this court is unable to say to what extent the rights and interests of the defendant who has not appealed are affected by the order appealed from, the appeal will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3121; Dec. Dig. § 780.*]

(Syllabus by the Court.)

Appeal from Circuit Court, De Soto County; Joseph B. Wall, Judge.

Bill by Thomas N. Carlton against the Consolidated Land Company, S. A. Rawls, and T. E. Bridges. From an interlocutory order striking out a part of the answer, S. A. Rawls and T. E. Bridges appeal. Appeal dismissed.

W. E. Leitner, for appellants. Treadwell & Treadwell, for appellee.

HOCKER, J. The appellee filed a bill in the circuit court of De Soto county against the Consolidated Land Company, a corporation, and S. A. Rawls and T. E. Bridges, as partners doing business as T. E. Bridges & Co., praying for the cancellation of a certain deed from Peacock-Hunt-West Company to the Consolidated Land Company, conveying lands claimed to be owned by the appellee, and for an injunction against trespassing on the same by T. E. Bridges & Co.

It appears from the bill and answer that T. E. Bridges & Co. are working the land for turpentine purposes under a contract made by the Consolidated Land Company with Sweat Bros. & Co. and others, which contract was assigned by these parties to T. E. Bridges & Co.; but the terms and conditions of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

said contract are not set forth in the bill or answer. The Consolidated Land Company and T. E. Bridges & Co. filed what is termed in the introductory part a joint and several answer, but which in reality appears to be a joint answer, as no separate rights or defenses are therein set up. The complainant excepted to a part of this answer, and the court sustained the exception. *S. A. Rawls* and T. E. Bridges, as partners, alone appealed from this interlocutory order. The Consolidated Land Company did not join in this appeal, and has not appeared here. We are unable to say that the order of the court only affected the interests of T. E. Bridges & Co. because, as the terms of the contract under which they claim the lands are not set up, we do not know to what extent, if any, the rights and interests of the Consolidated Land Company are affected by the order appealed from. Under such circumstances the appeal must be dismissed. *Harlson v. Ocala Building & Loan Ass'n*, 52 Fla. 522, 42 South. 696; *Ferris v. Ferris*, 43 Fla. 358, 31 South. 345; *Witt v. Baars*, 36 Fla. 119, 18 South. 330; *Sarasota Ice, Fish & Power Co. v. Lyle*, 53 Fla. 1069, 43 South. 602.

TAYLOR and PARKHILL, JJ., concur.

SHACKLEFORD, C. J., and COCKRELL and WHITFIELD, JJ., concur in the opinion.

(56 Fla. 763)

CARHART et al. v. ALLEN.

(Supreme Court of Florida, Division B. Dec. 19, 1909. Headnotes Filed Jan. 27, 1909.)

MORTGAGES (§ 581*) — FORECLOSURE — ATTORNEY'S FEES.

In a foreclosure proceeding, where the note for the security of which the mortgage was given in express terms contracts to pay a stipulated and definite sum as attorney's fees for the foreclosure of such mortgage, it is proper for the court to decree such stipulated sum as an attorney's fee, without proofs as to its reasonableness.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1670; Dec. Dig. § 581.*]

(Syllabus by the Court.)

Appeal from Circuit Court, Polk County; Joseph B. Wall, Judge.

Bill by W. G. Allen against Andrew R. Carhart and others. Decree for complainant, and defendants appeal. Affirmed.

F. M. Simonton, for appellants. Frazier & Mabry, for appellee.

TAYLOR, J. The appellee, as complainant below, filed his bill in equity against the appellants, as defendants below, in the circuit court of Polk county, for the foreclosure of a mortgage executed by Andrew R. Carhart and his wife to the complainant. The Ybor City Bank and James B. Scully

were made defendants for the purpose of foreclosing some alleged subsequently acquired interest in the mortgaged property. The defendant Andrew R. Carhart answered the bill, alleging that the note and mortgage sought to be foreclosed were without consideration; that they were executed and delivered to the complainant to secure him in the payment of \$500 to be advanced by him and to be paid to the Bank of Ybor City to liquidate a debt due from Carhart to the bank, and that neither said \$500 nor any other sum was ever paid by the complainant for him to said bank, and that, therefore, there was no consideration for said note and mortgage. This was the real issue in the case. A voluminous amount of testimony was taken and reported to the court, and at the final hearing on the bill, answers, and testimony the court below made a final decree in favor of the complainant for the full amount of his note and mortgage, and interest thereon, including the sum of \$57.60 for attorney's fees for the foreclosure of the mortgage; said amount being 10 per cent. of the amount of principal and interest adjudged to be due on the note and mortgage.

From this decree the defendants below have appealed here, assigning as error the rendition of said decree, and the feature thereof adjudging \$57.60 for attorney's fee, and in the court's refusal to decree that the Bank of Ybor City had a first lien upon the property in dispute.

Upon the main issue in the case as to whether the complainant's note and mortgage were given to him to secure a loan to be made by him with which to pay a debt due from the mortgagor, Andrew R. Carhart, to the Bank of Ybor City, or whether it was made to him to secure him in the payment of a debt due to him by E. A. Carhart, the son of the mortgagor, Andrew R. Carhart, the evidence is conflicting; but we are of the opinion that the great preponderance of the evidence shows that the note and mortgage sued upon were given to him to secure the payment of a debt due to him from E. A. Carhart, the son of Andrew R. Carhart, the mortgagor.

Prior to the execution of the note and mortgage to the complainant, Andrew R. Carhart made a contract of sale of the mortgaged property to the defendant James B. Scully, whereby Scully paid \$500 in cash and gave his six several promissory notes, for \$500 each, payable, respectively, in one, two, three, four, five, and six years after date. Carhart executed a deed to the property to Scully, and deposited the same in the Polk County National Bank in escrow, to be delivered when all of said notes were fully paid with interest; and said agreement of sale further stipulated that, in the event the said Scully should be in default for six months in making any of said payments,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

then all previous payments made by him should be forfeited, and that Carhart might then demand and receive from the Polk County National Bank the deed to Scully deposited with said bank in escrow, and should not be liable to said Scully for any sum or sums of money theretofore paid on account thereof. Scully took possession of the property, and remained in possession of it for about a year, but made default in the payment of all of his notes given for the deferred payments, paying nothing more than the cash payment of \$500 made at the time of his purchase. Then Scully abandoned the place and his purchase, and Andrew R. Carhart, the vendor, took possession thereof. Prior to the maturity of any of the Scully notes Andrew R. Carhart assigned the four of them first falling due to the Bank of Ybor City as collateral security for an indebtedness due by him to the bank. On the default of Scully to pay any of these notes, and some time subsequent to the execution and record of the complainant's mortgage, the Bank of Ybor City took a new note from Andrew R. Carhart for \$1,500, consolidating therein all of the indebtedness due to said bank by Carhart, and then took a mortgage from Carhart on the property covered by the complainant's mortgage to secure said \$1,500 note. The complainant was informed, at the time he took his note and mortgage, that the property covered thereby had been sold to Scully under the terms and conditions as above stated. It is contended by appellee Ybor City Bank that, being the assignee of these Scully notes under the circumstances stated, it had a prior lien on the property to the mortgage of the complainant, who took his mortgage with notice of the sale to Scully. This contention is untenable. According to our view Scully is entirely out of the case. He defaulted in all of his deferred payments, threw up the property and his purchase thereof, and his vendor, in recognition of this, has again assumed possession thereof, and all efforts to collect from Scully have terminated, and the notes he gave for the purchase money of said property are worthless; and the Bank of Ybor City, in recognition of all this, has taken a second mortgage on the property formerly sold to Scully to secure the indebtedness due to it by Carhart, Scully's vendor.

It is also objected that the court erroneously, without any evidence to sustain its reasonableness, decreed an attorney's fee for foreclosing the mortgage of \$57.60. There is no merit in this contention. The note given to the complainant, and for the security of which the mortgage was given, in express terms agrees to pay 10 per centum of its amount as attorney's fee for collecting same; and the amount allowed in the decree is exactly 10 per centum of the principal and interest due on the note and mortgage sued

upon. There being an express contract and stipulated amount for attorney's fee, no evidence as to its reasonableness was necessary.

Finding no error, the decree of the court below in said cause is hereby affirmed, at the cost of the appellants.

HOCKER and PARKHILL, JJ., concur.

SHACKLEFORD, C. J., and COCKRELL and WHITFIELD, JJ., concur in the opinion.

(158 Ala. 630)

SEABOARD AIR LINE RY. CO. v. BROWN. (Supreme Court of Alabama. Dec. 17, 1908.)

1. EVIDENCE (§ 472*)—OPINION EVIDENCE—DAMAGES.

A witness may not give his opinion as to the amount of damages; this being a question for the jury, to be determined on the facts testified to.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2187; Dec. Dig. § 472.*]

2. DAMAGES (§ 159*)—ISSUES AND PROOF.

Where, in an action for damages to plaintiff's land through defendant railroad's failure to keep up a stock gap, no claim for damage to grass was made, it was error to permit plaintiff to testify as to the value of the grass damaged; the measure of damage to the land being its value before and after the injury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 447; Dec. Dig. § 159.*]

3. LANDLORD AND TENANT (§ 142*)—CROPS—INJURY TO PREMISES—DAMAGES.

A lessor is not entitled to damages to grass resulting from a railroad's failure to maintain a stock gap; his damage being limited to that done to the land itself.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 510; Dec. Dig. § 142.*]

Appeal from Circuit Court, St. Clair County; A. H. Alston, Judge.

Action by W. T. Brown against the Seaboard Air Line Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Tillman, Grubb, Bradley & Morrow and M. M. Baldwin, for appellant. M. M. Smith and Victor H. Smith, for appellee.

SIMPSON, J. This suit was brought by the appellee for damages to crops and land by reason of the failure of the defendant to keep up a stock gap. The plaintiff, being on the stand as a witness, after testifying that he did not know the market value of his land, in response to a question on cross-examination, said that he could tell how much he thought his land had been damaged, but was stopped by said attorney's telling him that he did not wish to hear his opinion. The court thereupon told the witness that he could not tell what he thought, but could give his best judgment as to the damage done to the land. The defendant objected. His objection was overruled, and the witness said: "My individual idea of the damage

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

on the market is \$150." The defendant moved to exclude, which motion was overruled.

The matter of the amount of damage is exclusively within the province of the jury, who must base their verdict on the facts testified to by the witnesses. A witness cannot give his opinion as to the amount of damages. This would be substituting his judgment for that of the jury. *Donnell v. Jones*, 13 Ala. 490-510, 48 Am. Dec. 59 et seq.; *Montgomery & W. Pt. R. R. v. Varner*, 19 Ala. 185; *Ala. & Fla. R. R. v. Burkett*, 42 Ala. 83, 87, 88; *Chandler v. Bush*, 84 Ala. 102, 4 South. 207; *Dushane v. Benedict*, 120 U. S. 631, 647, 7 Sup. Ct. 696, 30 L. Ed. 810; *Hames v. Brownlee*, 63 Ala. 277; *Young & Co. v. Cureton*, 87 Ala. 727, 6 South. 352; 4 Ency. Ev. pp. 12, 13. The evidence with regard to damage to crops was excluded by the court.

The court erred in permitting the plaintiff to testify to what, in his best judgment, was the value of the grass damaged. The complaint does not make any claim for damage to or loss of grass, but for damage to the land; and the measure of damage to the land is the value before and after the injury. *Brinkmeyer et al. v. Bethea*, 139 Ala. 376, 35 South. 996. Moreover, the plaintiff's testimony showed that the land was rented to one Davis for \$200, which had been paid, and the only damage which plaintiff could claim was that done to the land itself. It may be said, further, that the "value of the grass damaged" gives no idea of what the value of the grass destroyed was, or how much damage was done to the grass.

From what has been said as to the evidence, it results that the court erred in giving the general charge for the plaintiff, instructing the jury, not only to find for the plaintiff, but to assess his damages at \$175, with interest. The amount of the damage was for the jury to ascertain from the evidence.

The judgment of the court is reversed, and the cause remanded.

TYSON, C. J., and ANDERSON and DENSON, JJ., concur.

(157 Ala. 449)

ROE et al. v. DOE ex dem. McCARTY.
(Supreme Court of Alabama. Nov. 12, 1908.
Rehearing Denied Dec. 24, 1908.)

1. EJECTMENT (§ 90*)—EVIDENCE—DEEDS BY PERSONS NOT IN POSSESSION.

Under the rule that, where neither party has the true title, the one with the older possession will prevail, evidence of deeds by parties under whom defendant claims was properly excluded, where it did not appear that the grantors were ever in possession of the land.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 255; Dec. Dig. § 90.*]

2. EJECTMENT (§ 109*)—PRIOR POSSESSION—UNDISPUTED EVIDENCE—GENERAL AFFIRMATIVE CHARGE.

Where, as the evidence stood, the question was one of prior possession, and the undisputed evidence showed prior possession in plaintiff, there was no error in giving the general affirmative charge at plaintiff's request.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 312; Dec. Dig. § 109.*]

3. EJECTMENT (§ 16*)—OLDER POSSESSION AS GIVING BETTER RIGHT.

Where neither party has the true title, the older possession gives the better right; and such right is not defeated by a subsequent entry and occupation by the opposing claimant, until it has ripened into title by adverse possession.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 30; Dec. Dig. § 16.*]

4. APPEAL AND ERROR (§ 721*)—REQUISITES OF CASE ON JOINT ASSIGNMENT OF ERROR.

Where an assignment of error is joint, error and injury as to both assignors must appear.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2985; Dec. Dig. § 721.*]

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

Action by John Doe, on the demise of Stephen J. McCarty, against Richard Roe, Thomas C. Barrett, and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Sullivan & Stallworth, for appellants. Bestor, Bestor & Young and L. H. & E. W. Faith, for appellee.

DOWDELL, J. This is a common-law action of ejectment. Only one demise was laid in the complaint, and that was in S. J. McCarty. The plaintiff, in support of his right to recover, relied upon both prior possession and paper title. Many exceptions were reserved by the defendants to the rulings of the court, and here assigned as error, on the admission of documentary evidence offered by the plaintiff as tending to show a chain of paper title reaching back from the plaintiff to the government. But the view we take of the case renders it unnecessary to consider these assignments.

The undisputed evidence shows that one Tisdale, in 1898, while in the actual possession of the land in question, claiming the ownership of it, conveyed the same by deed to Miles E. McCarty, and that said Miles E. McCarty, in 1901, by his last will and testament, devised the said land to the plaintiff, S. J. McCarty. This evidence was in without any objection, and unquestionably established a prima facie case in favor of the plaintiff. The defendants admitted by their own evidence that their possession was subsequent to this. The defendant Thomas C. Barrett testified that he went into possession of the land in 1904, and that when he took possession of the lot it was vacant, and that he inclosed it with a fence; and in this connection he offered in evidence a deed from N. Harleston Brown to the said Thom-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

as C. Barrett, of date July 22, 1904. There was no pretense that Brown, the grantor in said deed, was in possession of said land when he executed the same, and on plaintiff's objection the court excluded the deed. The defendants also offered in evidence a certified copy of a deed from one Campbell to Brown, of date in June, 1858, but without any offer to show that either Campbell, the grantor, or Brown, the grantee, had ever at any time been in possession of the land, and on plaintiff's objection this deed was excluded. In these several rulings no reversible error was committed.

On the conclusion of the evidence the court, at the request of the plaintiff, gave the general affirmative charge. In this there was no error. As the evidence then stood, the question was one of prior possession. The undisputed evidence showed prior possession in the plaintiff. The law is well settled that, "where neither party has the true title, the older possession gives the better right; and such right is not defeated by a subsequent entry and occupation by the opposing claimant, until it has ripened into title by adverse possession." *McCreary v. Jackson Lumber Co.*, 148 Ala. 247, 41 South. 822; *Reddick v. Long*, 124 Ala. 267, 27 South. 402; *Higdon v. Kennermer*, 120 Ala. 198, 24 South. 439; *N. C. & St. L. R. R. v. Mathis*, 109 Ala. 382, 19 South. 384; *Strange v. King*, 84 Ala. 212, 4 South. 600; *Mills v. Clayton*, 73 Ala. 359.

But apart from the foregoing considerations, and all other questions raised on the record, there is one that is fatal to any right of the appellants to a reversal on this appeal. The appeal is sued out jointly by both of the defendants. The assignments of error are jointly made. There is nothing in the record of which the defendant John P. Barrett has any right to complain. He is confessedly a bare, naked trespasser, with not the slightest pretense under the evidence of any right of possession. Where the assignment of error is joint, error and injury as to both must appear. Such is not the case here. *Beachman v. Aurora Silver Plate Co.*, 110 Ala. 555, 18 South. 814.

The judgment appealed from will be affirmed.

Affirmed.

TYSON, C. J., and ANDERSON and McLELLAN, JJ., concur.

(158 Ala. 414)

NORTH ALABAMA TRACTION CO. v. DANIEL

(Supreme Court of Alabama. June 18, 1908. Rehearing Denied Dec. 24, 1908.)

1. ACTION (§ 38*)—SINGLE CAUSE OF ACTION—CARRIERS—STREET RAILROADS.

A complaint against a street railway company alleged that, as a car approached a speci-

fied street, plaintiff passenger's signal to the conductor to stop was ignored; that he gave another signal as he reached and passed the street; that the motorman's only reply was, "You will have to sleep in the shed like a dog to-night, or walk back home;" that the car proceeded to the end of the line, stopping once one-half mile beyond plaintiff's destination, and plaintiff remaining on the car to go home on the return trip; that at a car shed between the terminal and plaintiff's home, maintained by the company, plaintiff was told by the conductor on the return trip that he would have to sleep in the shed or walk; that when the car began to back into the shed plaintiff alighted, whereupon the car moved rapidly towards his home; that he unsuccessfully attempted to reboard the car; that the conductor or motorman observed his effort, and halloed to him, "We have got it on you after all," that it was 11 p. m.; that he was and had been sick, and that through such act of defendant's servants he was forced to walk home, about half a mile, resulting in his being greatly weakened, etc.; that he suffered great physical pain on the car, was taunted, etc. *Held*, that the complaint did not state separate causes of action; the facts set out being mere matters of aggravation, connected with the failure to deliver plaintiff at his destination.

[Ed. Note.—For other cases, see *Action*, Dec. Dig. § 38.*]

2. CARRIERS (§ 275*)—PLEADING—CERTAINTY.

Nor was the complaint demurrable as being uncertain as to what act plaintiff relied on, or as to whether it was a servant of defendant by whom plaintiff was taunted, etc.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 275.*]

3. CARRIERS (§ 277*) — MISCONDUCT TOWARD STREET CAR PASSENGER — EXCESSIVE DAMAGES.

\$1,750 was an excessive recovery by a street car passenger for the company's failure to permit him to alight at his destination, and for indignities inflicted by the motorman and conductor, though he had to walk half a mile, and had been sick, and was made nervous, and was insulted by the motorman and conductor, where he suffered no ill effects of a serious or permanent character and had habitually taunted the motorman on former trips.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1084; Dec. Dig. § 277.*]

4. APPEAL AND ERROR (§ 911*)—REVIEW—PRESUMPTIONS.

In the absence of a showing to the contrary, the Supreme Court will presume that a supernumerary judge who presided at the trial and signed the bill of exceptions lawfully held court in the place of the regular judge, though the record shows that the term was organized by the regular judge.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3662-3684; Dec. Dig. § 911.*]

Appeal from Circuit Court, Morgan County; A. H. Alston, Judge.

Action by Clarence E. Daniel against the North Alabama Traction Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The complaint was in the following language: "Plaintiff claims of defendant the sum of \$5,000 as damages, for that the defendant, a street railway company operating electric cars in Decatur and New Decatur, Ala., is engaged in carrying passengers

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

for hire. It is a rule or regulation of defendant to stop its cars at street crossings in each of said towns for the purpose of allowing passengers to alight, and to this end its cars are equipped with buttons, which, when pressed, ring an electric bell, which is a notification to the conductor in charge of the car that a passenger desires to alight at the next regular stopping place. On, to wit, the 25th day of July, 1905, plaintiff boarded a car belonging to defendant on Bank street, in Decatur, Ala., and paid his fare for the purpose of riding to his home, on or about the corner of Fourth avenue and Grant street, in New Decatur, Ala., and proceeded thereon until he reached Second avenue and Grant street, in New Decatur, Ala., at which point he was duly transferred to his car on a connecting line belonging to the defendant, which line extended along Grant street by plaintiff's home to East Decatur, a mile or more distant. Said car was in charge of F. M. Smirell as conductor, and George Shuckfull, as motorman, servants of the defendant. As the car on which plaintiff was riding on said connecting line approached Fourth avenue, plaintiff signaled the conductor (by pressing the button and ringing the electric bell) to stop the car at Fourth avenue, and no heed was given to his signal. In the same manner plaintiff gave another signal for the car to stop just as he reached and just after he passed Fourth avenue, and the only response which said signal received was a reply from the motorman on said car, to wit: 'You will have to sleep in the shed like a dog to-night, or walk back home.' The said car was not stopped until it reached Summerville road, about half a mile distant, at which two passengers alighted, and it then proceeded to the end of defendant's line in East Decatur. Plaintiff remained on the car for the purpose of going to his home on its return trip. Between the terminal of defendant's car line in East Decatur and plaintiff's home the defendant maintained a car shed some distance, to wit, about half a mile, from plaintiff's home, and just before the car on which plaintiff was riding (on its return trip) reached said car shed plaintiff was informed by the conductor on said car that he (plaintiff) would have to walk back home or sleep in the barn, and when said car reached said shed or barn the motorman began to back it into the shed, and plaintiff alighted and walked to the sidewalk near by, whereupon the car was immediately put in rapid motion up the track in the direction of plaintiff's home. Plaintiff made an effort to then board said car, which effort was observed by defendant's conductor or motorman, who not only refused to stop the car, but hailed to plaintiff as a parting insult: 'We have got it on you after all.' Plaintiff avers that the aforesaid occurrence happened late at night, to wit, 11 o'clock, that he was sick at the time, and had been for some days prior

thereto, and that by reason of the aforesaid act of defendant's servants in charge of the car he was forced to walk to his home, a distance of, to wit, about half a mile, in consequence of which he was greatly weakened, fatigued, and was very nervous, and could not get composed or go to sleep for a long time thereafter, and suffered great physical pain while on said car as aforesaid, was taunted, gayed, insulted, badgered, and baffled, and was greatly humiliated, and his feelings and pride were outraged and sorely wounded, and he suffered great mental pain."

Demurrers were interposed to the complaint as follows: "(1) That the several acts of defendant's servants and employes are alleged as occurring at different times, and it is vague, uncertain, and indefinite as to which of said acts plaintiff bases his right of action. (2) Said complaint alleges several different, distinct, and independent acts of defendant's servants as the cause of injuries complained of, all in one and the same count. (3) Said count is vague, indefinite, and uncertain in its allegation as to whether or not it was a servant of defendant engaged in the performance of his duties by whom he was taunted, gayed, insulted, baffled, and humiliated. (4) It is not alleged that the person by whom he was so gayed, insulted, baffled, etc., was in the service of defendant and in the performance of his duties at the time. (5) Said complaint fails to allege that plaintiff was a passenger upon said car to which he was transferred, having a right of passage thereon. (6) The remark alleged therein as having been made by the motorman to the plaintiff is not the subject or the element of damages on the facts alleged. (7) It is uncertain from said complaint whether the grievance complained of was the failure of said car to stop at said Fourth avenue, or remarks alleged to have been made by the motorman after it passed Fourth avenue and was on its return trip towards plaintiff's home. (8) It is uncertain whether the injuries complained of was the failure of the car to stop at the place where plaintiff alleges to have attempted to board it on its return trip to Fourth avenue, and does not allege that the place where he so attempted to get on or board such car was a regular stopping place for said car."

The evidence of plaintiff was substantially as the facts are stated in the complaint, with the additional fact, as testified to by plaintiff, that he had often gayed and taunted the motorman and conductor on this line in a spirit of fun and pleasantry. The evidence for defendant tended to show that the signal to stop at Fourth avenue was not given until the avenue was reached, and at a time when the car was in rapid motion going down-grade, but that an offer was made to put plaintiff off in the middle of the block, which offer he declined, but went on to the end of the line in order to return to his home

on the return trip; that on the return trip the car stopped at the barn, and the motorman in charge told plaintiff in a joking way that he would have to walk home as this car did not go on, but neither the motorman nor conductor knew of his getting off the car until after it had started and was passing him as he was walking towards home; and that plaintiff made no signal for the car to stop.

Motion for new trial was made, based on the grounds that the verdict was excessive; it being \$1,750.

John C. Eyster, for appellant. Callahan & Harris and Lowe & Tidwell, for appellee.

ANDERSON, J. The gravamen of the complaint was the negligent failure of the defendant to transport and deliver the plaintiff, a passenger, at the place of his destination, by carrying him beyond his home or by negligently causing him to debark from the car at the barn upon the return trip. The facts set out in the complaint did not constitute separate and distinct causes of action, but were mere matters of aggravation connected with the failure to deliver the plaintiff at his destination. If the complaint is bad, the defect consists in prolixity, and it was not subject to the demurrer interposed.

While the complaint authorizes punitive damages, and the evidence may have justified the assessment of such damages, we are constrained to hold that under the evidence the verdict was excessive, and the trial court should have granted a new trial. It is true the plaintiff had to walk from the barn home, and that he had been sick and was made nervous; but he suffered no ill effects of a serious or permanent character. Therefore the damages awarded were almost entirely due to the alleged jeers and insults of the defendant's servants. It may be that their conduct was unpardonable, and that the defendant should be punished for having such servants; but we do not think that this plaintiff was in a position to feel the same amount of chagrin over what was said and done as the ordinary passenger, who had comported himself in a proper and dignified manner. He admitted that he had been in the habit of "guying" this motorman on former trips, and it may be that what was said and done on this occasion was but a retaliation incited by the plaintiff's previous conduct. We do not mean to justify the conduct of these servants, even if intended as a joke, and brought on by the plaintiff's own conduct; yet we think, under the circumstances, that \$1,750 was too much for the indignities complained of by the plaintiff. Our conclusion finds support in the cases of *Birmingham R. R. v. Ward*, 124 Ala. 409, 27 South. 471, and *Bessemer Land Co. v. Jenkins*, 111 Ala. 135, 18 South. 565, 56 Am. St. Rep. 28.

It is insisted by counsel for appellee that the bill of exceptions does not contain all of the evidence, because of the omission of certain interrogatories to defendant's witnesses. It is sufficient to say that it contains all of the evidence of the plaintiff, which fails to support the verdict; but we think it contains all the evidence, notwithstanding the omission of some of the interrogatories.

While the record shows that the term of court at which this case was tried, was organized by Hon. D. W. Speake, the regular judge, it sufficiently appears that Hon. A. H. Alston, supernumerary judge, presided at the trial and signed the bill of exceptions; and in the absence of anything to the contrary we will presume that he was lawfully and regularly holding the court, at the time of the trial of this cause, in the place of the regular judge.

The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

TYSON, C. J., and DOWDELL and McCLELLAN, JJ., concur.

(159 Ala. 344)

McDANIEL v. OAIN.

(Supreme Court of Alabama. Nov. 19, 1908. Rehearing Denied Dec. 24, 1908.)

1. CRIMINAL LAW (§ 211*)—AFFIDAVIT—SUFFICIENCY.

An affidavit that affiant had probable cause for believing, and did believe, that within 10 months before the filing of the complaint plaintiff removed and sold or disposed of lint cotton, to hinder and defraud affiant, on which affiant held a landlord's lien for advances to plaintiff during 1906, with the knowledge of the existence thereof, which offense had been committed within the county, against the peace and dignity of the state, etc., was not void.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 211.*]

2. FALSE IMPRISONMENT (§ 20*)—PLEAS.

Pleas to false imprisonment counts in a complaint, reciting the affidavit on which the warrant of arrest was issued and such warrant, were not demurrable because they failed to show that plaintiff was arrested for what was legally a criminal offense on a valid warrant, or because the affidavit attempted to charge an offense in the alternative.

[Ed. Note.—For other cases, see False Imprisonment, Dec. Dig. § 20.*]

3. CRIMINAL LAW (§ 211*)—PRELIMINARY AFFIDAVIT—DEFECTS.

Where an affidavit for a warrant of arrest designated the offense as per the statutory caption, the fact that an indictment similar to the affidavit would not have been good, if attacked by demurrer, did not render the affidavit void.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 211.*]

4. APPEAL AND ERROR (§ 1040*)—RULINGS ON PLEADING—PREJUDICE.

The sustaining of a demurrer to an original complaint for false imprisonment and malicious prosecution was not prejudicial to plaintiff, where he had to prove the averment complained of in the demurrers in order to establish

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

a prima facie case, which he did without dispute.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1040.*]

5. APPEAL AND ERROR (§ 1040*)—RULINGS ON PLEADING—PREJUDICE.

The sustaining of a demurrer to so much of a complaint as sought to recover counsel fees was without prejudice to plaintiff, where the court properly disallowed plaintiff any recovery, as he could not recover counsel fees, if not entitled to recover on the merits.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1040.*]

6. LANDLORD AND TENANT (§ 242*)—LANDLORD'S LIEN—ADVANCES.

A mere rental agent for the owners of land is not entitled to a lien on the crops for advancements made to a subtenant.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 242.*]

7. MALICIOUS PROSECUTION (§ 6*)—WRONGFUL PROSECUTION.

Where crops raised by a tenant were not subject to a landlord's lien in favor of defendant for advances made to the tenant, a prosecution against the tenant, instituted by defendant for alleged wrongful sale of the crop to the prejudice of defendant's alleged lien, was wrongful.

[Ed. Note.—For other cases, see Malicious Prosecution, Dec. Dig. § 6.*]

8. MALICIOUS PROSECUTION (§ 71*)—MALICE—QUESTION OF FACT.

Where defendant advanced certain money to a tenant, and, mistakenly believing he had a lien on the tenant's crop therefor, instituted a prosecution for the tenant's alleged wrongful sale of the crop to the prejudice of the lien, whether the prosecution was malicious was a question of fact for the trial court, sitting as a jury.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 163; Dec. Dig. § 71.*]

Appeal from Circuit Court, Morgan County; D. W. Speake, Judge.

Action by Frank McDaniel against James F. Cain for malicious prosecution and false imprisonment. From a judgment for defendant, plaintiff appeals. Affirmed.

The complaint was in the following language: "(1) Plaintiff claims of defendant \$500 damages for maliciously and without probable cause therefor causing plaintiff to be arrested under a warrant issued by J. C. Hogan, a justice of the peace, on the 14th day of December, 1906, on a charge of removing and selling or disposing of lint cotton for the purpose of hindering, delaying, or defrauding said Cain, on which said Cain held a landlord's lien for advances made to said McDaniel during the year 1906, with the knowledge of the existence of said lien, which charge, before the commencement of this action, has been judicially investigated and said prosecution made, and plaintiff discharged. (2) Plaintiff claims of defendant \$500 damages for causing plaintiff to be arrested and imprisoned without probable cause therefor [and then follows the charge as set out in count 1]. (3) Plaintiff claims of defendant the like sum of \$500

damages for unlawfully causing plaintiff to be arrested against the will of plaintiff [here follows the description of the cause of arrest as set out in count 1] for one day or part thereof, to wit, on December 14, 1906. And plaintiff alleges that, by reason of said arrest and deprivation of his liberty, plaintiff incurred a liability of \$50 in the employment of an attorney, and said \$50 is claimed as special damages; that plaintiff was by reason of said arrest compelled to attend court and lost the fruits of his labor for one day, which he claims as special damages; that by reason of said charge made against him, and said arrest, plaintiff was injured in his good name, and suffered humiliation and mental pain." (4) Same as 1, with special damages alleged in count 3 added. (5) Same as 2, with special damages alleged in count 3 added. This complaint was amended by adding to each count thereof the following: "That said prosecution and proceedings were had before the said J. C. Hogan, who was the justice of the peace at the time in and for precinct No. 10, Morgan county, Ala." Counts 1 and 2 were amended by adding to each of the counts the special damages claimed in count 3. Counts 3 and 4 were amended by adding the following: "That plaintiff procured an attorney at law to defend him against said charge, for which he incurred a liability for a reasonable attorney's fee, which is alleged to be \$50, as hereinabove set out."

The general issue was interposed to all of these counts. To counts 2, 3, and 5, separately and severally, the following pleas were interposed: "That on the 11th day of December, 1906, defendant made before J. C. Hogan, justice of the peace in Morgan county, Ala., an affidavit in substance and effect as follows [omitting the caption]: 'Before me, J. C. Hogan, a justice of the peace in and for said county, in said state, this day personally appeared James F. Cain, and made oath that he had probable cause for believing and does believe that within 12 months before the filing of this complaint that one Frank McDaniel did remove and sell or dispose of lint cotton for the purpose of hindering, delaying, or defrauding affiant, on which affiant held a landlord's lien for advances made to said Frank McDaniel during the year 1906, with the knowledge of the existence thereof, which said offense has been committed in said county, against the peace and dignity of the state of Alabama.' Signed and sworn to, etc. Upon which affidavit the said J. C. Hogan issued the following writ [omitting the caption]: 'To Any Lawful Officer of the State of Alabama: Complaint on oath having been made before me that the offense of removing and selling cotton on which another held a landlord's lien has been committed, and accusing Frank McDaniel thereof, you are

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

therefore commanded forthwith to arrest Frank McDaniel and bring him before me. Dated the 11th day of December, 1906. J. C. Hogan, J. P.' Upon which warrant the plaintiff was taken and retained in custody by W. A. Culver, constable; his bail being fixed at \$300." Plea 3 was a duplicate of plea 2.

Demurrers were interposed to pleas 2 and 3, because "It is not shown that plaintiff was arrested for what is legally a criminal offense upon valid process. (2) The affidavit is void, in this: It attempts to charge the commission of an offense in the alternative, and each alternative does not charge an indictable offense. (3) Disposing of lint cotton for the purpose of hindering, delaying, or defrauding a person who holds a landlord's lien thereon, with the knowledge of the existence thereof, as alleged in said affidavit, is not a violation of the statute, and is not a criminal offense. (4) Said affidavit is void, for that it charges the plaintiff, McDaniel, with removing and selling or disposing of the property therein mentioned, and the alleged disposing of said property as therein alleged does not constitute a criminal charge. (5) It is not shown that said prosecution was for what is legally a criminal offense upon valid process. (6) Said writ of arrest is void in this: The offense therein set forth does not aver or show the commission of a single offense," etc.

S. A. Lynn, for appellant. E. W. Godby, for appellee.

ANDERSON, J. The affidavit, as set out in the pleas, both before and after amendment, was not void, and said pleas were not subject to the demurrer interposed, as they related only to the false imprisonment counts of the complaint. The affidavit designated the offense as per the statutory caption, and was not void. The fact that an indictment similar to said affidavit would not be good against a demurrer did not render the said affidavit void.

The action of the trial court in sustaining the demurrer to the original complaint was clearly innocuous to the plaintiff, as he had to prove the very averment complained of in the demurrers in order to make out a prima facie case, which he did without dispute.

Conceding that the court erred in sustaining the demurrer to so much of the complaint as sought to recover counsel fees, the action in this respect was innocuous, if the court properly disallowed a recovery by the plaintiff. He could clearly get no attorney's fees if he did not show a right to recover anything.

It is true the testimony of Spencer, one of the owners of the land, showed that the defendant was a mere rental agent, rather than a tenant in chief, and that McDaniel

was not his (Cain's) tenant, and he therefore had no lien on the crops for said \$20.24 advanced. There was also a judgment, from which the defendant took no appeal, adjudging that the cotton raised on the land was not subject to a landlord's lien in favor of the defendant, Cain. This being true, the prosecution was wrongful, yet it was a question of fact as to whether or not it was maliciously instituted. *Goldstein v. Drysdale*, 148 Ala. 488, 42 South. 744; *Alsop v. Liddell*, 130 Ala. 543, 30 South. 401. The trial court, sitting as a jury, could well infer from the evidence that the prosecution was not malicious. It was not disputed that the defendant advanced the sum claimed, and it is evident that he thought he had a lien on the crop. It is true that ignorance of the law excuses no man for crime, or for an ordinary civil wrong; but in a civil action for malicious prosecution an honest belief in the existence of a right, though it does not in fact exist, may purge the prosecution of malice and defeat a recovery. The existence of malice being a question of fact, we are not prepared to hold that the court, sitting as a jury, erred in the conclusion reached.

The judgment of the circuit court is affirmed.

Affirmed.

TYSON, C. J., and DOWDELL and McLELLAN, JJ., concur.

(157 Ala. 20)

BADGETT v. STATE.

(Supreme Court of Alabama. Dec. 17, 1908.)

1. INTOXICATING LIQUORS (§ 242*)—UNLAWFUL SALES—INAPPROPRIATE PUNISHMENT.

Where one is convicted of retailing liquors without a license, in violation of Code 1896, § 5476, it is improper to assess a penalty under a prohibition law prevailing in the county.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 242.*]

2. INTOXICATING LIQUORS (§ 40*)—UNLAWFUL SALES—INCONSISTENT OFFENSES.

One cannot be convicted of retailing liquors without a license, in violation of Code 1896, § 5476, in prohibition territory.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 34; Dec. Dig. § 40.*]

3. CRIMINAL LAW (§ 304*)—JUDICIAL NOTICE—PROHIBITION LAWS.

Courts take judicial notice of prohibition statutes and of the time of their taking effect, and that under a local law prior to a particular date prohibition was not in force in towns or cities of a particular county having police regulations "both by day and by night."

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 706; Dec. Dig. § 304.*]

4. CRIMINAL LAW (§ 304*)—JUDICIAL NOTICE—MUNICIPALITIES.

Courts take judicial notice that since a particular date a particular town has been incorporated, but not whether at a particular time it had police regulations "both by day and by night," within a local law exempting towns

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

having such regulations from the operation of prohibition.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 703; Dec. Dig. § 304.*]

Appeal from Criminal Court, Jefferson County; Samuel L. Weaver, Judge.

Will Badgett was convicted of selling liquor without license, and appeals. Reversed and remanded.

The affidavit charges that "Will Badgett engaged in or carried on the business of a retail dealer in spirituous, vinous, or malt liquors, in the town of Brookside, of less than 1,000 inhabitants, without a license and contrary to law, against the peace and dignity," etc. The court adjudged that defendant was guilty as charged in the affidavit, and fixed his punishment at six months' hard labor for the county, together with the costs in that behalf expended.

Alexander M. Garber, Atty. Gen., for the State.

DENSON, J. The affidavit upon which the defendant was tried and convicted was sued out on the 29th day of February, 1908, and in terms charges a violation of the revenue statute (section 5476 of the Code of 1896). The case was tried in the criminal court of Jefferson county without a jury. There is no bill of exceptions in the record, but the judgment entry recites that "after hearing the evidence the court is satisfied that the defendant is guilty as charged in the affidavit."

The only punishment prescribed by the statute for the offense charged in the affidavit, and which the court could legally have imposed, was a fine of thrice the amount of the license fee required to be paid for carrying on the business indicated; but it is manifest that the punishment here awarded by the court is that prescribed by the prohibition law which prevails in Jefferson county—a punishment wholly inappropriate upon conviction for the offense charged; and from this circumstance it might well be inferred that the defendant was really tried and convicted for violating the prohibition law. If prohibition was in force in the territory where the sale or sales were made, at the time they were made, then the affidavit charges no offense, for the reason that a license to carry on the business of a retail liquor dealer could not have been legally issued in a prohibition district; and if the evidence developed that the sale for which the defendant was convicted was made in a prohibition district, then he was entitled to his acquittal. *Cost's Case*, 96 Ala. 60, 11 South. 435.

Courts take judicial knowledge of prohibition statutes; and we judicially know that general prohibition throughout Jefferson county became effective January 1, 1908.

and that prior to that time it was not in force in towns or cities in that county having police regulations "both by day and night." Local Laws of Jefferson County, p. 724. We also judicially know that Brookside—averred in the affidavit as the place where the offense was committed—is, and has been since February 18, 1897, an incorporated town; but we do not know whether it had or had not, at the time in question, police regulations "both by day and night," and therefore cannot have judicial cognizance that prohibition prevailed within its corporate limits prior to January, 1908, nor that license to carry on the business of retail liquor dealer, within such limits, could not be legally issued. If we possessed such knowledge, the law would require a reversal of the judgment of conviction and discharge of the prisoner, because the affidavit would be void. *Cost's Case*, *supra*.

Not knowing whether or not prohibition prevailed in Brookside at the time the sale was made, and it appearing that the punishment awarded for the offense charged (and of which the judgment entry recites the defendant was convicted) was imposed without authority of law, we can only reverse the judgment and remand the cause.

Reversed and remanded.

DOWDELL, ANDERSON, and MCLELLAN, JJ., concur.

(158 Ala. 311)

KUMPE et al. v. BYNUM et al.

(Supreme Court of Alabama. Dec. 15, 1908.)

1. COUNTIES (§ 1*)—DEFINITION.

A "county," as a corporate organization, is a governmental agency of the state, and in a sense a municipal corporation.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1653-1660; vol. 8, p. 7621.]

2. COUNTIES (§ 196*)—MISAPPROPRIATION OF COUNTY FUNDS—INJUNCTION.

An injunction lies at the suit of a taxpayer to restrain the misappropriation of county funds by county officers.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 808; Dec. Dig. § 196.*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 93*)—HIGH SCHOOLS—COUNTIES.

Loc. Acts 1898-99, p. 30, confers on the board of revenue of Lawrence county such powers and jurisdiction as county commissioners have. Code 1907, § 133, authorizes the county commissioners to erect courthouses, jails, hospitals, and other necessary county buildings; sections 134, 138, relate to the levy and collection of special taxes for purposes therein named; and section 158 authorizes the county commissioners to order elections to determine whether the bonds of the county shall be issued to construct public buildings, including school-houses. Act Aug. 7, 1907 (Gen. Acts 1907, p. 728) § 3, provides that when the "citizens" of a county shall secure a suitable site and erect a high school building, and convey the same to the state, the state will then make an annual

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

appropriation to maintain such high school. *Held*, that Code 1907, §§ 133, 134, 138, 158, relate only to those schoolhouses owned by the county, and do not relate to a high school building erected pursuant to Act Aug. 7, 1907 (Gen. Acts 1907, p. 728), and that the board of revenue is without power to appropriate county funds to aid in the construction of such a high school building.

[Ed. Note.—For other cases, see *Schools and School Districts*, Dec. Dig. § 93.*]

Appeal from Chancery Court, Lawrence County; William H. Simpson, Chancellor.

Bill for injunction by H. D. Bynum and others against J. C. Kumpe and others. The application having been set down for hearing, pursuant to Code 1907, § 4528, and the chancellor having made his fiat for the issuance of the writ, defendants appeal. Affirmed.

G. O. Chenault and J. M. Irwin, for appellants. C. M. Sherrod, for appellees.

DOWDELL, J. This is a bill by resident taxpayers of the county against the probate judge and the county treasurer, and for the purpose of enjoining the issuance and payment of a warrant on the order of the board of revenue appropriating \$2,000 out of the general fund of the county to aid in the construction and building of a "high school building." The application for the writ of injunction was set down for hearing by the chancellor under section 4528 of the Code of 1907, and on such hearing the chancellor made his fiat for the issuance of the writ. From this order the present appeal is taken, under section 4531 of the Code.

The power and jurisdiction of a court of equity on a bill by a taxpayer to enjoin the misappropriation of public funds by public officers is too well settled by the adjudications of this court to now admit of any doubt. This was determined in the case of *Railroad Co. v. Dunn*, 51 Ala. 128, cited by counsel for appellant. The case of *Allen v. Intendant*, etc., of La Fayette, 89 Ala. 641, 8 South. 30, 9 L. R. A. 497, is another, and in which it was said: "The right of the complainants to maintain this suit is, as a general proposition, fully supported by the authorities and not seriously controverted by the appellees." It is true that the cases above cited related to "municipal corporations"; but there can be no distinction in principle between those cases and the case at bar as to the question of jurisdiction of a court of equity. A county, as a corporate organization, is a governmental agency of the state, and in a sense a municipal corporation. In the case of *Simpson v. Lauderdale County*, 56 Ala. 64, in which the question of the power of the commissioners' court of the county to borrow money for the purpose of building a bridge was involved, it was said by this court, speaking through Brickell, C. J.: "We adopt, in reference to counties, what has been so

forcibly said by Justice Bradley in reference to municipal corporations." Then follows a quotation from the opinion of Justice Bradley in the case of *Mayor v. Ray*, 19 Wall. 475, 22 L. Ed. 104, in reference to the powers, etc., of municipal corporations. We cite the above case as showing that principles applicable to municipal corporations in the exercise of corporate powers are alike applicable to counties, and logically the remedies in restraint of the abuse of such powers, in the absence of legislation, is the same; that is, by a bill in equity to enjoin. In *High on Injunction* (4th Ed.) vol. 2, §§ 1238, 1239, the right of taxpayers to go into a court of equity to enjoin the misappropriation of county funds by county officers is recognized. The case of *Warren County v. Barr*, 55 Ind. 30, is directly in point. We are clearly of the opinion that the chancery court in the present case was not wanting in jurisdiction.

The vital question in the case and on which the equities of the bill depend, is, Did the board of revenue of Lawrence county have the power and authority under the law to appropriate \$2,000 out of the general fund of the county "to aid in the construction and building of a high school building" in said county? The board of revenue of Lawrence county has like powers and jurisdiction as courts of county commissioners of the various counties of the state. Loc. Acts 1898-99, p. 30. The power and control of county boards of revenue over county revenues is derived solely and exclusively from the state, and, where there is no constitutional provision, then only from legislative enactment. It is not pretended here that any authority can be found in our Constitution to sustain the alleged act of the board of revenue in making said appropriation. We are therefore to inquire whether any such statutory authority exists. In the case of *Simpson v. Lauderdale County*, supra, where the power of the court of commissioners to borrow money to pay for the building of a bridge over a stream within the county was involved, it was said: "It would be a departure from the statutes, which clearly define the powers of counties and prescribe their duties and liabilities, to imply a power of borrowing money. No necessity for the implication exists, and the legislative history of the state, which abounds with special enactments conferring the power wherever it has been deemed necessary, forbids it." The power existed under the general statutes to build necessary bridges, but under the above decision carried no implication of the power to borrow money for such purpose.

In support of the power and authority of the board of revenue in the present case to make the alleged appropriation, we are cited by counsel for appellants to the following statutes: Sections 133, 134, 138, and 158 of the Code of 1907; also article 20, c. 41, p.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

786, of the same Code, containing sections 1861 to 1868, inclusive. Section 133 is as follows: "The court of county commissioners of each county shall erect courthouses, jails, and hospitals, and the other necessary county buildings; and such court has authority to levy a special tax for that purpose: Provided, that in counties in which a circuit court or court of like jurisdiction has been authorized before the adoption of this Code, to be held in more than one place, the court of county commissioners or board of revenue may build courthouses in each place of holding court, but this section shall not affect in anywise any local law heretofore enacted." It will be observed that this section relates to the duties of the court of county commissioners, requiring the erection of "courthouses, jails, and hospitals, and other necessary county buildings," whatever they may be. (Italics supplied.) Sections 134 and 138 relate to the levy and collection of special taxes for special purposes therein named. Section 158 is as follows: "The courts of county commissioners and boards of revenue in the several counties may order elections to be held in their respective counties for deciding whether or not the bonds of the county shall be issued for the purpose of constructing, or paying debts created for constructing, public buildings, including school houses and buildings, public roads, bridges, or such other purposes as are authorized by law." This section, it will be observed, provides for the holding of elections for the issuance of bonds for the purposes therein mentioned, namely: "For the purpose of constructing, or paying debts created for constructing public buildings, including schoolhouses and bridges, public roads, or such other purposes as are authorized by law."

We think there can be no question that the "public buildings, including school houses and buildings," referred to in the statute, must necessarily be such as are authorized by law; and, construing the several sections above cited together, we think there can be no doubt that the statutes relate to public buildings, "including school houses and buildings," which are the property of and belong to the county. These several statutes were enacted long prior to the act approved August 7, 1907 (Gen. Acts 1907, p. 728), and which was adopted into the Code of 1907 as article 20 of chapter 41. This act provides for the creation of a high school commission and the establishment of high schools upon certain conditions in certain counties of the state—a class of schools theretofore unknown in the free public school law of the state. The act is complete in itself, and the system of high schools provided for is distinct and independent from the free public schools, and such distinction is especially recognized in the act. Section 5 as copied in the Code. Section 3 of the act as adopted into the Code is as follows: "For any county in which the

citizens thereof shall secure a suitable site, which shall consist of not less than five acres of land the title to the surface of which shall be in fee (but the land need not include mineral rights), and erect thereon a good and substantial building with all the necessary equipments for a high school, the cost of said land, building and equipments to be not less than five thousand dollars, and upon making a deed to the state of Alabama of said land, building, and equipments, there shall be appropriated out of any money in the treasury not otherwise appropriated the sum of two thousand dollars for the payment of the teachers in said high school or high schools complying with the provisions of this article, and this appropriation is hereby made to continue annually, the same to be paid quarterly upon warrants drawn by the county board of education in the county in which said high school is located, said warrant or warrants to be subject to the approval of the commission hereinbefore created; provided further, that none of said two thousand dollars shall be devoted to any other purpose whatever than the payment of teachers' salaries."

The statute in terms and expressly provides that when the "citizens" of the county shall furnish the five acres of land and the building and equipment, to cost not less than \$5,000, and convey the same by deed to the state, the state will then make an annual appropriation to maintain such high school. Certainly it cannot be said that the county was intended from the terms used—"the citizens of the county." If so, why require the county to convey the property by deed to the state? And if by the language and terms employed the county was not intended, then there is no power, express or implied, in the act whereby the county is authorized to appropriate out of the general fund of the county money to aid in the building and construction of such high school building. Manifestly the statute imposes no duty to furnish and equip such high school building. It was only intended to provide an opportunity for the citizens of the county to obtain state aid in the support of such high school, whenever they (the citizens) complied with the conditions named in the statute. So, taking the several statutes above referred to, and relied on by the appellants, separately or collectively, we are unable to find that any power exists, by express grant or by necessary implication, to the county to make an appropriation out of its general funds to aid in the construction of such high school building.

Our conclusion is that no such authority exists, and the order of the chancellor, appealed from, will be affirmed.

Affirmed.

TYSON, C. J., and SIMPSON and DENSON, JJ., concur.

(157 Ala. 399)

BARRON v. CITY OF ANNISTON.

(Supreme Court of Alabama. Dec. 17, 1908.)

1. CRIMINAL LAW (§ 385*)—EVIDENCE—RES GESTÆ.

Where, on a trial for selling whisky in violation of a city ordinance, a witness testified, describing an interview with defendant, that when he called defendant from his room he paid him for whisky he had bought earlier that day and told him he wanted another pint, a motion to exclude the statement about paying for the whisky previously bought was properly overruled, since it was a part of the *res gestæ*, and such action would have left the sentence without meaning.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 807; Dec. Dig. § 365.*]

2. WITNESSES (§ 372*)—IMPEACHMENT—BIAS.

A witness for the prosecution, on a trial for the violation of a city ordinance, may be asked on cross-examination whether he had not taken enough interest in the prosecution to follow the proceedings before the chancellor on application to reduce bail, to show his animus to defendant.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1192-1199; Dec. Dig. § 372.*]

3. CRIMINAL LAW (§ 1170*)—HARMLESS ERROR—ERRONEOUS EXCLUSION OF EVIDENCE.

The error, if any, in refusing to allow a witness to answer whether it was possible for any one to get into the room of defendant without passing through the room of the witness, was without injury, where the witness subsequently described the location of the rooms.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3147, 3148; Dec. Dig. § 1170.*]

4. MUNICIPAL CORPORATIONS (§ 642*)—VIOLATIONS OF MUNICIPAL ORDINANCES—PROSECUTIONS.

A trial in the city court of a city on appeal from the recorder's conviction of a violation of an ordinance is still the same case and is governed by the same rules as to the admissibility of evidence and the proof necessary for conviction, though the trial in the city court is *de novo*.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 642.*]

5. WORDS AND PHRASES—"QUASI."

"Quasi" is not a very definite term. It marks a resemblance and supposes a difference.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, p. 5883.]

6. MUNICIPAL CORPORATIONS (§ 635*)—VIOLATIONS OF ORDINANCES—PROSECUTIONS—NATURE OF PROCEEDINGS.

A prosecution for the violation of a city ordinance, though not strictly within the definition of a criminal case, because the offense is not against the state in its sovereign capacity, partakes of the nature of a criminal prosecution and is subject to the same rules of evidence, since the city is one of the governmental instrumentalities, clothed with a part of the sovereignty of the state; and this is especially true as to offenses punishable by imprisonment or hard labor.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1400; Dec. Dig. § 635.*]

7. MUNICIPAL CORPORATIONS (§ 642*)—ORDINANCES—VIOLATION—PROSECUTION—APPEAL—REASONABLE DOUBT—PRESUMPTION OF INNOCENCE.

The rule that, to justify a conviction, the evidence must establish guilt beyond a reason-

able doubt, is applicable on trial *de novo* in the city court on appeal from a conviction in the recorder's court for violating a municipal ordinance.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 642.*]

8. WITNESSES (§ 52*)—COMPETENCY—HUSBAND AND WIFE.

Since a prosecution for the violation of a municipal ordinance is subject to the rules of evidence governing a criminal prosecution, the wife of defendant is not a competent witness in his behalf on appeal in such a prosecution to the city court from a conviction in the recorder's court.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 124-136; Dec. Dig. § 52.*]

Appeal from City Court of Anniston; Thomas W. Coleman, Jr., Judge.

J. F. Barron was convicted in the city court on appeal from the recorder's court, of violating an ordinance of the city of Anniston, and he appeals. Reversed and remanded.

Knox, Acker & Blackmon, for appellant. A. T. Agee, for appellee.

SIMPSON, J. The appellant, after having been convicted before the recorder of the city of Anniston, appealed to the city court, and was tried in that court; the form of the action being a complaint claiming \$500 on account of the violation of said city ordinance, and also claiming, in addition, that the defendant should be imprisoned for six months.

The witness Bryant, in describing his interview with the defendant, said that when he called him from his room he paid him for whisky he had bought that morning and told him he wanted another pint; and defendant moved to exclude that part of the testimony about paying for the whisky previously bought. There was no error in overruling said motion. The words objected to were a part of *res gestæ*, and to have stricken them out would have left the sentence without meaning.

The court erred in sustaining the objection to the question, by defendant's counsel to the witness Sweets, as to whether he had not taken enough interest in the prosecution of the defendant to follow the proceedings before Chancellor Whiteside on application to reduce bail. This question was asked on cross-examination, in which great latitude is allowed and the defendant was entitled to have all the facts brought out which might have any bearing on the animus of the witness to him. *Beal v. State*, 138 Ala. 94, 98, 35 South. 53.

If there was error in the refusal to allow the witness Yeatman to answer whether it was possible for any one to get into the defendant's room without passing through his, it was without injury, as the witness afterwards fully described the location of the rooms, from which the court could judge

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

whether defendant's room could be otherwise reached.

The refusal to allow the wife of the defendant to testify in his behalf, and, on the other hand, the refusal to give the charge requested by the defendant as to reasonable doubt, bring up the main question in this case, to wit, the nature of the proceeding and the rules of evidence which should prevail. While the trial in the city court is *de novo*, yet it is still the same case, involving a prosecution for the violation of a city ordinance, and must be governed by the same rules as to the admission of evidence and the proof necessary for conviction. While there seems to be some confusion in the authorities generally as to the nature of such proceedings, a learned annotator suggests that when the proceeding relates to "private corporate purpose," or to the mere collection of a fine, civil proceedings would be proper; yet "considering it as an arm of the government, clothed with sovereign power and endowed with the function of enacting and enforcing laws for the preservation of the public peace and health, the protection of life and property, even to the limit of punishment by forfeiture and imprisonment for the public weal, debt and assumpsit seem alien and vain remedies, and nothing but criminal procedure suggests itself as proper and efficient." 28 Cyc. 781, and note 85.

Our own court, at an early day, held that proceedings for the recovery of fines and penalties are quasi criminal, and "should be conducted with greater regard to strictness than attaches to the pleadings in civil cases," and that the rules with regard to indictments for misdemeanors may, with much propriety, be applied to them. *Brown v. Mayor, etc., of Mobile*, 23 Ala. 722, 724. Again, this court has said that proceedings for the violation of city ordinances are in no sense "civil causes," but are "punitive regulations," and "the object of a proceeding for the violation of them is not the redress for a civil injury, but the punishment of an offender against the peace and good order of society. Hence they are termed 'quasi criminal proceedings.'" *Withers v. State ex rel., etc.*, 36 Ala. 252, 262. Based upon the reasoning of these cases, our court held (previous to the enactment of the statute authorizing defendants in criminal cases to testify) that a defendant, on trial for a violation of a city ordinance, could not testify. *Mayor of Mobile v. Jones*, 42 Ala. 630.

Again it was held that as "a prosecution for a violation of a municipal ordinance, designed for the preservation of the public peace, the security of the person or property, or the protection of public morals," is "a quasi criminal proceeding, and not a civil suit," therefore the costs in such a case could not be taxed against the city on appeal. *City Council of Montgomery v. Foster*, 54 Ala. 62. "Such municipalities are sub-

divisions of the political organization of the state," etc (*Town of Camden v. Bloch*, 65 Ala. 236, 241), and are governed by stricter rules of investigation than civil cases (*Furman v. Mayor, etc., of Huntsville*, 54 Ala. 263). In a recent case, in which we held that a party arrested for a violation of a city ordinance was entitled to a written complaint describing his offense, we pretermitted this question and stated "if it was neither civil nor criminal, but partook of the nature of both, then the right was secured by the common law." *Mayor and Aldermen of Birmingham v. O'Hearn*, 149 Ala. 307, 310, 42 South. 836. In another recent case, in which we affirmed the action of the lower court in discharging a prisoner because of the failure of the affidavit to conform to section 4600 of the Criminal Code of 1896, we said: "The proceeding was quasi criminal. It was commenced by affidavit and warrant, and was essentially in the nature of a prosecution. * * * The fact that the case was triable *de novo* in the city court did not change the character of the proceeding from that of a prosecution criminal in its form and nature to that of a civil action in debt." *City of Selma v. Shivers*, 150 Ala. 502, 43 South. 565, 566.

"Quasi" is not a very definite term. It has been said that it "marks a resemblance and supposes a difference." 23 Am. & Eng. Ency. Law (2d Ed.) 540. While our own court, as well as others, speaks of these proceedings as quasi criminal, neither defines just how far criminal they are; yet we think it safe to say that, while they do not strictly come within the definition of criminal cases (because they are not for offenses against the state in its sovereign capacity), yet, as the city is one of the governmental instrumentalities, clothed with a part of the sovereignty of the state, these offenses—particularly those which may be punished by imprisonment or hard labor—partake so far of the nature of criminal prosecutions that they should be subject to the same rules of evidence. It seems that the legislative intent was to make it clear that this interpretation should be placed upon the charter of the city, for in the amendment thereto it is declared that: "The proceedings on such appeal shall be, in all respects, as prescribed by law in cases of appeals from the judgment of the county court in criminal cases, except as herein changed." Acts 1898-99, pp. 508-516.

The long-established rule that, in order to a conviction, the evidence must establish guilt beyond a reasonable doubt, results from the presumption of innocence which attends every one and the nature of our free government, which jealously guards the liberty of the citizen; and we cannot see why he should be protected against a prosecution from the state, and not be equally protected against a prosecution by one of the governmental instrumentalities of the state.

Consequently the court erred in refusing to give the charges, requested by the defendant, to the effect that, unless, the jury were satisfied of the guilt of the defendant from the evidence beyond reasonable doubt and to a moral certainty, they could not convict. It also follows that the court did not err in refusing to allow the wife of the defendant to testify.

The judgment of the court is reversed, and the cause remanded.

TYSON, C. J., and DOWDELL and DENSON, JJ., concur.

(158 Ala. 323)

BROMBERG v. EUGENOTTO CONST.
CO. et al.

(Supreme Court of Alabama. Dec. 17, 1908.)

1. SPECIFIC PERFORMANCE (§ 75*)—BUILDING CONTRACTS—MATTERS OF DISCRETION.

A contract to lease a certain amount of floor space in a building being erected will not be specifically enforced, where the erection of the building will extend over a considerable period of time and will require the exercise of skill and discretion in placing the beams, etc., so as to give the required space.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 210; Dec. Dig. § 75.*]

2. EQUITY (§ 153*) — GROUNDS OF JURISDICTION.

The equity of a bill will be determined from the facts stated therein, and not from the prayer for relief.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 153.*]

3. INJUNCTION (§ 22*) — GROUNDS FOR RELIEF—OBJECTIONS—FUTILITY OF RELIEF.

An injunction will not be granted to restrain defendant from violating his contract to lease complainant certain floor space in a building in the process of erection, where the building was so far constructed that the violation of the contract was completed when the suit was brought and injunction would be futile.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 20; Dec. Dig. § 22.*]

4. INJUNCTION (§ 37*)—MANDATORY INJUNCTION—MATTERS OF DISCRETION.

A mandatory injunction will not lie to enforce a contract to lease complainant a certain amount of floor space in a building being erected, where its enforcement would require the removal of beams, etc., and necessitate the exercise of skill and discretion in reconstructing the building; it not being feasible for the court to supervise the work.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 57.*]

5. SPECIFIC PERFORMANCE (§ 128*)—RELIEF—COMPENSATION IN LIEU OF SPECIFIC RELIEF.

A contract leasing to complainant floor space in a building being erected, not being enforceable specifically, because of the impossibility of supervising the work, damages for the breach of the contract will not be awarded; complainant's legal remedy being adequate, and no special equities existing which require such incidental relief.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 412-419; Dec. Dig. § 128.*]

Appeal from City Court of Birmingham; C. C. Nesmith, Judge.

Suit by F. W. Bromberg against the Eugenio Construction Company and others. From a decree dismissing the bill, complainant appeals. Affirmed.

Tillman, Grubb, Bradley & Morrow, for appellant. Campbell & Johnson, for appellees.

DOWDELL, J. The appeal in this case is taken from a decree on the demurrer to the bill. The bill is to enforce the specific performance of a contract, and in the alternative, as it is urged in argument, to enjoin the violation of a contract. The contract is for the lease of a storeroom in a proposed building, and by the terms of said lease contract the lessee was to have a certain amount of floor space, of a part of which he complains in his bill he is being deprived of by the respondent, lessor, in the manner of construction of the said building. The question is whether a court of equity will entertain a bill for the enforcement of this contract.

In *Madison Athletic Association v. Brittin*, 60 N. J. Eq. 160, 46 Atl. 652, in speaking of the specific performance of building contracts, it was said by the New Jersey court: "The doctrine of the later cases is that the court will not ordinarily enforce specific performance of building contracts, not only on the ground that damages at law are generally an adequate remedy, but also on the ground of the inability of the court to see that the work is carried out." In *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266, it was said: "There is a class of special and exceptional contracts in which courts of equity refuse to exercise jurisdiction by way of specific performance. These are contracts having such terms and provisions that the court could not carry into effect its decree without some personal supervision and oversight over the work to be done, extending over a considerable period of time, such as agreements to repair or build, to construct works, to build or carry on railways, mines, and the like." In *Kendall v. Fray*, 74 Wis. 26, 42 N. W. 466, 17 Am. St. Rep. 118, which was a suit to compel specific performance of a contract to erect a building on a certain lot, the court, adopting the rule above announced, denied relief. In *Beck v. Allison*, 56 N. Y. 366, 15 Am. Rep. 430, where the suit was for the specific performance of a contract in a lease on the part of the lessor to repair damages by fire, among other things, it was said by the court: "The idea that the court can appoint a receiver to take possession of the property and cause the work to be done with money furnished by the defendant would be, in the language of Lord Worthington, absurd." The relief sought was denied. In a case of our own (*Bridgeport Co. v. American Fire Proof Co.*, 94 Ala. 592, 10 South. 704) it was said: "We

are of opinion that a bill for specific performance would not lie under the facts as they appear in the present case. The consideration offered is 'the erecting and operating of a car factory,' etc. To carry out this agreement requires the exercise of labor and special skill, judgment, and discretion; * * * and, furthermore, a court of chancery will not undertake to enforce a specific performance, where it involves the exercise of special skill, judgment, and discretion"—citing *Iron Age Publishing Co. v. W. U. Tel. Co.*, 83 Ala. 498, 3 South. 449, 3 Am. St. Rep. 758, and *Clark's Case*, 1 Blackf. (Ind.) 122, 12 Am. Dec. 214.

It seems, both on reason and authority, that where the erection of the building requires the exercise of skill, judgment, and discretion a court of equity will not assume jurisdiction for the enforcement of specific performance of a contract in such a case. There can be no doubt that the erection of the building, such as is referred to in the contract in this case, would require the exercise of "special skill, judgment, and discretion," and would extend over a considerable period of time. The erection of such a building would require the services of the architect, the skilled mechanic, and various workmen and superintendents. Necessarily the distribution and placing of the beams, vents, and air-shafts, component parts of such a building, and the very things of which the bill complains as diminishing the "floor space" contracted for in the lease, are involved in the exercise of the required special skill, judgment, and discretion in the construction of the building. Under the authorities cited above, and on the facts stated in the bill, we are clearly of the opinion that there cannot be an enforcement of specific performance of the contract in a court of equity.

It is insisted by counsel for appellant that, even though the appellant be not entitled to have the contract specifically performed by the decree of the court, yet, since his prayer for relief is in the alternative for relief by injunction, that he ought to be granted that relief. The prayer for injunction is in the alternative—to restrain the defendant from violating its contract as to the "floor space" leased to complainant, "or" commanding the respondent to perform its contract in this respect. It is insisted that the bill has equity for this purpose. The equity of a bill is to be determined on the facts stated in the bill, and not on the prayer for relief alone. It appears on the face of the bill that the thing complained of as constituting a violation of the contract, and asked to be enjoined, had already been done, and hence the violation was complete at the time of the filing of the bill. There is, therefore, no room for invoking the doctrine of the interposition of a court of equity to prohibit the violation of a contract. As to the alternative

prayer for a mandatory injunction to compel the respondent "to so distribute the floor space on the ground floor of said building as to give your orator the amount to which he is entitled by the terms of said lease," for the same reasons, in a case like the present one, that a court of equity would decline to enforce a specific performance of the contract, it would refuse to interfere by mandatory injunction. Practically there can be no difference in the application of the two remedies—that of specific performance and mandatory injunction—under the facts in the case. The court, in either event, would be confronted with the proposition of the "special skill, discretion, and judgment" required in the erection of the building. Manifestly the relief sought by injunction would compel a removal of the "beams, vents, and air-shafts" which have already been placed, and, for aught that appears, such a thing, if feasible, could not be accomplished without materially deranging the whole plan of structure of the building. We repeat that under the facts in this case the same principle is involved in the granting of relief by mandatory injunction as in the enforcement of a specific performance of the contract. The case of *Hendricks v. Hughes*, 117 Ala. 591, 23 South. 637, cited by counsel for appellant, is not in point. The facts of the present case clearly differentiate these two cases.

It is further insisted that the bill should be retained for the purpose of compensation in damages. The rule is stated as follows in 20 Ency. Pl. & Pr. p. 483: "The power to grant relief by way of compensation exists only as ancillary or incidental to grant specific performance. It is only under special circumstances and upon peculiar equities, as, for instance, in cases of fraud, or when a party has disabled himself by matters ex post facto from a specific performance, or when there is no adequate remedy at law, that the court awards pecuniary compensation in lieu of other relief. Where the court has no jurisdiction to decree specific performance, and no other special equity intervenes, the bill cannot be retained for the purpose of awarding damages." *Sims v. McEwen*, 27 Ala. 184; *Harrison v. Deramus*, 33 Ala. 463; 1 Pom. Eq. 237.

The bill here must depend for its equity upon the doctrine of specific performance, and, as we have seen, under the facts stated that principle cannot be applied. There is no other special equity shown by the facts that would justify a retention of the bill for the purpose of awarding damages. For this purpose the complainant has a complete and adequate remedy at law.

It follows, from what we have said, that the decree must be affirmed.

Affirmed.

SIMPSON, DENSON, and McCLELLAN, JJ., concur.

(157 A.1.a. 577)

SCARBROUGH v. CITY NAT. BANK.
(Supreme Court of Alabama. Dec. 17, 1908.)**1. BILLS AND NOTES (§ 469*) — ACTIONS — PLEADING — NOTICE OF DISHONOR — NOTICE TO AGENT.**

An allegation that notice of dishonor was given to one who was present at the indorser's place of business and in his employment was a sufficient allegation of notice to the indorser.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1496-1498; Dec. Dig. § 469.*]

2. BILLS AND NOTES (§ 460*)—ACTIONS—PARTIES—JOINDER—MAKER AND INDORSER.

While the payee of a negotiable promissory note may sue both the maker and indorser at the same time in separate actions, in absence of statute he cannot sue them jointly.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1437; Dec. Dig. § 460.*]

3. PARTIES (§ 65*)—ACTIONS—AMENDMENTS—COMPLAINT—STRIKING IMPROPER PARTIES.

The purpose of Code 1896, § 3331 (Code 1907, § 5367), requiring the court, during trial, to permit the complaint to be amended by striking out parties defendant, etc., is to permit improper parties to be stricken without working a discontinuance; and, the maker and indorser of a negotiable note being improperly joined as defendants, the complaint was properly amended by striking out the maker.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 105; Dec. Dig. § 65.*]

4. BILLS AND NOTES (§ 419*)—NOTICE—NOTICE OF DISHONOR — SUFFICIENCY—VERBAL NOTICE.

A verbal notice of dishonor to an indorser is sufficient, even though it was given to the agent of the indorser.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1129; Dec. Dig. § 419.*]

5. BILLS AND NOTES (§ 419*)—NOTICE—NOTICE OF DISHONOR—FORM.

No particular form of notice of dishonor of a negotiable note is necessary; it being sufficient that the party liable is informed of its dishonor and notified that he will be held for payment.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1129; Dec. Dig. § 419.*]

6. BILLS AND NOTES (§ 267*)—LIABILITIES ON INDORSEMENT—INDORSER'S CONTRACT.

The indorsement of a negotiable note is a separate and independent contract that the indorser will pay the note on due presentment and notice of dishonor, that the indorsement and signatures of prior parties to the note are genuine, that the indorsement is valid according to its purported effect, that the parties thereto are competent to contract, and that he himself has title and right to transfer.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 620; Dec. Dig. § 267.*]

7. EXEMPTIONS (§ 92*) — WAIVER—ACTS CONSTITUTING WAIVER.

Const. 1901, § 210, authorizes an exemption of personality to be waived by an instrument in writing, and Code 1907, § 4232 (Code 1896, § 2105), authorizes the waiver of exemptions as to personal property by a separate instrument in writing subscribed by the party making it, or in a promissory note or other written contract executed by him. A note stated that as a part of the consideration "we each, whether maker or indorser," hereby waive all right of exemption of personal property from levy and sale for the collection of the debt; but the indorsement was simply by signing the in-

dorser's name without any such statement. *Held*, that the waiver must be in the writing signed by the party, and the maker could not waive exemption for the indorser, so that the waiver in the note did not operate as a waiver of exemption by the indorser.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 115; Dec. Dig. § 92.*]

Appeal from City Court of Anniston; Thomas W. Coleman, Jr., Judge.

Action by the City National Bank against Eba Scarbrough and another. From a judgment for plaintiff, defendant Scarbrough appealed. Modified and affirmed.

Count 1 of the complaint was against the defendant Gus Woodruff, and contained a claim for attorney's fees and a declaration of waiver of exemptions, with the averment that the note was executed by the defendant Gus Woodruff to one James Keith, Jr., and was by him for a valuable consideration transferred to the City National Bank. The second count claimed of the defendant Eba Scarbrough \$100 due by note executed by Gus Woodruff, with the averment that said defendant Eba Scarbrough indorsed said note, and that demand for same had been made on Gus Woodruff, one of defendants herein and principal on said note, and payment had been refused, of which demand for payment and refusal to pay said defendant Scarbrough had had notice. Then follow claims for attorney's fees and a declaration of waiver of exemptions as to personal property and a proper transfer of the note from payee to present plaintiff. Count 3 is against Eba Scarbrough, and is exactly like count 2, except that no declaration as to the waiver of exemptions is made.

Demurrers were interposed to the complaint by defendant Scarbrough: "(1) Because it fails to show that there was any consideration passing to this defendant for his alleged indorsement of said note. (2) It is not alleged that said note was protested for nonpayment at maturity. (3) It is not shown that this defendant had any legal notice of the dishonor of said note at maturity, or notice of protest thereof. (4) For that the demand for payment made upon the principal, and his refusal to pay the said note as in the said count alleged, does not fix upon this defendant as the indorser thereof any liability to the plaintiff in this case. (5) For that it is shown by the terms of said count that this defendant did not waive rights of exemptions by his indorsement of the said note." He also filed demurrers attempting to raise the question of misjoinder of parties defendant, in that said counts aver causes of action only against Woodruff, and because the suit is brought against the defendant jointly, and no count of the complaint seeks to recover against both of said defendants. The complaint was amended by adding the fourth, fifth, sixth, and seventh counts, which

were practically the same as the original counts, with the exceptions that both defendants were joined in each count. Afterwards the defendant Gus Woodruff was stricken from each count, and the defendant Scarbrough thereupon moved for a discontinuance. The other facts sufficiently appear.

Lapsley & Arnold, for appellant. H. D. McCarty, for appellee.

SIMPSON, J. This suit was brought by the appellee against the appellant and Gus Woodruff. The cause of action is a negotiable promissory note alleged to have been signed by Woodruff and indorsed by Scarbrough, and there are separate counts against each and others against both jointly.

The assignments of error first insisted upon are to the action of the court in overruling demurrers to the complaint as amended. There was no error in overruling said demurrers. The agency of said Noble, upon whom the notice of dishonor of the note is claimed to have been served, is sufficiently set out in the count. It is also sufficiently alleged that said Noble was authorized to receive such notice. At any rate, the count alleges that the notice was given to Noble, "who was present at defendant's (Scarbrough's) place of business and in the service and employment of said Scarbrough," etc., which is sufficient. 3 Randolph on Commercial Paper, p. 241, § 1219; 7 Cyc. 1090. This covers all of the propositions with regard to the agency of Noble, and the question as to whether the written power of attorney, introduced in evidence, authorized Noble to accept notice of dishonor.

The next assignment of error insisted on is that the court erred in allowing the name of Gus Woodruff to be stricken out as a party defendant to the complaint. Section 3331 of the Code of 1896 (section 5367 of the Code of 1907). Our courts have held that one of the objects of this statute was to permit amendments striking out improper parties to the suit, without working a discontinuance of the action. *Vinegar Bend Lumber Co. v. Chicago Title & Tr. Co.*, 181 Ala. 411, 30 South. 776; *Evans Marble Co. v. McDonald & Co.*, 142 Ala. 130, 133, 37 South. 830; *Masterson v. Gibson*, 56 Ala. 56, 58; *Jones v. Nelson's Ex'r*, 51 Ala. 471; *Mock v. Walker*, 42 Ala. 668, 670; *Lealrd v. Moore*, 27 Ala. 326, 328. While the payee of a negotiable promissory note may sue both the maker and the indorser simultaneously in separate actions, yet, without statutory provision to that effect, there is no authority for suing them jointly. 8 Cyc. 292; 3 Randolph on Commercial Paper, § 1669. In the case of *Abercromble v. Knox et al.*, 3 Ala. 728, 37 Am. Dec. 721, referred to by counsel for appellant, the reference is to "separate suits" against all the parties. 3 Ala. 729-731 (37 Am. Dec. 721). Seeking to hold Scarbrough as a joint debtor does not change the fact

that he is merely an indorser. As it was improper to join the maker in a suit against the indorser, there was no error in allowing the complaint to be amended by striking out the maker.

As to the notice of dishonor, the law recognizes a verbal notice as sufficient. *Martin, Dumee & Co. v. Brown, Shipley & Co.*, 75 Ala. 443, 448; *Abels v. Planters' & Merchants' Ins. Co.*, 92 Ala. 385, 9 South. 423; *Stephenson v. Primrose*, 8 Port. 155, 159, 33 Am. Dec. 281; 7 Cyc. 1104. The fact that it was given to an agent cannot change the above principle. The case of *N. Y. & Ala. Contracting Co. v. Selma Springs Bank*, 51 Ala. 805, 23 Am. Rep. 552, did not refer to a notice given to any one at the maker's place of business. In addition to this there was evidence from which the court, acting as a jury, could find that Noble was the agent of defendant, with authority to receive notice.

As to the form of the notice, no particular form is required. "All that is necessary is that * * * the party liable and intended to be charged should be apprised of the dishonor and that he is looked to for payment." *Martin, Dumee & Co. v. Brown, Shipley & Co. supra*. Taking the notice and the reply together, it was open to the judge to infer that it was understood by both parties that the note had been dishonored and that the plaintiff looked to the indorser for payment, and hence that the notice was sufficient.

The only remaining contention is that the court erred in stating, in the judgment, that said indorser had waived the benefit of the exemption law as to personal property. The note contains, in the face of it, this clause: "And as a part of the consideration of this note, we each, whether maker or indorser, agree and hereby waive all right to have any of our personal property exempted from levy and sale under legal process for collection of this debt, whether under the laws of Alabama or any other state in the Union." But the indorsement was simply by signing the name, without any such statement. The law is clear that the indorsement is a separate and independent contract, and that the only contract of the indorser is, "first, that it [the note] shall be paid on due presentment and notice of dishonor; second, that the instrument and the signatures of all prior parties upon it are genuine; third, that the instrument is valid according to its purport; fourth, that the parties to it are competent to contract; and, fifth, that the indorser himself has the title to the paper and the right to transfer it." *Jordan v. Long*, 109 Ala. 414, 417, 19 South. 843, 844, and authorities cited.

Section 210 of the Constitution of 1901 authorizes the right of exemption, as to personal property, to be waived by an instrument in writing; and section 4232 of the Code of 1907 (section 2105, Code 1896) pro-

vides that "as to personal property the waiver may be made by separate instrument in writing subscribed by the party making the same, or it may be included in a bond, bill of exchange, promissory note, or other written contract executed by him." The only contract "executed" by the indorser is the simple indorsement, which has a certain definite meaning and certain limitations. He has not "executed" any writing whereby he has waived his exemption. The waiver of the exemptions is no part of the obligation of the note, but simply an additional agreement which the maker of the note makes. He cannot make it for the indorser, and the indorser cannot be held to have waived his exemption by implication. Both the Constitution and the statute show a clear intention that the waiver must be in the writing which the party signs. The court therefore erred in holding that Scarbrough had waived his right of exemption.

The judgment of the court will be here corrected, by striking out the second paragraph, relating to waiver of exemptions, and, with said correction, the judgment of the court is affirmed.

Corrected and affirmed.

TYSON, C. J., and DOWDELL and DENSON, JJ., concur.

(158 Ala. 453)

LOUISVILLE & N. R. CO. v. CANNON.
(Supreme Court of Alabama. Dec. 17, 1908.)

1. CARRIERS (§ 275*)—PASSENGERS—ACTIONS—COMPLAINT—PROOF—VARIANCE.

The complaint in an action against a railroad company because its gateman at a union depot misdirected plaintiff as to a train of another road, which alleges that plaintiff purchased a ticket over the latter road from defendant and that defendant sold him the ticket, is not supported by proof that the ticket agent at the depot sold tickets for all the roads entering it.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 275.*]

2. CARRIERS (§ 275*)—PASSENGERS—ACTIONS—COMPLAINT—ALLEGATIONS—MATERIALITY.

The allegation of a complaint, in an action against a railroad company because its gateman at a union depot negligently misdirected plaintiff as to a train of another railroad, that plaintiff purchased a ticket over the latter road from defendant is descriptive of the wrong imputed to defendant, and must be proved, though the pleader might have confined his averment to the allegation that he had purchased a ticket, omitting the allegation that it was purchased from and sold by defendant.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 275.*]

3. CARRIERS (§ 265*)—PASSENGERS—ACTIONS—LIABILITY.

Where the complaint, in an action against a railroad company because a gateman at a union depot negligently misdirected plaintiff to a train of another road, sought to fix liability on defendant on the ground that the gateman was its agent, and not for the misfeasance of a joint agent, to whom defendant bore the relation,

with others, of principal, proof that the gateman was the servant of defendant, and while acting within the scope of his employment as such negligently misdirected plaintiff as to the train, and that as a proximate consequence thereof plaintiff suffered injury, authorized a recovery, irrespective of the proposition that if the gateman was the joint agent of the several roads entering the union depot, defendant could be liable only in consequence of negligence with respect to duties owed in performance by such joint agent to defendant.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 265.*]

Appeal from City Court of Montgomery; A. D. Sayre, Judge.

Action by Adolphus Cannon, pro am, against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

George W. Jones and S. L. Fields, for appellant. L. A. Sanderson, for appellee.

MCCLELLAN, J. The complaint consists of two counts, the gravamen of each of which is that a gateman in the employ and service of the defendant (appellant) negligently misdirected the plaintiff in respect of a train he desired to take and to passage on which he was entitled. To both these counts of the complaint this averment is, in substance, common: " * * * That the defendant owned, operated, and conducted a passenger depot in the city of Montgomery, and sold tickets for passage on its railway and on various and other sundry railroads that operated in and carried passengers into and out of the city of Montgomery, and also at said time sold tickets for passage on the Atlantic Coast Line Railroad operating [in] and out of the city of Montgomery to various and sundry points; * * * that he [the plaintiff] purchased a ticket from defendant at defendant's passenger depot over the Atlantic Coast Line Railroad from Montgomery to Ramer, Ala. * * * " The allegation that Cannon's ticket from Montgomery to Ramer, over the Coast Line road, was sold by the defendant to plaintiff is wholly without support in the testimony in the transcript before us. The only effort to produce any testimony bearing even remotely upon this allegation was through the ticket agent, introduced by defendant, Suratt. Suratt testified "that he was ticket agent at the Union Depot; that he sold tickets for all the roads entering the Union Depot." Further testimony from this witness, with reference to the separation, of funds secured from sales of tickets over each road, was disallowed at the instance of the plaintiff. As is manifest, the quoted testimony from Suratt did not alone tend to the proof of the allegation that the defendant sold this ticket from Montgomery to Ramer. Indeed, the testimony did not assume to be directed to the sale of this particular ticket. The averment under consideration being wholly unsupported in the evidence, the inquiry is

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

whether that averment was material? We think so; and the result is that the affirmative charges as to each count, requested by the defendant, should have been given.

Our reasons for the conclusion will be briefly stated. The averment was descriptive of the wrong imputed to the defendant. It was necessary, in this instance, and obviously so regarded by the pleader, that plaintiff's right to pass the entrance gate and gateman be predicated upon a ticket entitling him to take passage on a train within the inclosure. The source of the prerequisite is flatly ascribed in the complaint to the defendant; and this, notwithstanding the place of destination was on the Coast Line's railway, and not on that of the defendant. The pleader might well have confined his averment, in this respect, to the allegation that he had purchased a ticket from Montgomery to Ramer over the Coast Line's railway, omitting the allegation that it was purchased from and sold by the defendant. Having, however, chosen to particularize, as this pleader did, it was necessary that he carry the averment in proof. The following decisions, with others therein cited, of this court, while not in exact point, announce the rule now applied: *Smith v. Causey*, 28 Ala. 655, 65 Am. Dec. 372; *A. G. S. R. R. Co. v. McWhorter* (Ala.) 47 South. 84; *Sou. Ry. Co. v. Hundley* (Ala.) 44 South. 195.

Since another trial must be had, it is proper that we should state our opinion that the complaint not only sets forth a good cause of action upon the alleged negligence of the gateman, but that no ground of the demurrer thereto is well taken. *Robertson v. L. & N. R. R. Co.*, 142 Ala. 216, 37 South. 831. The insistence of counsel for appellant that if the gateman, to whom the negligence is imputed, was the joint agent of the several roads entering the Union Station, then this defendant could be liable only in consequence of negligence with respect to duties owed, in performance, by such joint agent to this defendant (see *Dean v. E. T., V. & G. Ry. Co. and L. & N. R. R. Co.*, 98 Ala. 586, 13 South. 489), is not a material inquiry, in this case, as the complaint is now framed, for the reason that both counts of the complaint seek to fix liability upon the defendant for the misfeasance of its agent, and not for the misfeasance of a joint agent to whom the defendant bore the relation, with others, of principal.

The court below correctly abstracted from the case the issue of fact tersely stated in the oral charge, viz.: Was the gateman the agent or servant of the defendant, and, if so, while acting within the scope of his employment as such, did he negligently misdirect this plaintiff in respect of the train on which he was entitled and desired to travel, as a proximate consequence of which the plaintiff suffered injury? And on the proof

on that issue contained in this record the court properly submitted the decision of the issue to the jury.

It is unnecessary to consider other questions. For the error in refusing the affirmative charges, on the theory stated, the judgment is reversed, and the cause is remanded. Reversed and remanded.

TYSON, C. J., and SIMPSON and DENSON, JJ., concur.

(157 Ala. 17)

GUARRENO v. STATE.

(Supreme Court of Alabama. Dec. 17, 1908.)

1. INTOXICATING LIQUORS (§ 206*)—ILLEGAL SALE—INDICTMENT.

An indictment for selling intoxicating liquors without a license held good against demurrer.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 206.*]

2. CRIMINAL LAW (§ 1170½*)—QUESTIONS TO WITNESS—OBJECTIONS OVERCOME BY ANSWER.

Objection that a question whether witness got any liquor from defendant specified no time was overcome by the answer, fixing the time.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3130; Dec. Dig. § 1170½.*]

3. INDICTMENT AND INFORMATION (§ 132*)—ELECTION BETWEEN OFFENSES.

Where the counts of an indictment charge different offenses of the same class, the doctrine of election of offenses does not apply; but the state may prove all the offenses.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 433, 434; Dec. Dig. § 132.*]

4. CRIMINAL LAW (§ 1170*)—TRIAL—CURING ERRORS—ADMISSION OF EVIDENCE.

Any error in sustaining objection to a question was cured by the court subsequently allowing the witness to testify to substantially the same matter.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3147, 3148; Dec. Dig. § 1170.*]

5. CRIMINAL LAW (§ 304*)—JUDICIAL NOTICE—BOUNDARIES OF CITY.

The court is charged with judicial knowledge that a place is not within the corporate limits of a city.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 705; Dec. Dig. § 304.*]

6. CRIMINAL LAW (§ 814*)—ABSTRACT CHARGES.

A charge as to a matter as to which there is no evidence is properly refused as abstract.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1979; Dec. Dig. § 814.*]

Appeal from City Court of Bessemer; William Jackson, Judge.

Jasper Guarreno was convicted of retailing without license, and appeals. Affirmed.

The indictment was as follows: (1) Jasper Guarreno sold spirituous, vinous, or malt liquors without a license and contrary to law. (2) Jasper Guarreno did sell, give away, or otherwise dispose of spirituous, vinous, or malt liquors without a license and contrary

to law. (3) Jasper Guarreno did unlawfully sell, give away, or otherwise dispose of spirituous, vinous, or malt liquors, intoxicating bitters, or cordials, or fruits preserved in alcoholic liquor, in Jefferson county, Ala., not in an incorporated town or city having police regulation both by day and by night. (Formal parts omitted.)

Demurrers were assigned to the first count: "(1) The place where sold is not alleged, as required when charging a violation of a local prohibition law. (2) Because it charges a violation of the revenue law, and not the prohibition law within a prohibited locality. (3) Because it does not allege that the sale was not within the exceptions provided by the local law. (4) Because it does not appear whether the defendant is charged with a violation of the general revenue law or of a special prohibitory law." To the second count, the same grounds as assigned to the first count, with the additional ground that it contains three alternative or disjunctive averments: "Sell, give away, or otherwise dispose of," and to give away or otherwise dispose of charges no criminal offense known to the law or violative of the special statutes of Jefferson county.

The solicitor asked Marbut, "Did you get any beer, ale, etc., from Jasper Guarreno?" Objection was interposed, because it fixed no time, and the witness answered that shortly before the finding of the indictment he bought beer, etc., from defendant. Dennis was offered as a witness, and testified that he procured beer, etc., at a different time from that testified to by Marbut. Dr. Schulhofer offered to testify concerning the ingredients of certain drinks sold to Eidge, and an objection was sustained to the question; but the court offered to permit witness to testify what ingredients the hop ale was made of that he sold Eidge, and state whether or not, in his opinion, the ingredients composing the hop ale would produce intoxication.

T. T. Huey, for appellant. Alexander M. Garber, Atty. Gen., for the State.

DENSON, J. The demurrer to the indictment was properly overruled. Guarreno's Case, 148 Ala. 637, 42 South. 833.

If the objection to the question propounded to witness Marbut, was meritorious when made, his testimony to the effect that the purchase of liquor made by him of the defendant "was shortly before the finding of the indictment" overcame the point of the objection.

The indictment contains three counts, and charges two or more misdemeanors. The prosecution was entitled to introduce evidence to establish the offense alleged in each count. Therefore no ground for the doctrine of election of offenses was presented, and the court did not err in overruling the objection inter-

posed to the testimony of Dennis. *Untreinor's Case*, 148 Ala. 133, 41 South. 170.

If the court erred in sustaining the objection to the question propounded to the witness Dr. Schulhofer, the error was cured by the court's subsequently offering to allow defendant to prove by that witness what ingredients composed the "hop ale," and to allow the witness to then testify whether or not, in his opinion, the ingredients composing the ale would produce intoxication. Moreover, this witness had testified substantially that the ale sold by defendant was neither spirituous nor vinous liquor, and that it did not contain malt.

The court orally charged the jury "that as matter of law, at the time of finding the indictment in this case, Twelfth avenue and Nineteenth street, Bessemer, was not in an incorporated town having police regulations." An exception, reserved by the defendant, presents this charge for review. The point of this charge is that the court was judicially cognizant of the fact that the place at which the evidence tended to show the sale of the liquor was made was not within the corporate limits of the city of Bessemer. Courts are charged with judicial knowledge of the boundaries of incorporated towns and cities, and the proposition asserted in the charge is within this principle. Therefore no error was involved in the giving of the charge.

The general affirmative charge, as well as the general charge in respect to count 8 of the indictment, invaded the province of the jury, and both were well refused.

The record contains no evidence that the sale was made in an incorporated town or city. Therefore charge 4, in defendant's series, was abstract, for which reason it was properly refused.

No error appearing in the record, the judgment of conviction is affirmed.

Affirmed.

TYSON, C. J., and SIMPSON, ANDERSON, and McCLELLAN, JJ., concur.

(157 Ala. 237)

STOKES v. DIMMICK.

(Supreme Court of Alabama. July 3, 1908.
Rehearing Denied Dec. 24, 1908.)

1. ABATEMENT AND REVIVAL (§ 9*)—PENDENCY OF OTHER ACTION—IDENTITY OF PARTIES AND CAUSE OF ACTION.

Pendency of suit by S. against a railway company and D. and J., who with S. constitute its board of directors, praying for a receiver to take charge of and operate the road, for construction of the contract between S. and D., to determine whether any of the indebtedness incurred thereunder is a proper charge against the company, and to "marshal the securities," and for sale of the company's property, to pay its debts and distribute the assets, is not a bar to a subsequent suit by D. individually against S. individually, alone, for a receiver, not to take charge of and operate the road, but merely of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

certain timber interests, which, it is claimed, are owned jointly by D. and S., and also of the shares of stock of the company owned by S., and claimed to have been pledged by him to D. for debts alleged to be due, and also praying that the property be sold and subjected to payment of the debts; the first bill relating entirely to corporate matters, and the second only to individual interests.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. § 74; Dec. Dig. § 9.*]

2. PLEDGES (§ 18*)—CONSTRUCTION OF CONTRACT.

The agreement, by which D. advanced money to S., and S. pledged his interest in timber and his stock in a railroad to secure repayment, providing that D. should be first paid out of the proceeds of the sale of the timber before S. should receive anything therefrom, does not mean that he was not entitled to be paid at all, if he and S. could not agree on a sale of the timber.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 41; Dec. Dig. § 18.*]

3. PLEDGES (§ 53*)—ENFORCEMENT.

Where the interest of a person in standing timber with right to remove the same is pledged, and the time limited for the removal is near at hand, and the state of feeling between pledgee and pledgor is such that they probably cannot agree, and the pledge does not provide a way for enforcing the lien, equity will supply the remedy and enforce the lien.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 129; Dec. Dig. § 53.*]

4. PLEDGES (§ 44*)—TIME FOR PAYMENT.

Where no time is fixed for payment of a debt for which property is pledged, a present liability will be presumed.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 103; Dec. Dig. § 44.*]

5. PLEDGES (§ 57*)—FORECLOSURE—PRAYER.

A bill, showing that the interests in several tracts of standing timber were pledged for payment of various amounts, does not seek to split up the securities by selling only a part thereof, though the first prayer asking for a receiver mentions only one of the tracts; a later prayer being for a decree ordering the sale of all the property pledged.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 185; Dec. Dig. § 57.*]

6. PLEDGES (§ 57*)—ENFORCEMENT—PRAYER OF BILL.

Though in a prayer of a bill there is an omission of some words, yet, its intent to ask for a decree for sale of the property pledged for payment of the debts being clear, it will be so construed; there having been no demurrer.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 185; Dec. Dig. § 57.*]

7. PLEDGES (§ 19*)—DEBTS SECURED.

Where a pledge was made to complainant to secure any debt he might have to pay for the A. Company, and thereafter the company authorized J., its vice president, to borrow money to effectuate a trade with the M. Company, whereby the M. Company should cancel a claim against it and transfer property to it, but instead thereof complainant purchased the property and took a transfer of it and an assignment of the debts, thus placing himself in the position of the M. Company, the matter is not covered by the pledge.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 58-63; Dec. Dig. § 19.*]

Appeal from City Court of Montgomery; A. D. Sayre, Judge.

Suit by J. W. Dimmick against M. C. Stokes. Decree for complainant. Defendant appeals. Affirmed.

J. M. Chilton, for appellant. W. F. Thetford, Jr., and Gunter & Gunter, for appellee.

SIMPSON, J. The bill in this case was filed by the appellee, against the appellant, and sought to collect certain debts, by the appointment of a receiver and the sale of certain property which had been pledged for the payment of said debts. The allegations of the bill are, in substance: That said appellant (Stokes) had obtained from one Smith an option on the timber on certain lands, and had also obtained from one Robinson a conveyance of the timber on certain other lands, to be paid for in the future; that on August 23, 1904, said respondent (Stokes) entered into an agreement with the said complainant (Dimmick) by which, in consideration of \$5,000 cash, and \$13,699.60 due November 23, 1904, said Stokes conveyed to said Dimmick one-half interest in said timber contracts, also 166⅔ shares of the capital stock of the Alabama Central Railway, being two-thirds of the entire stock of said railway company, and it was therein agreed that said Dimmick should receive, from the proceeds of timber sold, \$16,699.61 and any further sums advanced by him to finish said railroad, before Stokes should participate in the proceeds; also, that the interest of Stokes in the timber and his stock in said railway should be held by Dimmick to secure any debts that Dimmick might pay for Stokes or said railway company, not stipulated in the contract. It was also agreed that Stokes should be general manager of said railway, "subject to the approval of the stockholders." On October 18, 1904, said Dimmick loaned to said Stokes \$750 and took his note therefor, due January 18, 1905; the agreement being—as shown by a letter and the note—that the stock in said railway owned by Stokes, being 83⅓ shares, should be held as collateral by Dimmick to secure said note, also that said note and the \$16,699.61 should be paid out of the proceeds of timber sales before Stokes should participate in profits from sales of timber or property of said railway. On October 27, 1904, Stokes and Dimmick entered into another contract, reciting that Dimmick had furnished \$3,750, and agreed to furnish \$13,699.61 to pay Scott & Sons for their interest in the capital stock of said railway and their interest in the timber contracts, and had agreed to furnish \$3,000 to complete the first five miles of said railway, and Stokes pledged his stock in said railway and his interest in the timber contracts to secure the payment of said several amounts, aggregating \$20,500, which were to be paid out of sales of timber. On June 21, 1905, M. M. Smith, the party from whom 3,500 acres

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of said timber land had been bought, entered into an agreement with said Stokes and Dimmick, by which certain parts of the timber were reconveyed to said Smith, in consideration of which said Smith acknowledged full payment for the timber, with certain other stipulations. On August 28, 1905, one Robinson, from whom the other timber had been purchased or optioned, executed a paper extending the time of payment for "two years from October 27, 1905."

The bill alleges: That said complainant, Dimmick, has paid out in all \$42,000, or more, under the various agreements, for which said timber and stock in said railway are pledged; that the time allowed for cutting said timber will expire on October 27, 1907; that it will require at least four months to remove it; that Stokes has no other property; that the contracts do not authorize complainant to sell said timber; that said Stokes is hostile to him and refuses to agree to sell said timber; that one item of the advances made by complainant was \$10,000 paid to the Mobile & Ohio Railroad Company for certain steel rails on the track and an engine and a passenger coach, which had been leased by said Mobile & Ohio Railroad Company to said Alabama Central Railway, and the lease had expired, so that it became necessary to buy said property, or the railway would be deprived of the use of same; that the amount due said Mobile & Ohio Railroad Company was \$17,000, but, in consideration of said \$10,000 paid by complainant, said Mobile & Ohio Railroad Company executed a conveyance of said property to complainant; that, before the consummation of said sale, he had procured an option and offered to transfer said option to purchase said property, but said railway company, not having the money, adopted a resolution authorizing the purchase of said property, by borrowing the money, and pledging the property of said corporation, and complainant made arrangements to lend said money to said railway company, but said Stokes protested against said action, insisting that said sum advanced by complainant should be covered by the contract existing between him and Dimmick. It is also alleged that said Stokes had filed a bill to place the affairs of the said railway company in the hands of a receiver, to sell its property and distribute the proceeds, and that this was done for the purpose of depreciating the market value of its stock. The bill prays: First, for a receiver of the Robinson land and of the shares of stock, that said property be sold to the highest bidder, and the proceeds brought into court, and applied to the payment of the debts due complainant, with a reasonable attorney's fee for the collection of the \$750, in accordance with the provisions of the note; second, that it be referred to the register to ascertain the amount due complainant, under said several contracts; third, that, upon the coming in of said report, a decree be rendered "directing

that all said property pledged for the payment of said debts, so ascertained, under the orders and directions of this court," be sold; and, fourth, for general relief. The answer alleges that, before the bill in this case was filed, to wit, on January 5, 1907, respondent filed his bill in the chancery court against Dimmick and others, that a decree had been rendered therein appointing a receiver, and that the bill is still pending.

The first insistence is that the chancery court, having, by said bill, acquired jurisdiction of the subject-matter of this suit, the present bill is without equity. The bill in chancery, as shown by Exhibit A to the answer, was filed by said Stokes against the "Alabama Central Railway, Joseph W. Dimmick (the complainant in the present case), and J. P. Dimmick," who, with complainant, Stokes, constitute the board of directors of said railway company, and the prayers of said bill were: First, for a receiver to take charge of and operate said railway; second, to construe the contract between said Stokes and Dimmick, for the purpose of determining whether any said indebtedness is a proper charge against the corporation, and to "marshal the securities"; third, to decree the sale of the property of the corporation, to pay all debts properly owing by it, and distribute the assets. In the present bill said railway company is not a party defendant or complainant, nor are its directors as such, but the bill is by J. W. Dimmick, individually, against said Stokes, individually, and prays for a receiver, not to take charge of and operate the railway, but merely of certain timber interests which, it is claimed, are owned jointly by the parties complainant and defendant, and also of the shares of capital stock in said railway owned by said Stokes and claimed to have been pledged for the debts alleged to be due, and that said property be sold and subjected to the payment of said debts. The bill in the chancery court relates entirely to corporate matters, while this one touches only individual interests. While it is true that in the chancery court case the bill prays for a construction of the contract between said Stokes and Dimmick, yet it is only for the purpose of ascertaining whether said railway company is responsible for any of the debts referred to. The receivership of the railway might be continued, but the interest in and ownership of the capital stock would not be in any way affected thereby, and the stock might be sold either privately or publicly, without, in any way, interfering with the receivership of the railway. The timber which is sought to be placed in the hands of the receiver, in this case, is not the property of the railway company, but the property of the individuals, Stokes and Dimmick. Whatever may be intended by the prayer in the chancery bill to marshal the securities, it cannot refer to any securities between the parties to this bill, but only to securities held by the rail-

way company, if there were any such. The pendency of the chancery proceedings is no bar to the prosecution of this case. *Tutwiler v. Tuscaloosa Coal, Iron & Land Co.*, 89 Ala. 391, 399, 7 South. 398; *Daniel Kaine* (D. C.) 35 Fed. 785, 788.

The various contracts set out in the exhibits and averments of the bill show that Dimmick advanced the sums mentioned to Stokes, and Stokes thereby became his debtor, and his interest in the timber, as well as his stock in the railway, was pledged to secure the payment of said sums of money. The exhibits are part of the bill, and will, of course, be looked to in ascertaining the terms of said indebtedness. The provisions in said contracts that said Dimmick was to be first paid out of the sales of the timber do not indicate that he was not entitled to be paid at all, if he and Stokes could not agree on a sale of the timber; but this was a provision for the protection of Dimmick, declaring his lien on the share of Stokes, and that Stokes was not to participate in the proceeds of sale until Dimmick was paid. The construction contended for by the appellant would enable Stokes, by refusing to agree to the sale of timber, to prevent the complainant from ever collecting the debts due him. As it is shown that the limited time for the removal of the timber is near at hand, that the state of feeling between the parties is such that it is not probable they can agree, and that the property is pledged to the complainant, but that no way is provided by which he may enforce his lien, it is the proper province of a court of equity to supply the remedy and enforce the lien. There is no effort to enforce a personal liability against Stokes, but only to subject the property which he has pledged for the payment of the debt, and, even if it be true, as contended by the appellant, that no time is fixed for the payment of the debts, the law will presume a present liability. *Waring v. Henry & Mott*, 30 Ala. 729.

The contention of appellant that the bill, in this case, is an effort to "split up" the securities, by selling only a part thereof, is not borne out by the record. The bill and exhibits show that not only one tract, but all of the timber interests were pledged for the payment of the various amounts advanced by said Dimmick; and while the first prayer for relief in the bill does mention only the Robinson land, in asking for a receiver, yet the third prayer is for a decree ordering the sale of all of the property pledged. It is true that, in this second prayer, there is in the record an omission of some words, but the intent is clear, and, as there was no decree on demurrer to it, it must be construed as stated, and the prayer for general relief is also added. There is no uncertainty as to the objects sought by the bill. It seeks no personal decree against Stokes, but shows

that all of the timber interests are pledged, and seeks to enforce that lien. As to the manner of enforcing that lien, the court will decide.

It is next objected that the amount of \$10,000 paid to the Mobile & Ohio Railroad Company cannot be included in the amounts for which the property was pledged. The facts, in regard to this item, have been hereinabove set out. The bill and exhibits show that said Stokes had agreed to build the railway in question, was interested in the project, and made various agreements with Dimmick for the purpose of carrying out that enterprise, and that the property was pledged to Dimmick to secure, not only amounts advanced to Stokes, but "such further sums of money advanced by him to finish the road," and "any debts the party of the second part (said Dimmick) may have to pay for the party of the first part, or the Alabama Central Railway Company, that are not stipulated in the contract." From the answer and exhibits it appears that the action of the board of directors of the Alabama Central Railway Company was to authorize J. P. Dimmick, the vice president, to borrow money to effectuate the trade with the Mobile & Ohio Railroad Company. The facts set out do not show a borrowing, under the terms of the resolution, but a purchase by J. W. Dimmick, who took an assignment of the debts and a transfer of the property, placing himself in the position of the Mobile & Ohio Railroad Company, from which it follows that the complainant has not placed himself in position to claim the enforcement of his lien, as to this \$10,000 item. Consequently, this item will not be taken into the accounting.

The decree of the chancellor is affirmed.

TYSON, C. J., and ANDERSON and DENSON, JJ., concur.

(158 Ala. 477)

SOUTHERN RY. CO. v. FORRISTER.

(Supreme Court of Alabama. Dec. 17, 1908.)

1. RAILROADS (§ 394*)—OPERATION—INJURIES TO PERSONS ON TRACKS—PLEADING.

Where the complaint in an action for death of a child run over by a train avers simple negligence, and fails to show either that the child was not a trespasser on defendant's track or that defendant's servants in charge of the train became aware of her perilous situation on the track in time to prevent the injury, it is insufficient on demurrer, since a child, as well as an adult, may be a trespasser, and ordinarily a railroad company is under no more obligation to keep a lookout for children who, without enticement for which it is responsible, may go on the track at a place where they have no right to be, than to look out for adults.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1335; Dec. Dig. § 394.*]

2. RAILROADS (§ 378*)—OPERATION—INJURIES TO PERSONS ON TRACKS—CONTRIBUTORY NEGLIGENCE—CHILDREN.

The presumption, which an engineer has a right to indulge in, that a person on a railroad

track will get off, does not extend to a child 15 months of age; it not being reasonable to presume that one so young would appreciate the peril of an approaching train, or have sufficient judgment or discretion to extricate herself.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1282; Dec. Dig. § 378.*]

3. NEGLIGENCE (§ 95*)—CONTRIBUTORY NEGLIGENCE OF PARENT—IMPUTATION TO CHILD.

Contributory negligence of the parents of a child 15 months of age, killed by being run over by the train, will not be imputed to the child.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 151-156; Dec. Dig. § 95.*]

4. RAILROADS (§ 382*)—OPERATION—INJURIES TO PERSONS ON TRACK—DEFENSES—CONTRIBUTORY NEGLIGENCE.

In an action by the personal representative of a child 15 months of age, killed by being run over by a railroad train, contributory negligence of the deceased is not available as a defense.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1297-1304; Dec. Dig. § 382.*]

5. EVIDENCE (§ 539½*)—EXPERTS—COMPETENCY—KNOWLEDGE.

In an action for death caused by being run over by a train, a witness who testified that she lived near a railroad all her life, and knew "the blows of an engine, and that there were two long blasts of the whistle," was competent to testify to the meaning of such signal.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 539½.*]

6. RAILROADS (§ 397*)—INJURIES TO PERSONS ON TRACKS—EVIDENCE.

In an action for death caused by being run over by a train, testimony as to the frequency of the use of a path along the side of a track by the public, where the accident occurred, at and prior to the time of the accident, was admissible to fix a knowledge of conditions on the defendant and its servants.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1347, 1348; Dec. Dig. § 397.*]

7. EVIDENCE (§ 539½*)—OPINIONS—COMPETENCY OF WITNESSES.

In an action for death caused by being run over by a train, a witness who had been an engineer for 2 or 3 years, about 20 years previous to the trial, and had since that time observed the operation of trains, and for the past 3 or 4 years lived near the defendant's railroad, and had noticed the trains operated on the railroad, equipped with air brakes, was qualified to give his opinion as to within what distance a train could be stopped on a straight track with slight upgrade, equipped with air brakes, drawing 7 or 8 cars, and running at a speed of 35 miles an hour.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2351; Dec. Dig. § 539½.*]

8. RAILROADS (§ 400*)—INJURIES TO PERSONS ON TRACKS—QUESTIONS FOR JURY.

Where, in an action for death caused by being run over by a train, the evidence tended to show that the track where the accident occurred was straight for a distance of about two miles in the direction from which the train was approaching, and that the accident occurred in the daytime, with nothing to obstruct the view, and that the engineer was looking ahead, the question whether the engineer did or did not see the person killed on the track was one for the jury, though the engineer testified that he did not see the obstruction.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 400.*]

9. RAILROADS (§ 378*)—OPERATION—INJURIES TO PERSONS ON TRACKS—NEGLIGENCE OF ENGINEER—WANTONNESS.

Where the engineer of a train, which ran over a child, saw the child on the track ahead of the approaching train, and with reckless indifference of consequences neglected to use preventive means to avoid the injury after discovering the peril, if discovered in time for preventive effort, he was guilty of wanton wrong.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1281, 1282; Dec. Dig. § 378.*]

Appeal from Circuit Court, Jackson County; W. W. Haralson, Judge.

Action by William A. Forrister, administrator, against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The second count is in the following language: "Plaintiff, William Forrister, as administrator of the estate of Alma Forrister, deceased, claims of the defendant Southern Railway, a corporation, the sum of \$1,999 as damages, for that, to wit, on or about the 23d day of October, 1906, plaintiff's intestate was a minor, of the age of 15 months, and on said date the defendant, by its servants and agents, was operating a railroad in this county for the transportation of freight and passengers, that on said date the agents and servants of defendant were then and there running a freight train on defendant's said road near Larkinsville, in this county, and that the engine of said freight train ran against plaintiff's intestate and killed her; and plaintiff avers that the death of intestate was caused by reason of, and as the proximate consequence of, the negligence of the agents and servants of the defendant then and there running said freight train, in this: That plaintiff's intestate was on the track of said railroad, and in danger of being run over by said train; that said agents and servants of defendant saw plaintiff's intestate on said track, and saw the peril of said intestate from said train; and that after the discovery of the peril of plaintiff's intestate the agents and servants of defendant negligently ran the engine of said train against said intestate and killed her." (4) Same as 2, down to and including the words "and killed her" where they first occur in said count, and the following: "And plaintiff avers that the place where plaintiff's intestate was killed by said train was a place where the public were accustomed with frequency and in considerable numbers along the track of said railway at and before the time plaintiff's intestate was killed; that said place of killing was in a thickly populated neighborhood near said town of Larkinsville; that the alleged constant use of said railroad track by the public at said place, and at or about said town, and prior thereto, were facts well known to the agents and servants of defendant in charge of said train; that running a train at a high rate of speed at said time

and place, without signals of approach, or without keeping a proper lookout, was dangerous to persons in exposed positions on this track at said time and place; that the agents and servants of defendant then and there in charge of said train negligently maintained great speed in the running thereof at said time and place, without keeping a proper lookout, and by reason of which negligence, and as a proximate consequence thereof, the engine of said train ran against plaintiff's intestate and killed her."

Demurrers to the first count were interposed as follows: "(1) Because it does not appear therefrom that said agents or servants of defendant could have stopped said train in time to have prevented the injury. (2) Because it does not appear therefrom that said employes saw intestate in a position of peril in time to have prevented injuring her. (3) Because it seeks to recover for the negligent killing of a trespasser." The following demurrers were interposed to count 4: "(1) It appears therefrom that said intestate was a trespasser on the track, and it does not appear that said agents or employes were guilty of any negligence after the discovery of her peril, or were guilty of wantonly or willfully killing her. (2) Under the facts alleged therein, no cause of action is stated for the killing of plaintiff's intestate. (3) It does not appear therefrom that said agents or employes discovered intestate's peril in time to have prevented stopping or injuring her."

The other facts sufficiently appear in the opinion of the court. There was judgment for plaintiff in the sum of \$900.

Humes & Speake, for appellant. Bilbro & Moody, for appellee.

DOWDELL, J. Considering the assignments of error in the order in which they are argued by counsel for appellant, the first question presented is on the demurrer to the fourth count of the complaint. The fourth count in terms avers simple negligence, and "fails to show either that plaintiff's intestate, when injured, was not a trespasser on defendant's track, or that defendant's servants in charge of the train became aware of her perilous position on the track and were thereafter guilty of actionable misconduct." *Gadsden & Attalla Ry. Co. v. Julian, Adm'r*, 133 Ala. 371, 32 South. 135, and cases there cited. "A child, as well as an adult, may be a trespasser; and ordinarily a railroad company is under no more obligation to keep a lookout for children who, without enticement for which it is responsible, may go on the track at a place they have no right to be, than to look out for adults." *Gadsden & Attalla Ry. Co. v. Julian, Adm'r*, supra; *Highland Ave. & B. R. R. Co. v. Robbins*, 124 Ala. 113, 27 South. 422, 82 Am. St. Rep. 153; *A. G. S. R. R. Co. v. Moorner*, 116 Ala. 642, 22 South. 900; 3 *Elliott on Railroads*, § 1259.

The demurrer to the fourth count should have been sustained, and the court committed error in overruling it.

The second count is not subject to the grounds of demurrer interposed. It is argued that the engineer had a right, after seeing plaintiff's intestate on the track, to presume that she would get off. It is averred in the count that the deceased was an infant, 14 months and 23 days old, and it is not to be supposed that one of such tender age would appreciate the perilous situation, or have sufficient judgment and discretion to extricate herself. The presumption that one so young would appreciate the peril of an approaching train and avoid it by getting off of the track would be unreasonable. This is not a suit by the parent to recover pecuniary compensation, but the action is in the name of the personal representative of the deceased. If death had not resulted, and the action had been brought by the infant, who is alleged to have been under 15 months of age, neither the contributory negligence of the infant nor that of her parents would have been available as a defense to the action. *A. G. S. R. R. Co. v. Burgess*, 116 Ala. 509-515, 22 South. 918. There was no error in sustaining the demurrers to the pleas of contributory negligence.

The witness Mrs. Forrister, having testified that she lived near a railroad all of her life and knew "the blows of an engine, and that there were two long blasts of the whistle," was competent to testify the meaning of such signal.

The frequency of travel and the use of the path along the side of the track by the public where the accident occurred, at and prior to the time of the accident, was within the issues; and hence the evidence of the witness McCutchen as to the frequency of use of the path by the public in 1904 was competent. The purpose of this evidence being to fix a knowledge of conditions on the defendant and its servants, the length of time covered by the public travel along the path was relevant.

The grounds of objection to the question to the witness Osborne as to within what distance a train could be stopped on a straight track with slight upgrade, equipped with air brakes, and drawing seven or eight cars, and running at a speed of about 35 miles an hour, were that it called for illegal evidence and that the witness was not shown to be an expert. The evidence called for under the issues in the case was relevant, and not illegal. The witness testified that he had been an engineer for 2 or 3 years on the Louisville & Nashville Railroad, about 20 years ago, and had since that time observed the operation of trains and for the past 3 or 4 years lived near the defendant's railroad, and had noticed the trains operated on that railroad, equipped with air brakes. We think, under this evidence, the witness was shown to be qualified to testify his opin-

ion, and the court committed no error in overruling the objections on the grounds stated.

The evidence tended to show that the track where the accident occurred was straight for a distance of about two miles in the direction from which the train was approaching, and it was in the daytime, with nothing to obstruct the view, and that the engineer was looking ahead. On this state of the evidence it has been repeatedly held by this court that it becomes a question for the jury whether the engineer did or did not see the obstruction on the track, notwithstanding he may testify that he did not see it. If he did see the obstruction, in this case the child, if in fact it was on the track, and that is also a question for the jury, and willfully failed, or with reckless indifference of consequences omitted, to use preventive means or effort to avoid the injury, after discovery of peril, if discovered in time for preventive effort, he would be guilty of wanton wrong. These were all questions for the jury under the evidence.

What we have said, we think, will be a sufficient guide on another trial; and for the errors indicated the judgment is reversed, and the cause remanded.

Reversed and remanded.

SIMPSON, DENSON, and McCLELLAN, JJ., concur.

(158 Ala. 204)

MURRY v. STROTHER.

(Supreme Court of Alabama. Dec. 15, 1908.)

1. PRINCIPAL AND SURETY (§ 175*)—INDEMNITY TO SURETY—ASSIGNMENT.

A mortgage given to indemnify the mortgagor's sureties for payment of the costs of a suit may be assigned as security to one who has paid such costs.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 508; Dec. Dig. § 175.*]

2. APPEAL AND ERROR (§ 843*)—REVIEW—MATTERS NOT NECESSARY TO DECISION.

Whether a mortgagor, seeking to redeem, was bound to tender money to cover certain items claimed by the mortgagee, will not be considered on appeal from a finding that a sufficient tender had not been made, where it appears that the tender made did not cover other items to which the mortgagee was clearly entitled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331, 3338; Dec. Dig. § 843.*]

Appeal from Chancery Court, Tallapoosa County; W. W. Whiteside, Chancellor.

Suit by J. Murry against J. W. Strother. From a decree for respondent, complainant appeals. Affirmed.

Ida Murry, wife of complainant, executed a mortgage to Julia Murry on her interest to certain described lands, in which orator joined. This mortgage was executed on the 26th day of October, 1896. On the 13th day of January, 1898, Ida Murry conveyed to

complainant, J. Murry, her interest in said land, subject to the mortgage above set out. On the 17th day of May, 1901, Julia Murry filed a bill to foreclose her mortgage on these lands, and on the 3d day of April, 1905, the sale was had, and on the 7th day of June, 1905, the sale was reported, and a few days thereafter confirmed, at which sale the Schuesslers became the purchasers. Before the sale, however, the present complainant took an appeal from the decree to the Supreme Court, and in order to perfect his appeal and to make a supersedeas bond the complainant executed to W. C. Stone and R. L. Johnston a mortgage on said land to hold them harmless on account of an adverse decree, and said Stone and Johnston signed complainant's appeal bond and became liable for the costs of appeal and the costs in the chancery court. Said Stone and Johnston, upon respondent becoming responsible for the costs, assigned and transferred in writing all their interest in the indemnity mortgage executed by complainant to them. Respondent, as junior mortgagee, redeemed from the Schuesslers their purchase at register's sale, made under the decree of the chancery court. Murry now files his bill against Strother to redeem from Strother, and tenders to Strother the amount which Strother paid to redeem from the Schuesslers, together with the regular amount of interest, taxes, etc., but declined and refused to pay the costs for which Strother was liable, or which he had paid, and for which the junior mortgage was security. The chancellor decreed that complainant was not entitled to redeem under the tender made by him.

Bulger & Ryland, for appellant. James W. Strother and George H. Sorrell, for appellee.

TYSON, C. J. The bill in this cause is exhibited to enforce a supposed statutory right of redemption. On final hearing the chancellor found that the complainant had not tendered a sufficient amount to pay "the purchase money, with 10 per cent. per annum thereon and all other lawful charges," as required by the statute (section 3507, Code 1896). The real matter of controversy, and the one presented for our determination, is whether the indemnity mortgage executed by complainant to Stone and Johnston, and assigned by them to the respondent, constitutes "a lawful charge" upon the lands. This mortgage was given by complainant to indemnify Stone and Johnston against any loss they should sustain, as his sureties, upon an appeal bond in a cause appealed by him from the chancery court to this court.

The decree appealed from having been affirmed, and the costs adjudged against him and his sureties, execution was issued out of this court against all of them for the cost incurred in this court. It was in consideration of the payment of this cost by respondent

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ent, and of the assumption by him of the costs of the chancery court, for which the sureties were liable upon the bond, that the transfer or assignment of the mortgage to the respondent was made. That the mortgage was assignable, and after assignment became a valid security, and therefore a lawful charge upon the lands in the hands of the respondent, for the amount of the costs actually paid by him, does not seem to us to admit of serious controversy. Had Stone and Johnston paid the costs of this court themselves, they would have had a debt, which was secured by the mortgage, and which they could have enforced by a foreclosure of it. Having procured the respondent, Strother, to pay their debt, they had the right to transfer the mortgage to him as a security for the payment, and thus invest in him their right to the mortgage as a security for the money so paid by him. 1 Jones on Mortgages (6th Ed.) § 802, and cases cited in note.

As to whether or not the mortgage was a lawful charge as to the costs assumed by respondent, which he has never paid, and, therefore, a tender of which was indispensable, is not necessary to be here determined, since the testimony undisputedly established that the costs paid by the respondent were not included in the amount tendered by complainant.

Affirmed.

SIMPSON, ANDERSON, and DENSON, JJ., concur.

(158 Ala. 607)

ATLANTA & B. AIR LINE RY. v. BROWN.
(Supreme Court of Alabama. Dec. 17, 1908.)

1. PLEADING (§ 52*)—SEPARATE CAUSES OF ACTION—SEPARATE STATEMENT.

The complaint in an action against a railroad company for trespass on land by stock on account of the failure of the company to erect and keep in proper condition cattle guards, which alleges conjunctively the failure to put in cattle guards and the failure after placing them in to keep them in repair, is not demurrable because it combines two different causes in one count, since both must be proved to authorize a recovery.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 113; Dec. Dig. § 52.*]

2. RAILROADS (§ 103*)—CATTLE GUARDS—CONSTRUCTION OF—DEMAND.

The statute requiring every corporation operating a railroad to put in cattle guards and keep the same in good repair whenever the owner of the land shall make demand on the corporation or agents, etc., simply requires demand on the corporation or its agents, and the landowner need not make demand on the special agent who is bound to construct the cattle guards.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 315, 317; Dec. Dig. § 103.*]

3. RAILROADS (§ 103*)—CATTLE GUARDS—REPAIR—DEMAND.

Code 1896, § 3480, requiring every railroad company to put in cattle guards and keep the same in repair whenever the owner shall make

demand on it or its agents and show that such guards are necessary to prevent the depredations of stock, does not require a new demand whenever cattle guards become out of repair; but, when the demand is made to place them, it becomes the duty of the company to construct them and keep them in repair.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 315; Dec. Dig. § 103.*]

4. RAILROADS (§ 114*)—INJURIES FROM CONSTRUCTION AND MAINTENANCE—INCURSION OF CATTLE—PLEADING.

A complaint in an action against a railroad company for trespass on land by stock on account of the failure of the company to erect and keep in condition cattle guards, which charges a failure to keep the cattle guards in repair is sufficient, without specifying which particular ones are out of repair.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 368; Dec. Dig. § 114.*]

5. RAILROADS (§ 114*)—INJURIES FROM FAILURE TO MAINTAIN CATTLE GUARDS—PLEADING.

The complaint in an action against a railroad company for failing to erect and keep in condition cattle guards, which alleges that cattle guards were necessary, need not allege that, when a demand was made on the company for the construction of cattle guards, plaintiff showed to the company that cattle guards were necessary: that being a matter of evidence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 368; Dec. Dig. § 114.*]

6. RAILROADS (§ 272*)—EVIDENCE OF OWNERSHIP OF ROAD.

In an action against the "Atlanta & Birmingham Air Line Railway" for failure to erect and keep in condition cattle guards, proof that the railroad that ran through plaintiff's lands was known as the "Atlanta & Birmingham Air Line Railway" and was assessed in that name established a prima facie case; and, on defendant failing to introduce any evidence to the contrary, the court properly based its charge on the idea that defendant owned the road.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 867; Dec. Dig. § 272.*]

7. TRESPASS (§ 50*)—INJURIES TO LAND—MEASURE OF DAMAGES.

In an action for trespass to land itself, the difference between the value of the land before and after the trespass is, as a general rule, the measure of damages.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 134; Dec. Dig. § 50.*]

8. DAMAGES (§ 112*)—INJURIES TO REAL ESTATE—NEGLIGENCE—MEASURE OF DAMAGES.

In an action for negligence resulting in injury to land, crops, etc., the recovery is limited to the value of the thing destroyed, and not the difference in the value of the land before and after such destruction, provided the thing destroyed has a value which can be ascertained without reference to the soil.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 281-283; Dec. Dig. § 112.*]

9. RAILROADS (§ 114*)—INJURIES FROM FAILURE TO ERECT CATTLE GUARDS—MEASURE OF DAMAGES.

In an action against a railroad company for injuries to land, crops, etc., by trespassing stock, on account of the failure to erect and keep in proper condition cattle guards, the measure of damages is the value of the thing destroyed, and not the difference in the value of the land before and after the destruction.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 370; Dec. Dig. § 114.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

10. EVIDENCE (§ 472*)—OPINION OF WITNESSES—INVADING PROVINCE OF JURY.

It is the province of the jury to ascertain the amount of damages to crops by trespassing stock from the facts testified to, and a witness cannot give his opinion as to the amount of the damage.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 472.*]

11. DAMAGES (§ 44*)—EXPENSES INCURRED—INJURY TO PROPERTY.

In an action against a railroad company for failing to erect and keep in proper condition cattle guards, testimony of the expenses incurred by plaintiff in trying to keep trespassing stock out of his land was admissible, provided plaintiff could not recover in all more than the amount of damages which he would have been entitled to, had not the expenses been incurred.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 90, 91; Dec. Dig. § 44.*]

12. EVIDENCE (§ 353*)—MEMORANDA—ADMISIBILITY.

Where memoranda of the amount of damages to crops by trespassing stock were not made at the time of the examination of the crops, and the witnesses did not make the necessary statements to render the memoranda themselves admissible, nor state that they had an independent knowledge of the matters therein contained, the court erred in admitting the memoranda in evidence as estimates of the damages.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1487, 1490; Dec. Dig. § 353.*]

13. APPEAL AND ERROR (§ 1053*)—HARMLESS ERROR—ADMISSION OF EVIDENCE—CURING BY INSTRUCTIONS.

The error in admitting as evidence memoranda containing estimates of damages to crops by trespassing animals was not cured by a charge stating that the memoranda were not conclusive evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4182; Dec. Dig. § 1053.*]

14. DAMAGES (§ 109*)—INJURY TO LAND—MEASURE OF DAMAGES.

Where one was prevented from cultivating his land by the depredations of trespassing stock, though he had the land prepared for cultivation, the measure of his damage was what he lost, and not the rental value of the land.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 273; Dec. Dig. § 109.*]

15. LANDLORD AND TENANT (§ 330*)—INJURY TO LAND—RIGHT OF ACTION.

A landlord, entitled to recover as rent a share of the crops, may, on the crops being destroyed by trespassing stock, recover to the extent of his share.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 330.*]

16. DAMAGES (§ 112*)—DESTRUCTION OF CROPS—MEASURE OF DAMAGES.

The measure of damages for the destruction of a crop is the value of the crop at the time it was destroyed.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 281; Dec. Dig. § 112.*]

17. DAMAGES (§ 112*)—DESTRUCTION OF CROPS—MEASURE OF DAMAGES.

Where, in an action for injuries to a crop of grass by trespassing stock, there was no evidence what the land would have brought for hay and pasturage, and plaintiff proved what the grass destroyed was worth, an instruction that plaintiff could recover what the land would have brought for hay and pasturage was erroneous.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 281; Dec. Dig. § 112.*]

18. LANDLORD AND TENANT (§ 332*)—DESTRUCTION OF CROPS—MEASURE OF DAMAGES.

Where, in an action for the destruction of crops by trespassing stock, it appeared that plaintiff had leased the land to tenants for a share of the crops, and there was a conflict in the evidence of the amount of damages, a charge authorizing the jury to consider the damage to the entire crops, and not only to plaintiff's share thereof, was erroneous.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 332.*]

19. DAMAGES (§ 69*)—UNLIQUIDATED DEMANDS—INTEREST.

Where the damages for the destruction of or injury to property have an ascertainable money value, it is proper to instruct the jury to add to the damages ascertained interest from the date when the injury was done.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 139, 140; Dec. Dig. § 69.*]

Appeal from Circuit Court, St. Clair County; A. H. Alston, Judge.

Action by W. T. Brown against the Atlanta & Birmingham Air Line Railway for trespass on lands by stock on account of the failure of defendant to erect and keep in proper condition cattle guards. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The following charges were refused to defendant: (1) The general affirmative charge. (2) "I charge you that plaintiff is not entitled to recover any damages for any injury or any destruction of the crop on said lands in the year 1905." (3) "I charge you that, under the evidence in this case, plaintiff had no title, interest, or property in the growing crops on said land, during 1905, for which he can recover damages in this case." (6) "I charge you that plaintiff cannot recover damages for any interest or property in the crops which might have been growing on said land." (9) "I charge you that plaintiff can only recover in this case damages for such injury to his reversionary interest in said land as were of a permanent character, and the injury or destruction of said crops growing on said land during the year 1905 is not such an injury to his reversionary interest for which plaintiff can recover."

The complaint was in the following language: "Plaintiff claims of defendant, a corporation, the sum of \$1,900 as damages, for that defendant is a corporation, and as such corporation was, on or about the 1st day of January, 1905, and prior thereto, and at all times during the year 1905, engaged in the operation of a railroad in and through St. Clair county, Ala., which said railroad passed through the grounds and fields of plaintiff, to wit, through the lands of plaintiff situated in the town of Ragland, and of plaintiff situated in sections 7 and 18, all in township 15, range 5 east, and all situated in St. Clair county, Ala., and thereby rendered cattle guards or stock gaps necessary to prevent the depredation of stock upon plain-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tiff's said lands and growing crop on said lands; that defendant negligently failed and refused to put in or supply cattle guards at the several points where said railroad entered the said land of plaintiff, so as to prevent stock of all character from entering on plaintiff's land and destroying plaintiff's crops, which were at the time growing and being grown on said land, notwithstanding plaintiff made repeated demands on L. B. Parsons, the superintendent of defendant, prior to the injury thereinafterwards complained of, said railroad, and other agents of said railroad corporation, to have good and sufficient cattle guards or stop gaps placed on said railroad at such point where defendant's said railroad entered the lands of plaintiff, but defendant negligently failed so to do, and as a proximate result of such negligence of defendant, and by reason of the insufficient cattle guards or stop gaps so placed by defendant at said point where defendant's said railroad enters the said lands of plaintiff and defendant's said negligent failure on plaintiff's land to repair the same, at divers times during the year 1905 large numbers of cows, hogs, goats, horses, and other stock entered into said fields and lands at said point on defendant's said railroad, and injured and destroyed plaintiff's fruit trees, growing crops of corn, wheat, grass, hay, and cotton, and did great depredation to plaintiff's land and all crops growing thereon, by eating said growing crops, tearing down said fruit trees, tramping the ground, and entirely destroying plaintiff's said crop, and by reason of such negligence of defendant in the failure to repair and put good and sufficient cattle guards at said point plaintiff has been put to great expense and labor and loss of time in trying to keep said stock out of his said field and preventing greater depredation, all to plaintiff's damage."

There was judgment for plaintiff in the sum of \$541.20.

Tillman, Grubb, Bradley & Morrow and M. M. Baldwin, for appellant. M. M. Smith and Victor H. Smith, for appellee.

SIMPSON, J. This action was brought by the appellee against the appellant to recover damages for injuries to lands, crops, etc., by reason of the defective condition of the stock gaps on said land. Appellant insists that the demurrer to the complaint should have been sustained, because it combines two different causes in one count, to wit, the failure to put in the cattle guards and the failure, after they were placed in, to keep them in repair. This ground of demurrer was not well taken, for the reason that said causes are alleged in the conjunctive, the only effect of which is that both must be proved.

It is next insisted that the complaint should have alleged that the notice was given to some agent who was authorized to place the cattle guards in. The statute does

not so require, but simply requires that the demand shall be made on the "defendant or their agents." The citizen is not supposed to know what the duties of the several agents of the railroad company are, and the statute very properly fails to require him to ascertain the particular one whose duty it is to place the cattle guards in.

It is next insisted that said complaint is subject to the demurrer because it does not allege that demand was made on the defendant or its agent to repair the cattle guards. The statute requires the railroad company to "put cattle guards upon such railroad and keep the same in repair whenever the owner * * * shall make demand upon them or their agents and show that such guards are necessary to prevent the depredations of stock upon the land." Code 1896, § 3480. We do not construe this statute to require a new demand whenever the cattle guards become out of repair; but, when the demand is made to place them, it then becomes the duty of the company to place them in and keep them in repair. The charge of failure to keep the cattle guards in repair is sufficient, without specifying which particular ones are out of repair. The description of the land is sufficient for identification. It is not necessary to allege that, when the demand was made, the plaintiff showed to the railroad company that the cattle guards were necessary. That is a matter of evidence, and, when it is shown to the court, that is a sufficient compliance with the statute. The complaint alleges, as a matter of fact, that they were necessary.

The proof that the railroad that ran through plaintiff's lands was known as the "Atlanta & Birmingham Air Line Railway," was assessed in that name, etc., was sufficient to make out a prima facie case; and, if the defendant did not introduce any evidence to the contrary, the court was justified in basing its charge on the idea that that is the railroad company whose road runs through plaintiff's land.

The appellant, in arguing assignments 2, 3, 4, and 5, insists that the proper measure of damages in this case is the difference in the value of the land before and after the depredation by the stock, and that it was improper to admit testimony as to the "hoorah grass" and "Johnson grass" destroyed by the stock. It is true that the general rule is recognized in this state that, in an action for trespass to the land itself, the difference between the value of the land before and after the trespass is the measure of the damage. *Brinkmeyer et al. v. Bethea*, 139 Ala. 376, 35 South. 993. This is not an action of trespass, but an action for negligence resulting in injury. The true rule is said to be that "if the thing destroyed, although it is part of the realty, has a value which can be accurately measured and ascertained, without reference to

the soil in which it stands, or out of which it grows, the recovery must be for the value of the thing thus destroyed, not the difference in the value of the land before and after such destruction." *Whitbeck v. N. Y. Cent. R. R. Co.*, 36 Barb. (N. Y.) 644-647. This rule is applied to crops, grass, fruit trees, etc. *Byrne v. Minneapolis, etc., Railway*, 38 Minn. 212, 36 N. W. 339, 8 Am. St. Rep. 608; *Railway v. Horne*, 69 Tex. 644, 649, 9 S. W. 440; *Galveston, H. & S. A. Ry. v. Rheiner et al.* (Tex. Civ. App.) 25 S. W. 972; *Berard et al. v. Atchison, etc., R.* (Neb.) 113 N. W. 537; *Gresham v. Taylor*, 51 Ala. 505. Our own court has said: "If the trespass consisted of a severance of a part of the freehold from the rest, for instance, growing timber or minerals, the value of the thing severed, while it constituted a part of the freehold at the time of severance, and not as a chattel after severance, may be regarded as a proper measure of recovery" (*Warrior, etc., Co. v. Mabel Mining Co.*, 112 Ala. 626, 20 South. 918); and again, in a case where damages were claimed for a continuing trespass, that "the difference in the value" before and after the trespass "is an improper measurement of damages," although it might be competent evidence, to be considered by the jury in connection with the other evidence (*Abercrombie v. Williams & Windham*, 127 Ala. 180, 182, 28 South. 387). Where there is damage to the land, and also destruction of property attached to the land capable of ascertainment as to its value, recovery may be had for both. *Receivers, etc., v. Pfluger* (Tex. Civ. App.) 25 S. W. 792; *Ft. Worth, etc., R. v. Wallace*, 74 Tex. 581, 12 S. W. 227. These principles have been distinctly applied to cases where the suit is for damages for failure to keep the cattle guards in repair. *Smith v. Chicago, etc., R.*, 38 Iowa, 518, 522; *St. Louis & S. F. Ry. v. Ritz*, 33 Kan. 404, 6 Pac. 533; *K. C., M. & O. Ry. v. Mayfield* (Tex. Civ. App.) 107 S. W. 940. It results that there was no error in the matters set forth in said assignments.

The court erred in allowing the witness (plaintiff) to testify as to what the amount of the damage done to the fruit trees was. A witness cannot give his opinion as to the amount of damage. The province of the jury is to ascertain the amount of damage, and the witness must testify to facts, upon which the jury must base its findings. *Donnell v. Jones*, 13 Ala. 490, 510, 48 Am. Dec. 59, et seq.; *Montgomery & W. P. R. v. Varner*, 19 Ala. 185; *Ala. & Fla. R. v. Burkett*, 42 Ala. 83, 87, 88; *Chandler v. Bush*, 84 Ala. 102, 4 South. 207; *Dushane v. Benedict*, 110 U. S. 631, 647, 7 Sup. Ct. 696, 30 L. Ed. 810; *Hames v. Brownlee*, 63 Ala. 277; *Young & Co. v. Cureton*, 87 Ala. 727, 6 South. 352, 4 Enc. Ev. pp. 12, 13. For the same reason the question to said witness, "In your judgment,

what was the injury or damage done to the land?" and the question, in the same words, to the witness Green, plainly, on their face, called for illegal testimony; and the questions and answers should have been excluded. There was no error in allowing the witness (plaintiff) to testify in regard to expense which he incurred in trying to keep the stock out of his land. This is a proper item of damage, provided the plaintiff could not recover, in all, more than the amount of damage which he would have been entitled to, had not the expense been incurred. *St. L. & S. F. R. v. Ritz*, 33 Kan. 404, 6 Pac. 533, 536; 13 Cyc. 154, note 85.

The court erred in admitting the estimates of damages, made in writing by several parties, and the error was apparent, because, first said papers were admitted as evidence, and not merely to be referred to by the witness as a memorandum to refresh his own memory, and such *ex parte* papers are not admissible; second, the questions and answers, in connection with the admission of said papers, called for the opinion of the witness as to the amount of damage, which, we have seen, was improper; third, even as memoranda they were not shown to have been made at the time of the examination of the crops; and, fourth, the witness did not make the necessary statement to render the papers themselves admissible, nor did he state that he had an independent knowledge of the matters therein contained to make them admissible as memoranda. *Battles v. Tallman*, 96 Ala. 403, 11 South. 247. That part of the oral charge of the court, referred to by the appellee, did not cure this error, but merely stated that the memoranda were not conclusive evidence.

The court erred in overruling the objection to the question to the plaintiff, as a witness, "What would have been a fair rental value in money of the 40 acres you were prevented from cultivating?" The witness had testified that he had this land prepared for cultivation, and was prevented from cultivating it by the depredations of the stock. The measure of his damage was what he lost, not the rental value of the land.

At the conclusion of the testimony the defendant "moved the court to exclude all the testimony in reference to the destruction or injury to the crops" of the tenants, and "all testimony as to the damage suffered by" them, which motion was overruled. There was no error in this. The testimony shows that the terms of renting to said tenants were that the landlord was to be paid one-third of the corn and one-fourth of the cotton made by said tenants respectively, so that to the extent of one-third the plaintiff was damaged by the destruction of the crops. While it is true that the title to the said one-third was not in the plaintiff, yet the direct result of the depredation was to defeat

plaintiff's recovery of rent to that extent.

The court in its oral charge instructed the jury "that they could take any portion of the year to determine the value of the crops at the time they were destroyed." This was error. While various ways have been suggested by different courts, such as ascertaining what the probable cost would be of carrying the crop on to maturity and subtracting said amount from the probable value of the crop when matured, etc., yet these are but methods of ascertaining what is recognized as the better rule, to wit, that the measure of damages is the value of the crop at the time it is destroyed. 4 Sutherland on Damages (3d Ed.) § 1023; 13 Cyc. 153; Gresham v. Taylor, 51 Ala. 505; Gulf, etc., Ry. v. Nicholson (Tex. Civ. App.) 25 S. W. 54. From what has been said in regard to the rental value of the 40-acre tract which the plaintiff had prepared for cultivation, it results that the court erred in instructing the jury that the plaintiff could recover the reasonable rental value of said 40 acres.

The court erred in instructing the jury that the plaintiff could recover for that portion of said lands having crops of grass thereon what the same would have brought for hay and pasturage. There was no evidence tending to show what said land would have brought for hay and pasturage. On the contrary, the plaintiff had elected to prove what the grass destroyed was worth.

The court erred, in its oral charge, in instructing the jury that they were to consider the injury and damage to the entire crops, and not only to one-third thereof. The plaintiff could not recover more than the amount of his damage, which covered only one-third of the crops. It cannot be said that the jury really assessed the damages at only the value of one-third of the crop, because their verdict was much less than the majority of the witnesses testified to as the damages. The witnesses were not in harmony on this matter, and the jury may have thought that the witness who placed the damages at much less than the others was entitled to more credit.

The court, at the request of the plaintiff, charged the jury that, if they believed the evidence, they should find the issue in favor of the plaintiff, for damages found, "together with interest from the time of such depredation." The appellant insists that it was erroneous to give this charge, because interest is not recoverable in this action. This is a matter that has received a great deal of consideration at the hands of the courts in various jurisdictions, with different results as to the right to recover interest in actions of tort. Several jurisdictions, treating the matter logically, hold that, as interest, at common law, was not recoverable at all unless there was a contract providing for it, the statute is the only authority for it, and

where the statute provides for interest only in actions on contracts, expressed or implied it cannot be recovered in an action of tort until the damages have been ascertained and reduced to judgment. *City of Chicago v. Allcock*, 36 Ill. 384; *Greeley S. L. & P. Ry. v. Yount*, 7 Colo. App. 189, 42 Pac. 1023; *Pittsburgh, Ft. W. & C. Ry. v. Swinney*, 97 Ind. 588, 596, 597; *New York, etc., R. v. Estill*, 147 U. S. 591, 619, 622, 13 Sup. Ct. 444, 37 L. Ed. 292. Others hold that while, in such cases, interest is not recoverable as a matter of right, yet the jury may, in their discretion, take the delay into consideration and adopt the rate of interest as a measure of damages for such delay, though the judge cannot direct them to add interest. *Richards v. Citizens' N. Gas Co.*, 130 Pa. 37, 40, 41, 18 Atl. 600; *Pittsburgh, Ft. W. & C. Ry. v. Swinney, Ex'r*, 97 Ind. 588, 596, 597; *Lawrence R. R. Co. v. Cobb*, 35 Ohio St. 94, 98, 99; *Walrath v. Redfield*, 18 N. Y. 457, 462; *Maire et al. v. Manhattan R. E. Ass'n*, 89 N. Y. 498, 507; *Duryee v. Mayor, etc., of New York*, 98 N. Y. 478, 499; *Parrott v. Knickerbocker, etc., Co.*, 48 N. Y. 361-369. Still others allow it as a matter of right. *Taylor et al. v. Bay City St. Ry.*, 101 Mich. 140, 59 N. W. 447, and cases cited; *Gates v. Comstock*, 113 Mich. 127, 71 N. W. 515, 516; *Everett v. Gores*, 92 Wis. 527, 66 N. W. 616; *Parrott v. Housatonic R. R.*, 47 Conn. 575. See, also, generally, 2 Sutherland on Damages, pp. 969, 974, § 355; 4 Sutherland on Damages, § 1026; 22 Cyc. pp. 1475, 1500, et seq.; 16 Am. & Eng. Ency. Law, pp. 1027, 1031; 2 Redfield on Negligence (5th Ed.) § 747.

In this state our court has stated that, "whenever one party has a legal right to recover of another a debt or damages as due at a particular time, he is entitled to interest as an incident from the maturity of the demand until the trial, unless some rule of law declare otherwise." *Stoudenmeier v. Williamson*, 29 Ala. 558, 569. That case, however, and those therein cited, were acting on contract. Our court has recognized the right to recover interest in actions of trover, stating that the object is "to give to the plaintiff a full indemnity for the injury sustained by the wrongful conversion, * * * and to prevent the defendant from deriving any benefit from his own wrongful act," and also stating that there are exceptions to the rule. *Williams, Adm'r, v. Crum*, 27 Ala. 468, 470. The rule of interest in cases of trover is recognized in other cases. *Ewing v. Blount*, 20 Ala. 694; *Curry v. Wilson*, 48 Ala. 638; *Linam v. Reeves*, 68 Ala. 89, 91; *Burks v. Hubbard*, 69 Ala. 380, 384; *Sharpe & Son v. Barney*, 114 Ala. 361, 362, 363, 21 South. 490; *Birmingham Min. R. v. Tenn. C., I. & R. R. Co.*, 127 Ala. 138, 147, 28 South. 679; *Brooks v. Rogers*, 101 Ala. 112, 126, 13 South. 386. This court has also stated that, in a case claiming damages for stock killed by a railroad, the jury should

allow interest from the date of the killing. *Ga. Pac. R. R. Co. v. Fullerton*, 79 Ala. 299, 303; *A. G. S. R. R. Co. v. McAlpine*, 75 Ala. 114, 121. The case of *Bradley et al. v. Harden*, Adm'r, 73 Ala. 70, was an action against the sureties on the bond, although the liability was claimed to have arisen from the conversion by the principal. In *Fall's Adm'r v. Presley's Adm'r*, 50 Ala. 342, the action was trespass, and the court say that the general rule is "that where trespass is brought for the destruction of personal property, and no circumstances of aggravation are shown, the action is to be regarded as one of trover, and the value of the property, with interest on such value, furnishes the rule for the measure of damages, because, if the owner * * * gets the value of the property * * * and interest, that is, in effect, a sale." Page 346. In a case wherein the only matter for decision was whether a claim against a ferry keeper and the sureties on his bond for damages resulting from negligence in operating the ferry was provable in bankruptcy, Judge Stone, in delivering the opinion of this court, said that the measure of recovery was "the amount of the injury sustained, to which interest may be added." *Borden v. Bradshaw*, 68 Ala. 362. The case of *Jean v. Standiford*, 39 Ala. 317, in which interest was not allowed, is placed distinctly on the ground that the suit was for a statutory penalty; and the case of *Glidden v. Street*, 68 Ala. 600, rests entirely on that case.

While there is much force in the arguments brought forward by other courts which have held otherwise, yet we feel bound by the decisions of our own courts, especially those in the cases of *Railroad v. McAlpine*, 75 Ala. 113, and *Railroad v. Fullerton*, 79 Ala. 298, to hold that where the damages claimed are for property which has been destroyed or injured, which has an ascertainable money value, it is proper to instruct the jury to add, to the damage ascertained, interest from the date when the injury was done. It is true that some of the cases which allow interest provide that it shall commence only from the date when the suit is commenced; but, if the plaintiff is entitled to interest at all, we are unable to see upon what principle it should be postponed from the time when the right of action accrued to the commencement of the suit.

There was no error in the refusal to give the general charge in favor of the defendant, nor in refusing to give the other charges requested by the defendant.

The judgment of the court is reversed, and the cause remanded.

TYSON, C. J., and ANDERSON and DENSON, JJ., concur.

(157 Ala. 589)

PENNSYLVANIA CASUALTY CO. v.
MITCHELL.

(Supreme Court of Alabama. Dec. 17, 1908.)

1. PLEADING (§ 409*)—OBJECTIONS TO FORM—
WAIVER.

Though the plea of "not guilty" is not a proper plea in an action on a policy of disability insurance, in the absence of a demurrer thereto it will be considered a plea of the general issue.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 409.*]

2. INSURANCE (§ 669*)—ACTION FOR INDEMNITY—INSTRUCTION AS TO EVIDENCE.

In an action on a policy of insurance against disability from sickness, providing that defendant would not be liable except for sickness commencing after the policy had been in force 60 days, where the only defense was that the sickness on which the action is based commenced within 60 days from the date of the policy, it was not error to instruct that, if the sickness "for which plaintiff claims indemnity was contracted after 60 days" from the policy, plaintiff is entitled to recover, though such instruction did not require recovery to be based on evidence as to any other fact necessary to make out plaintiff's case.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 669.*]

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

Action by Shaler A. Mitchell against the Pennsylvania Casualty Company. From a judgment for plaintiff, defendant appeals. Affirmed.

E. C. Crow and Cabaniss & Bowie, for appellant. Kerr & Haley, for appellee.

SIMPSON, J. This action by the appellee against the appellant is on a policy insuring the plaintiff against disability from sickness, etc. Pleas 1 and 2 were in abatement, plea 3 was the general issue, and plea 4 a special plea reciting a clause in the policy to the effect that the company would not be liable except for sickness or disability commencing after the policy had been in force for 60 days, and that the sickness complained of originated before the expiration of the 60 days. Demurrers were sustained to pleas 1 and 2, while the demurrer to plea 4 was overruled; and issue was "joined thereupon." We take this expression in the record to mean that thereupon issue was joined—that is, on all of the pleas to which demurrers had not been sustained, to wit, that of the general issue and the special plea set out.

On the request of the plaintiff the court charged the jury as follows, to wit: "The jury are instructed that, if they find from the evidence that the sickness for which the plaintiff claims indemnity was contracted after 60 days from 12 o'clock noon on December 4, 1906, then the plaintiff is entitled to recover in this case." It is insisted that, as issue was joined on the plea of the gen-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

eral issue, this charge is erroneous, because it was not hypothesized on a belief of the evidence as to other facts necessary to make out the plaintiff's case. The plea of "not guilty" was not a proper plea in this case; but, in the absence of a demurrer to it, it will be considered as a plea of the general issue. *Espalla v. Richard & Sons*, 94 Ala. 159, 10 South. 137. However, as to the point insisted on, the correspondence introduced in evidence shows that the only objection raised to the payment of the policy was that the sickness commenced within 60 days from the date of the policy. That would be a waiver of all other defenses (*Ga. Home Ins. Co. v. Allen*, 128 Ala. 451, 30 South. 537); and the entire record shows that that was the only matter litigated. These being the facts, there was no error in the giving of said charge. It left for the determination of the jury the only controverted question in the case.

The judgment of the court is affirmed.

TYSON, C. J., and HARALSON and DENSON, JJ., concur.

(158 Ala. 657)

TUTWILER COAL, COKE & IRON CO. v. TUVIN.

(Supreme Court of Alabama. Dec. 17, 1908.)

1. TRESPASS (§ 12*)—TRESPASS TO REAL ESTATE—RIGHTFUL ENTRY.

Where an employer placed a gate across a private road over his land, leading to a house thereon occupied by an employé, and stationed guards at the gate, with authority to exercise discretion in the admission of persons, and a guard admitted a third person wishing to collect a debt from the employé, the third person was not guilty of trespass in the original entry on the premises.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. § 10; Dec. Dig. § 12.*]

2. TRESPASS (§ 12*)—TRESPASS TO REAL ESTATE—RIGHTFUL ENTRY.

Where an employé, who rented a house on the land of his employer, acquired thereby the right to have persons visit the house on business or pleasure and go over the employer's land in so doing, no one as to whom the right had been acquired could be guilty of trespass in exercising the right; and, where the right was acquired by the contract of renting, it could not be taken away by a mere notice to such person, so long as the contract of renting remained in force.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. § 10; Dec. Dig. § 12.*]

3. EASEMENTS (§ 48*)—WAYS—WAY OF NECESSITY.

Where an owner of a tract of land conveys a portion thereof, which is so surrounded by his other land that the purchaser cannot have ingress and egress to and from it save through the other land, and there is no stipulation or circumstance showing a contrary intention, the law gives to the purchaser a way of necessity, which attaches to the conveyance of the land as appurtenant to it; but the owner has the right to designate the way, and if he

fails to do so the purchaser has the right, and where neither designates it the way used by common consent will be considered the way.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. § 105; Dec. Dig. § 48.*]

4. EASEMENTS (§ 44*)—WAYS—WAY OF NECESSITY.

Since a lease for a period, long or short, carries with it the incidents of a conveyance, a lessee, occupying lands surrounded by the lands of his landlord, will, in the absence of stipulations to the contrary, be entitled to the same ingress and egress that a purchaser of the land would have; and where the owner of a tract of land leases to a tenant a portion thereof for occupation as a dwelling, and there is no agreement to the contrary, the tenant has the right to use all such apparent ways as are reasonably necessary to the enjoyment of the property which he has leased, and the owner cannot exclude the tenant from the reasonable use of such ways, and cannot exclude therefrom persons who, with the landlord's permission, desire to use such ways for the purpose of visiting the tenant's dwelling to transact business with him; but the tenant cannot put the way to a use that will put an additional servitude on the landlord's other lands.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. § 98; Dec. Dig. § 44.*]

5. EASEMENTS (§ 52*)—WAYS—WAY OF NECESSITY.

While a way of necessity is a matter of presumption, and may be restricted by special contract, yet, in the absence of any stipulation or statute, it is presumed to be for the use of the owner and his family and employes, and he may license others to use it for the purpose of coming to or going from the dominant estate.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. § 113; Dec. Dig. § 52.*]

6. EASEMENTS (§ 52*)—WAYS—WAY OF NECESSITY.

Where a way is appurtenant to an estate, it may be used by those who own or lawfully occupy any part thereof, and by the persons lawfully going to or from such premises, whether they may be mentioned in the grant or not.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. § 113; Dec. Dig. § 52.*]

7. EASEMENTS (§ 52*)—WAYS—WAY OF NECESSITY.

Where an employé in a mine leases a house on the premises of the employer, and thereby acquires a way of necessity over the premises to and from the house, the way of necessity is presumptively one for the convenience of the employé, and only so long as the necessity exists; but he may invite persons to visit him, either socially or on business, and such persons traveling the way are not trespassers; but until he extends the invitation, either actually or by implication, no third person can claim the benefit of the way.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. § 113; Dec. Dig. § 52.*]

8. EASEMENTS (§ 52*)—WAYS—WAY OF NECESSITY.

An employé in a mine leased a house on the premises of the employer, and thereby acquired a way of necessity over the premises to and from the house. The employé bought furniture on the installment plan, and a third person had been periodically visiting the employé at the house to collect the installments. Held that, though it might be inferred that the third person was authorized by the employé to visit him to collect the installments, the mere desire of the third person to go to the house of the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

employé to collect a bill would not be a legal excuse for entering on the way.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 113; Dec. Dig. § 52.*]

9. EASEMENTS (§ 26*)—WAYS—WAY OF NECESSITY.

Where an employé, who occupied as a tenant a house on his employer's premises, and who acquired a way of necessity over the premises to and from the house, invited a third person to visit the house, the right possessed by the employé to use the way inured to the benefit of the third person; and, since the right was appurtenant to the contract of renting, it could not be taken away by mere notice, while the contract of renting remained in force.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 72½; Dec. Dig. § 26.*]

10. EASEMENTS (§ 24*)—WAYS—WAY OF NECESSITY.

Where a tenant, who possessed a way of necessity over the premises of the landlord, invited third persons to visit him, the invitation was not an assignment of the easement of the right of way, but was merely the exercise of the right which the tenant possessed.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 66; Dec. Dig. § 24.*]

11. FALSE IMPRISONMENT (§ 3*) — DISTINGUISHED FROM MALICIOUS PROSECUTION.

A complaint which alleges that defendant, acting through agents acting within the scope of their employment, maliciously and without probable cause procured a warrant for the arrest of plaintiff, that by virtue of the warrant he was arrested and imprisoned for a day, that he was subsequently brought before a court for trial, and that the court adjudged him not guilty, states a cause of action for false imprisonment, if not for malicious prosecution.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. § 2; Dec. Dig. § 3.*]

12. MALICIOUS PROSECUTION (§ 58*)—ACTIONS—EVIDENCE.

Where, in an action for malicious prosecution of plaintiff for trespass for entering on the premises of defendant, plaintiff showed that he entered the premises with a view of visiting a tenant thereon to collect a debt, and that he entered on a way of necessity possessed by the tenant, evidence as to whether the debt was due from the tenant, as to whether there was any other way to reach the tenant's house, and as to whether the way in question was the way usually traveled was admissible, as bearing on the question of the way of necessity and as to whether that way had been established by consent.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 117; Dec. Dig. § 58.*]

13. MALICIOUS PROSECUTION (§ 53*)—ACTIONS—ATTORNEY'S FEES.

Where the complaint in an action for malicious prosecution does not specifically claim attorney's fees, it is error to admit testimony as to the agreement for attorney's fees.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 109; Dec. Dig. § 55.*]

14. MALICIOUS PROSECUTION (§ 55*)—ACTIONS—ATTORNEY'S FEES.

Where the complaint in an action for malicious prosecution specifically claims attorney's fees, the amount recoverable is the amount proved to be reasonable, and it is error to admit testimony as to the agreement for attorney's fees.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 109; Dec. Dig. § 55.*]

15. MALICIOUS PROSECUTION (§ 58*)—ACTIONS—EVIDENCE.

Where, in an action for malicious prosecution of plaintiff for trespass in entering on the land of defendant, there was evidence that the entry was after plaintiff had been warned according to law, testimony as to whether plaintiff was molesting the property of defendant was inadmissible, since the offense of trespass after warning was complete when the premises were entered.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 117; Dec. Dig. § 58.*]

16. MALICIOUS PROSECUTION (§ 58*)—ACTIONS—EVIDENCE.

In an action for malicious prosecution of plaintiff for trespass, proof that the president of defendant, a corporation was present at the trial of plaintiff for trespass, was admissible to show the part taken by him in the prosecution.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 117; Dec. Dig. § 58.*]

17. MALICIOUS PROSECUTION (§ 58*)—ACTIONS—EVIDENCE.

Where, in an action for malicious prosecution of plaintiff for trespass on the premises of defendant, plaintiff showed that he entered on the premises pursuant to the consent of guards placed on the premises by defendant, questions asked the president of defendant corporation as to the authority delegated by him to the guards was admissible; for, if the guards had authority to admit persons into the premises, a person who entered by their permission could not be guilty of a trespass for entering.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 117; Dec. Dig. § 58.*]

18. TRIAL (§ 214*)—INSTRUCTIONS.

In an action for malicious prosecution of plaintiff for trespass, based on his entering on the premises of defendant, an instruction that defendant was in possession of the premises on which plaintiff was at the time he was arrested was properly refused, because it asserted no principle of law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 480; Dec. Dig. § 214.*]

19. MALICIOUS PROSECUTION (§ 71*)—ACTIONS—EVIDENCE—QUESTIONS FOR JURY.

Where, in an action for malicious prosecution and for false imprisonment, based on arresting and prosecuting plaintiff for trespass, the evidence was in conflict as to whether the arrest was made on the charge of refusing to leave defendant's premises after having entered, or on that of having entered unlawfully previously, and plaintiff was arrested by an officer, the refusal to give the general charge for defendant on the count of false imprisonment, on the ground that the offense was committed in the presence of the officer, who, under Code 1907, §§ 6269-6273, had a right to arrest, so that the arrest was legal, was proper.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 160; Dec. Dig. § 71.*]

20. TRIAL (§ 143*)—INSTRUCTIONS—GENERAL CHARGE.

Where the evidence was not without conflict, there was no error in refusing to give the general charge requested by defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 342; Dec. Dig. § 143.*]

Appeal from City Court of Birmingham; O. C. Nesmith, Judge.

Action by Abe Tuvin against the Tutwiler Coal, Coke & Iron Company. From a judg-

ment for plaintiff, defendant appeals. Reversed and remanded.

Count 4 was as follows: "Plaintiff claims of defendant \$10,000 damages, for that on, to wit, September 14th, defendant, acting by and through its agents, whose name or names are unknown to the plaintiff, who were acting within the scope of their employment, maliciously and without probable cause therefor caused one R. H. Smith to procure from W. H. Wooden, a justice of the peace for Jefferson county, Ala., his warrant for apprehending plaintiff and bringing him before the criminal court of said county, and that by virtue of said warrant plaintiff was arrested and imprisoned for a long period of time, to wit, one day, and was subsequently brought before the criminal court of Jefferson county for trial, which court adjudged the plaintiff not guilty of the charge under which he was arrested, and that said prosecution was so ended, whereby plaintiff was injured in his credit and reputation, and has suffered in mind and body, and has been prevented from carrying on his business and has incurred expenses in defending himself."

Demurrers were interposed to said count as follows: "(1) It does not appear from said count that defendant did not have probable cause for having plaintiff arrested and imprisoned. (2) It is not alleged for what alleged defense had plaintiff arrested and imprisoned. (3) It is not alleged that R. H. Smith was the agent of defendant, or that he was acting for defendant in the procurement of his warrant of arrest. (4) No facts are alleged in said count showing that the arrest and imprisonment of plaintiff was done or caused by defendant maliciously or without probable cause."

The facts sufficiently appear in the opinion of the court.

The following charges were given at plaintiff's request: (3) "I charge you that if you find from the evidence that Minsu was rightfully and with defendant's leave occupying a house on defendant's land, and plaintiff in good faith for the purpose of transacting business with Minsu by the road usually traveled and the nearest and most feasible way, and therefore went on defendant's land, plaintiff was not guilty of trespass after notice." (8) "I charge you that it is the law that if the owner of a tract of land leases to a tenant a portion of the same for occupation as a dwelling, and there is no agreement to the contrary, the tenant has the right to use all such contiguous or apparent roads and ways as are reasonably necessary to the enjoyment of the property which he has leased, and the owner cannot exclude the tenant from the reasonable use of such roads and ways, and cannot exclude therefrom persons who with defendant's permission, express or implied, desire to use such roads and ways, for the

purpose of visiting the tenant's dwelling in order to transact business with him."

The following charges were refused to defendant: (15) "I charge you that the desire of plaintiff to go to the house of Minsu to collect a bill would not be either legal cause or good excuse, within the meaning of the law, to justify him in either going on the premises of defendant after being warned not to do so, or his failure to leave said premises after being requested not to do so." (17) "I charge you that under the undisputed evidence the defendant was in possession of the premises on which plaintiff was at the time he was arrested." (18) "I charge you that, although Minsu may have had the right to go and come over the lands of defendant, this right would not in any way inure to plaintiff's benefit, and even if you believe from the evidence that Minsu rented the house from defendant, and thereby acquired the right to have persons visit his house on business or pleasure, and go over defendant's land in doing so, that the forbidding by defendant of persons going to such house would not give such person any right of action, or violate any right of such person."

Percy & Benners, for appellant. George Huddleston, for appellee.

SIMPSON, J. This suit was brought by the appellee against the appellant for malicious prosecution and false imprisonment. One Minsu was an employé of the defendant, working in its mines, and occupied a house on the land of the defendant, so situated that it could not be reached except by passing over the lands of defendant. There was a road over the premises, which had been used by employés and others, but which it was admitted was not a public road. There was a strike among defendant's employés, and the defendant had placed a gate across said road, and put a lock thereon, and stationed guards at the gate to prevent persons from entering the premises, and this status had continued for three or four months. The plaintiff approached the gate on horseback, having in his possession an account against said Minsu for collection in favor of a furniture house in whose employment he was. After stating his business to the guard, he was permitted to enter the premises, but was afterwards stopped. It may be well to state, in the outset, that if the plaintiff, on merely stating that he wished to go in to collect a debt, entered upon the land with the permission of the guards placed at the gate, clothed by the defendant with the discretion to admit persons, he could not be convicted for trespass in the original entry on the premises, whatever might have been his liability for the unlawful refusal to leave the premises after being requested so to do.

The first assignment of error insisted on

is that numbered 36, which claims error in the refusal of the court to give charge No. 18 requested by the defendant. There was no error in refusing this charge. If Minsu, in renting the house, "thereby acquired the right to have persons visit his house on business or pleasure, and go over defendant's land in so doing," then no one for whom said right had been thus acquired could be guilty of trespass in exercising such right; and, if it was a right acquired by the contract of renting, it could not be taken away by a mere notice to such person, so long as the contract of renting remained in force. *Proudfoot v. Saffie*, 62 W. Va. 51, 57 S. E. 256, 12 L. R. A. (N. S.) 482.

Charge No. 15, requested by the defendant and refused, brings up the important point specially contended for in this case, and that is whether the plaintiff in this case, having in his hands a claim for collection against Minsu, had a right to go to his house over the private road through the defendant's lands against the objection of the defendant. It is a well-recognized principle of law that if A., owning a large tract of land, conveys to B. a portion which is so surrounded by A.'s lands that B. cannot have ingress and egress to and from the land bought, save through the land of A., and there be no stipulations and circumstances showing a contrary intention, the law gives to B. a way of necessity, and, as this way of necessity attaches to the conveyance of the land, it is appurtenant to it. A. has the right to designate the way, and if he fails to do so then B. has the right. If neither designates it, but a way is used by common consent that will be considered the way. 2 Washburn on Real Property (3d Ed.) pp. 282 (*31), 306 (*51); Tiedeman on Real Property, § 609; 23 A. & E. Ency. Law, p. 13; *Benedict v. Barling*, 79 Wis. 551, 48 N. W. 670; *Ellis v. Bassett*, 128 Ind. 118, 27 N. E. 344, 25 Am. St. Rep. 421; 14 Cyc. p. 1204. A lease for a period, long or short, carries with it the incidents of a conveyance; so that a lessee, occupying lands surrounded by the lands of his landlord, would, in the absence of stipulations to the contrary, be entitled to the same ingress and egress that a purchaser would have.

While a way of necessity is a matter of presumption, and may be limited or restricted by special contract, yet, in the absence of any stipulation or statute, it is presumed to be for the use of the owner, his family, and his employes; and he may license others to use it for the purpose of coming to or going from the dominant estate. 23 A. & E. Ency. Law, p. 25; 14 Cyc. 1208. In a case where a right of way over a private alley was granted, with no specifications as to how it should be used, the grantor undertook to block up the way so as to leave the grantee only the right to pass over it on foot, while the grantee claimed that he was running a milk house and had a right to use it, by himself, his em-

ployes, and customers, either on foot or in vehicles; and the Chancery Court of New Jersey held that "a footway, a wagonway, a passage for horses or other animals, are all permissible uses of a way; * * * nor is the owner of the way limited to its use by himself in propria persona. The way belongs to him as his property. All persons having occasion may, with his permission, transact business with him by passing to and fro over the way." *Shreve v. Mathis*, 63 N. J. Eq. 170, 178, 52 Atl. 234. It is also stated that, "where a way is appurtenant to an estate, it may be used by those who own or lawfully occupy any part thereof and by all persons lawfully going to or from such premises, whether they be mentioned in the grant or not." 14 Cyc. 1208.

The circumstances and conditions of the parties and premises at the time of the leasing must be taken into consideration; and, while the tenant could not put the way to a use that would put an additional servitude on the servient estate, yet it may be used for such purposes as were reasonably within the contemplation of the parties at the time of leasing. In the instance suggested by the appellee, where a room in an office building is rented to a lawyer, the character of the building and the purpose for which the room is rented necessarily indicate that it was within the contemplation of the parties that clients and other persons having business with the lawyer should have free ingress and egress.

So the question arises whether, when a miner, who is working the mines of a mine owner, leases a house on the premises to live in, it can be claimed as a right, by a third party who has a demand against the miner, to travel the road, against the protest of the owner, to collect his claim. There must be some line of distinction between a private way of necessity and a public way. The way of necessity is presumed only for the convenience of the tenant, and only so long as the necessity exists. As shown, he may invite persons to visit him, either socially or on business, and such persons, traveling the way, would not be trespassers; but, until he does extend the invitation, either actually or by implication, no third person can claim the benefit of using the private way.

While there was some proof in this case tending to show that, previous to the time in question, the plaintiff had been visiting Minsu periodically, for the purpose of collecting the installments on the furniture as they became due, and this, in connection with the contract made, might afford an inference that the plaintiff was authorized by Minsu to visit him for that purpose, yet charge 15, requested by the defendant, does not hypothesize these facts, but merely that the desire of plaintiff to go to the house of Minsu to collect, etc., would not be a legal excuse, etc. The mere "desire of plaintiff to go to

the house of Minsu to collect a bill would not be either legal cause or good excuse," unless it was shown to have been connected with circumstances showing Minsu's invitation or consent. Hence charge 15 should have been given.

Charge No. 3, given at the request of the plaintiff, does not hypothesize the invitation or consent of the tenant for the plaintiff to visit him at his house, and should have been refused. Charge No. 8 does hypothesize the defendant's permission, and it was properly given.

Charge No. 18, requested by the defendant, was properly refused. As shown above, there is evidence in this case which tends to show that the plaintiff may have been invited by Minsu to visit the premises occupied by him, and, if that was the case, the "right" acquired by Minsu would inure to the benefit of plaintiff; and (referring to the latter part of the charge) if Minsu, by renting the house, "thereby acquired the right to have persons visit his house on business or pleasure, and to go over defendant's lands in doing so," that right, being appurtenant to the contract of renting, could not be taken away by the mere notice, while the contract of renting remained in force. *Proudfoot v. Saffie*, 62 W. Va. 51, 57 S. E. 256, 12 L. R. A. (N. S.) 482. The invitation to others to visit him is not an assignment of the easement, within the authorities referred to by appellant (which, it may be further said, refer to personal easements, and not to those appurtenant to an estate), but is merely the exercise of the right which the tenant acquires.

There was no error in overruling the demurrer to the fourth count of the complaint. If not good as a count for malicious prosecution, it was good as a count for false imprisonment. *Davis v. Sanders*, 133 Ala. 275, 32 South. 499, and cases cited.

There was no error in admitting the testimony as to whether the debt was due by Minsu, nor as to whether there was any other way to reach Minsu's house, nor as to whether the road in question was the road usually traveled, as they all had a bearing upon the question of a way of necessity *vel non*, and as to whether that way had been established by consent.

It was error to admit testimony as to the agreement for attorney's fees. In the first place, the attorney's fees were not specially claimed in the complaint; and, second, if they had been specially claimed, the amount recoverable would not be that agreed upon, but that amount proved to be reasonable.

Assignments of error 5, 6, 7, and 8 are not sustained. The questions objected to were, first, preliminary, to call the witness's attention to the time inquired about, and then to show that the duties of the guards were such as to place them under the direction

of the defendant as to the matter of admitting persons on the premises, all of which was legitimate.

As the offense of trespass after warning would be complete when the premises were entered after having been warned according to law, it was improper to allow testimony as to whether the plaintiff was molesting the property.

The questions, on cross-examination, to the witness Tutwiler as to his presence and the presence of others at the trial, were admissible on cross-examination, as tending to show the part taken by said witness (who was the president of defendant) in the prosecution, and to test his recollection of the facts. *Motes v. Bates*, 74 Ala. 374, 377.

The testimony regarding the establishment of a post office on the premises, and the allowance of others to go there, should have been excluded. There was no pretense that the plaintiff was going to the post office, and any permission given to others would not inure to him. *Cross v. State*, 147 Ala. 125, 129, 41 South. 875.

There was no error in overruling the objections to the question to the witness Tutwiler as to the authority delegated by him to the guards, because, if the guards had authority to admit persons into the premises, then a person entering by their permission entered by the permission of the defendant, and could not be guilty of a trespass for entering.

Charge 17, requested by the defendant, asserts no principle of law, and was properly refused. *Morrison v. State* (Ala.) 46 South. 647, 648.

Appellant claims that inasmuch as one count is for false imprisonment, and the offense was committed in the presence of the officer, who, under sections 6269-6273 of the Code of 1907, had a right to arrest, therefore the general charge asked to said count should have been given; the argument of appellant being that, as the plaintiff was arrested by the officer for an offense committed in his presence, the arrest was legal, and therefore no recovery could be had for false imprisonment. The evidence is in conflict as to whether said arrest was made on the charge of refusing to leave after having entered, or on that of having entered unlawfully previously. There was no error in the refusal to give said charge.

There was no error in the refusal to give the general charge, requested by the defendant, as to malicious prosecution, as the evidence is not without conflict.

The judgment of the court is reversed, and the cause remanded.

TYSON, O. J., and ANDERSON and DENSON, JJ., concur.

(157 Ala. 536)

**NORTH BIRMINGHAM LUMBER CO. v.
SIMS & WHITE.**

(Supreme Court of Alabama. Dec. 17, 1908.)

**1. CORPORATIONS (§ 47*)—CORPORATE NAME—
CHANGE—EFFECT.**

A change in a corporate name has no more effect upon the corporation's identity than a change of name by a natural person has upon his identity; and it does not affect its rights, nor lessen or add to its obligations.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 134, 135; Dec. Dig. § 47.*]

**2. PARTIES (§ 95*)—AMENDMENT OF DEFECTS—
SHOWING DEFENDANT'S CHANGED NAME.**

Where a contract was entered into with defendant under its original name, which was afterwards changed, and plaintiff subsequently sued defendant on the contract under its original name, an order, when the case was called for trial, that it should proceed against defendant in its new name, which was in effect an amendment of the summons and complaint to make the action one against defendant in its new name, was proper.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 164; Dec. Dig. § 95.*]

3. EVIDENCE (§ 332*)—DOCUMENTARY EVIDENCE—JUDICIAL RECORDS—RECORD OF PROBATE COURT.

Code 1896, § 1816, provides that all transcripts of books or papers required by law to be kept in the office of any public officer, when certified by the proper custodian, must be received in evidence in all courts. Section 1819 provides that transcripts from proceedings required to be kept by any sworn state officer are presumptive evidence in any cause, and have the same effect as if the originals were produced and proved upon the custodian's certificate. *Held* that, where defendant specifically waived the objection that a certified copy of the record of a probate court was not offered, it was not error to admit the original record; it being competent evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1245; Dec. Dig. § 332.*]

4. EVIDENCE (§ 354*)—DOCUMENTARY EVIDENCE—BOOKS OF ACCOUNT.

In an action on a contract for sale of lumber, where it appeared that defendant was receiving lumber from others than plaintiff, and it did not appear that a person in defendant's employ, alleged to have entered in a book lumber received from plaintiff, knew where the lumber came from, nor that the entries in the book were correct, nor that the one making the entries was dead, insane, or beyond the jurisdiction of the court, the book was properly excluded as evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1432-1483; Dec. Dig. § 354.*]

5. APPEAL AND ERROR (§ 525*)—REVIEW—INSTRUCTIONS—NECESSITY FOR BILL OF EXCEPTIONS.

Charges not set out in the bill of exceptions will not be reviewed, though they appear elsewhere in the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2376; Dec. Dig. § 525.*]

6. APPEAL AND ERROR (§ 1064*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

In an action on a contract for the sale of lumber, it was not reversible error to charge that the court "does not intimate what the contract was, but instructs that, whatever it was, both parties are bound by it, and either one violating it is liable for the violation, if any."

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1064.*]

7. APPEAL AND ERROR (§ 1064*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

In an action on a contract for sale of lumber, it was not reversible error to charge that if the jury believe that the agreement was not absolute to furnish such lumber as defendant should order absolutely, but only if they could or had the lumber, then that contract would prevail, and there would be no obligation to furnish it unless they could or had the timber.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1064.*]

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

Action by Sims & White against the North Birmingham Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The bill of exceptions shows that defendant offered a small book, called the "check book," which was used by a colored man named Jack, who superintended the unloading of lumber, but who was not shown to have known where the lumber came from, and who had the lumber piled up in defendant's yard. It was further shown that the book was a book of original entry by said Jack, made in the usual course of business, in checking lumber received by the defendant, when it was unloaded from the cars and placed on the yard, and that the negro named Jack made the entries in the book. The book purported to show the amount of culls received from the plaintiff, and with this book defendant's inspector inspected the lumber on the yard. Evidence was then offered to show that the man that made the entries in the book was not in the employ of the defendant at the time of the trial, and had not been for several months prior thereto; that when last seen he was in North Birmingham, and the defendant has no knowledge of the whereabouts of Jack, and did not know whether he was in the state or dead.

On page 9 of the transcript four charges are set out as plaintiff's given charges; but this part of the transcript is no part of the bill of exceptions. On page 27 of the transcript, which is a part of the bill of exceptions, the following charges appear: "(1) The court does not intimate to the jury what the contract was, but instructs them that, whatever it was, both parties were bound by it, and either one violating it was liable for the violation, if any. (2) If the jury believe from the evidence that the agreement was not absolute to furnish such lumber as defendant should order absolutely, but only if they could or had the timber, then that contract would prevail, and there would be no obligation to furnish it unless they could or had the timber."

The demurrers referred to seek to raise the question that the count served on the Mitchell Lumber Company was not the count or complaint under which they were then proceeding, as the party defendant had been

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

changed to the North Birmingham Lumber Company.

Allan & Bell, for appellant. Bowman, Harsh & Beddow, for appellee.

DENSON, J. This is an action of assumption, commenced on the 28th day of November, 1906, against the Mitchell Lumber Company, a corporation. On the call of the case for trial on the 7th day of November, 1907, the plaintiffs moved the court that the cause should proceed against the North Birmingham Lumber Company, a corporation, instead of the Mitchell Lumber Company. This motion was based upon the ground that the Mitchell Lumber Company had changed its name to the North Birmingham Lumber Company. In support of the motion it was shown that, in accordance with the statute in such cases made and provided, the name of the defendant was changed from Mitchell Lumber Company to North Birmingham Lumber Company in April, 1906, and upon this proof being made the court ordered and adjudged that the cause should proceed against North Birmingham Lumber Company. The change made in the name of the defendant had no more effect upon its identity as a corporation than a change of name by a natural person has upon his identity; neither did it effect its rights, nor lessen or add to its obligations. 1 Morawetz on Private Corp. 354; Lomb v. Pioneer Savings & Loan Co., 106 Ala. 591, 17 South. 670.

The complaint shows that the contract, the foundation of the suit, was entered into with plaintiffs by the corporation under its original name; and, notwithstanding the action was commenced after the change in name of the defendant was effected, this constituted no legal obstruction to the allowance of the amendment, nor to the order of the court that the cause should proceed against the North Birmingham Lumber Company. While the amendment or order changed the name, it did not, according to the authorities supra, work a change in the party defendant. The defendant, under its new name, was the same entity that made the contract and was originally sued. The effect of the order was to amend the summons and complaint, so as to make the action one against the defendant in its new or changed name. The court holds that there is no error in the order made by the trial court, nor in its judgment overruling the demurrer to the complaint. Ex parte Nicrosi, 103 Ala. 104, 15 South. 507; Singer, etc., Co. v. Greenleaf, 100 Ala. 372, 14 South. 109; Merriam v. Wolcott, 61 How. Prac. (N. Y.) 377.

For the purpose of showing the change in the corporate name of defendant from Mitchell Lumber Company to that of North Birmingham Lumber Company, the plaintiffs offered as evidence the record of the proceedings in the probate court. The defendant in

the court below specifically waived the point that a certified copy was not offered, but made a general, undefined objection to the record offered. Record of such proceedings is required to be kept in the office of the judge of probate; and, a certified transcript having been waived, the record was competent evidence, and the court committed no error in admitting the record offered against the general objection made thereto. Code 1896, §§ 1816, 1819; Stevenson v. Moody, 85 Ala. 33, 4 South. 595.

Even granting that the book kept by "Jack" was a book of original entry, kept by him in the usual course of business, yet the evidence shows that the defendant was receiving lumber from other parties than the plaintiffs; and it was not shown that "Jack" knew where the lumber came from, nor was there any evidence tending to show that the entries made in the book were correct. "Jack" was not shown to be dead nor insane, nor beyond the jurisdiction of the court. On the authority of the case of Bolling v. Fannin, 97 Ala. 619, 12 South. 59, it must be held that the book was properly excluded.

The seventh ground of error is in this language: "The court erred in giving each of the written charges asked by plaintiffs, and which charges are copied, but not numbered, on page 9 of this transcript. Each one of them separately are assigned as erroneously given." Even if this assignment were sufficient to bring to the attention of the court the matters designated (Williams v. Coosa Co., 138 Ala. 673, 33 South. 1015; Milner, etc., Co. v. Wiggins, 143 Ala. 132, 38 South. 1010), yet page 9 of the transcript is no part of the bill of exceptions, and charges not set out in the bill of exceptions—although they may appear elsewhere in the record—will not be reviewed. Nuckol's Case, 109 Ala. 2, 19 South. 504; Southern Railway Co. v. Jones, 132 Ala. 437, 442, 31 South. 501; Alabama, etc., Co. v. Wagnon, 137 Ala. 888, 34 South. 352; Lunsford v. Bailey, 142 Ala. 319, 38 South. 362; Milner, etc., Co. v. Wiggins, supra. We find in the bill of exceptions (on pages 27 and 28 of the record) two of the four charges that are set out on page 9; but the court holds that the trial court committed no reversible error in giving these.

No error has been found in the record, and the judgment of the trial court is affirmed. Affirmed.

TYSON, C. J., and SIMPSON and ANDERSON, JJ., concur.

(158 Ala. 421)

BIRMINGHAM RY., LIGHT & POWER CO.
v. CHASTAIN.

(Supreme Court of Alabama. Dec. 17, 1908.)

1. CARRIERS (§ 314*)—INJURIES TO PASSENGERS—ACTS OF EMPLOYEES—PLEADING.

A complaint alleging that the servant of defendant carrier, acting within the line of his

duty, caused plaintiff's minor son to fall from the car, and that such servant wantonly caused plaintiff's son to fall from the car, sufficiently averred that the servant was acting within the scope of his authority.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 314.*]

2. NEGLIGENCE (§ 114*)—PLEADING—PERSONAL INJURIES.

In actions for personal injuries the complaint must state the injuries with certainty and definiteness.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 181; Dec. Dig. § 114.*]

3. PARENT AND CHILD (§ 7*)—ACTIONS FOR INJURIES TO CHILD—COMPLAINT.

A complaint in an action by a parent for the loss of services and society of his minor child, alleging that the child was severely injured in his person, and was made sick and sore, and as a consequence thereof plaintiff lost the services and society of the child, sufficiently itemized the child's injuries.

[Ed. Note.—For other cases, see Parent and Child, Dec. Dig. § 7.*]

4. DAMAGES (§ 99*)—INJURY TO CHILD—DAMAGES.

In an action by a parent for loss of services of a minor child, the damages are limited to such as will compensate the parent for the loss of the child's services up to the time of his majority, for reasonable amounts necessarily expended in the treatment and care of the child, and for the value of the parent's services while nursing the child; and in estimating the damages, while the jury cannot consider that the child might, if not injured, engage in any particular calling, they may consider that, with age, growth, and experience, the value of the services of the child to the parent would increase.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 240; Dec. Dig. § 99.*]

5. TRIAL (§ 218*)—IMPROPER ARGUMENT OF COUNSEL—OBJECTIONS.

Where a party deems the argument of counsel of the adverse party improper, he should object and move to exclude the argument from the jury; and it is not error to refuse an instruction asked solely for the purpose of answering such argument.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 487; Dec. Dig. § 218.*]

6. TRIAL (§ 260*)—INSTRUCTIONS ALREADY GIVEN.

It is not error to refuse a requested charge which is a duplicate of a charge given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

7. TRIAL (§ 76*)—EVIDENCE—OBJECTIONS—TIME TO MAKE.

The court cannot be put in error for overruling an objection to a question interposed after the same has been answered, nor for refusing to exclude a responsive answer to the question.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 185; Dec. Dig. § 76.*]

8. DAMAGES (§ 133*)—ACTIONS FOR LOSS OF SERVICES.

A boy nine years old lost his right hand, except the thumb and index finger, and they were permanently stiff. His skull was fractured, and he was subject to sudden and acute pains in his head, and dull aching, and hemorrhages from the nose. His mind was not active, and his memory was not good. Up to the time of the injury the boy was unusually large and healthy, and fully up to, if not above, the average intellect. *Held*, that a verdict of \$3,-

250 for his father, suing for the loss of the services and society of the child, was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 169; Dec. Dig. § 133.*]

Appeal from City Court of Birmingham; C. C. Nesmith, Judge.

Action by Benjamin F. Chastain against the Birmingham Railway, Light & Power Company for damages for loss of society and service of a minor son. From a judgment for plaintiff, defendant appeals. *Affirmed*.

Count 2 was as follows: "Plaintiff claims of defendant \$5,000 as damages, for that heretofore, to wit, on the 20th day of August, 1906, defendant was a common carrier of passengers by means of a car operated by electricity upon a line of railway known as the 'East Lake Railway'; that on said day defendant's servants or agents on said car, acting within the line or scope of their authority, threw or caused plaintiff's minor son, Russell Chastain, who was a member of plaintiff's family, to fall from said car while same was in rapid motion, and while said car was at a point on said railway in or near Avondale, in Jefferson county, Ala., and as a proximate consequence thereof plaintiff's said minor son was severely injured in his person, and was made sore and sick from it, and as a proximate consequence thereof plaintiff lost the services and society of his said minor son for a long time, and will likely for a long time continue to lose said services and society, and said services of said minor son will be rendered less valuable to plaintiff until said minor son reaches the age of 21 years, and plaintiff was put to great trouble, inconvenience, and expense for medicine, medical attention, care, and nursing in or about his effort to heal and cure said wound, soreness, and sickness of the said minor son. Defendant's servant or agent on said car, to wit, the conductor thereof, wantonly or intentionally caused plaintiff to suffer said injuries and damages, by wantonly or intentionally throwing or causing said plaintiff's minor son to fall from said car while same was in rapid motion, well knowing that to do so would likely or probably cause great personal injury to said minor son."

The demurrers to the said count were as follows: "(1) That it was vague, uncertain, or indefinite. (2) It does not appear therefrom what duty the defendant, its servants, or agents owed to plaintiff's minor son. (3) It does not appear wherein or how the defendant, its agents, or servants violated any duty which it owed to plaintiff's minor son. (4) No facts are therein alleged showing wherein or how the defendant negligently conducted itself in or about carrying plaintiff as a passenger. (5) It does not appear that said conductor was then and there acting within the line or scope of his employment as such. (6) No facts are alleged which

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

render defendant liable to the plaintiff for such wanton or intentional act of said conductor. (7) The nature, character, and extent of plaintiff's minor son's injuries are not therein set forth with sufficient certainty to advise defendant thereof, and the same are alleged by way of conclusion merely."

The following charges were refused to the defendant: "(1) In estimating the damages, if the jury find for the plaintiff, the jury cannot consider the probability that the plaintiff's son might become a locomotive engineer during his minority, and earn wages as such. (2) If the jury find for plaintiff, in assessing his damages as affected by the lost earning capacity of the son, the jury cannot consider the likelihood of the boy's earning capacity increasing by reason of doing work of more value as he increased in age up to the time of obtaining his majority. (3) The basis of computing the value of plaintiff's son's earnings to him during his minority is to be estimated upon the value of his son's time at the time of the injury, as shown by the evidence; and the jury, in making this estimate, cannot consider any possible increase in plaintiff's son's earning capacity from the time of his injury to the time he becomes of age. (4) If the jury find for plaintiff, they cannot, in assessing his damages, award him anything to compensate him for the time he lost in attending upon his son at the hospital, or at his home, when he was suffering from his injuries."

Tillman, Grubb, Bradley & Morrow, for appellant. Bowman, Harsh & Beddow, for appellee.

DENSON, J. This action is one by the father of a minor son against the defendant, as a common carrier of passengers, for the loss of the services and society of the son consequent upon injuries alleged to have been occasioned by the defendant's conductor, in wantonly or intentionally throwing or causing to fall from one of the defendant's cars, while the same was in rapid motion, the said minor son. The first ground in the assignment of errors challenges the correctness of the judgment of the court in overruling a demurrer to the second count of the complaint.

It is first urged, as an objection to the count, that it does not sufficiently aver that the agent of the defendant, alleged to have been guilty of wanton or intentional misconduct, was acting within the scope of his authority. This objection is not, we think, well founded. In the outset the count avers "that on said day defendant's servant or agent on said car, acting within the line and scope of his authority, threw or caused plaintiff's minor son * * * to fall from said car," etc. Then, after setting forth the injuries and damages consequent thereupon, and in the conclusion of the count, it is alleged that "defendant's servant or agent on said car,

to wit, the conductor thereof, wantonly or intentionally caused plaintiff to suffer said injuries and damage, by wantonly or intentionally throwing or causing plaintiff's said minor son to fall from said car while same was in rapid motion, well knowing that so to do would likely or probably cause great personal injury to said minor son." The argument in support of this objection is founded upon a separation of this concluding portion of the count (by the defendant termed the charging part) from the rest of the count. If this theory of construction were correct, then manifestly the contention of the defendant would be sound; but the court is of the opinion that the count should be construed as a whole. So construing it, the latter part is qualified by the averment (heretofore referred to) that the agent or servant was acting within the scope of his authority. In other words, looking to all the averments of the count, and giving to them a fair and reasonable construction, the agent or servant referred to in the conclusion is the identical agent or servant indicated in the former part of the count; and in the conclusion the conduct complained of is the same as that formerly referred to, notwithstanding the interpolation of the words "wantonly or intentionally."

It is next urged against the count that the injuries to the son are not averred with sufficient certainty. The rule is settled in this jurisdiction that in cases of personal injury, where the recoverable damages depend upon the extent of the hurts sustained and the suffering endured on account thereof, the complaint must state the injuries with certainty and definiteness to a common intent, so that the defendant may be prepared to rebut the case the plaintiff proposes to lay before the jury. *City Delivery Co. v. Henry*, 139 Ala. 161, 34 South. 889; *Ency. Pl. & Pr.* 377, 378, 399. And it was held in the *Henry Case*, supra, that a complaint, the averments of which, in respect to the injuries, were that they were "serious," and that the plaintiff had suffered and would continue to suffer from them "both in body and in mind," was open to demurrer for indefiniteness. Without stopping to analyze the *Henry Case* further, it appears that the case in judgment is distinguishable from it. Here the recoverable damages are for the services of the child lost to the parent, and not from any suffering consequent upon the injury; and, while the loss of services is a consequence of the injuries inflicted on the child, it would seem that the averments of the complaint in judgment, to the effect that "plaintiff's minor son was severely injured in his person, and was made sick and sore, and as a proximate consequence thereof plaintiff lost the services and society of his said minor son," should be held to be a sufficient itemization of the son's injuries to show the foundation or condition upon which plaintiff

bases his claim for lost services, and even for other items of damages claimed in the complaint. *Birmingham, etc., Co. v. Lintner*, 141 Ala. 420, 38 South. 363, 109 Am. St. Rep. 40; *Bube v. Birmingham, etc., Co.*, 140 Ala. 276, 37 South. 285, 103 Am. St. Rep. 33; *Gulf, etc., Co. v. McMannewitz*, 70 Tex. 73, 8 S. W. 66; *Street R. R. Co. v. Muth*, 7 Tex. Civ. App. 443, 27 S. W. 752; *Ehrgott v. New York*, 96 N. Y. 275, 48 Am. Rep. 622; *Ohio, etc., Co. v. Hecht*, 115 Ind. 443, 17 N. E. 297; *Hanson v. Anderson*, 90 Wis. 195, 62 N. W. 1055; 15 Ency. Pl. & Pr. 453; 13 Cyc. 146, 179, 185. The demurrer was properly overruled.

In this action the recoverable damages are limited to such as will compensate the parent for the loss of the child's services up to the time of his majority, for such reasonable amounts necessarily expended in and about the treatment and care of the child, and for the value of the parent's services while nursing child. 13 Cyc. 146; *Woodward Iron Co. v. Curl (Ala.)* 44 South. 974; *Bube v. Birmingham, etc., Co.*, 140 Ala. 276, 37 South. 285, 103 Am. St. Rep. 33; *Central Foundry Co. v. Bennett*, 144 Ala. 184, 39 South. 574, 1 L. R. A. (N. S.) 1150, 113 Am. St. Rep. 32; *Southern Railway Co. v. Crowder*, 135 Ala. 417, 33 South. 335. In estimating the damages, the jury could not legally consider that the son might have become a locomotive engineer or embraced other like profitable or more profitable calling during his minority. *Central Foundry Co. v. Bennett*, supra; *Davis v. Kornman*, 141 Ala. 479, 37 South. 789; *Smith, Adm'r, v. Middleton*, 112 Ky. 588, 66 S. W. 388, 56 L. R. A. 484, 99 Am. St. Rep. 308; *Cent. Mfg. Co. v. Cotton*, 108 Tenn. 66, 65 S. W. 403.

But charge 1, refused to the defendant, as clearly shown by the record, and also by brief of appellant's counsel, was asked solely for the purpose of answering the argument of counsel to the jury. Otherwise, it is abstract. If counsel deem the argument of counsel for plaintiff improper, he could have screened his client from its effect by an objection and motion to exclude it from the jury. A refusal of such charges involves no error. *Brown's Case*, 121 Ala. 9, 25 South. 744; *Mitchell's Case*, 129 Ala. 23, 30 South. 848.

While, as announced above, the subject of damages may not be considered in respect to any particular calling, yet the jury should not be restricted to the value of the son's services at the time the injury occurred. They may legitimately consider that, with age, growth, and experience, his value to his father might have increased. In this view, charges 2 and 3 of the defendant's series were properly refused. *Central Foundry Co. v. Bennett*, supra; *Ihl v. Forty-Second Street, etc., Co.*, 47 N. Y. 321, 7 Am. Rep. 450; *Houghkirk v. President, etc., S. & H. C. Co.*, 92 N. Y. 220, 44 Am. Rep. 370; *O'Mara v.*

Hudson River R. R. Co., 38 N. Y. 445, 98 Am. Dec. 61.

Refused charge 4, as the record shows, is a duplicate of a charge that was given for the defendant; hence error cannot be predicated upon its refusal.

Defendant's objection to the question calling for testimony that plaintiff paid his car fare in visiting his son while the latter was at the hospital (even conceding the illegality of such testimony) came too late. The court cannot be put in error for overruling it, nor for refusing to exclude the responsive answer to the question. *McCalman's Case*, 96 Ala. 98, 11 South. 408; *Billingsley's Case*, 96 Ala. 126, 11 South. 409.

The jury assessed the plaintiff's damages at \$3,250, and the only question remaining open for consideration is whether or not the verdict is excessive. The argument in support of the insistence of excessiveness is based solely on the theory that the jury was not authorized to consider that the earnings of the nine year old boy might have increased as he approached his majority. In other words, defendant would limit the plaintiff's recovery to the value per week of the son's services, as fixed at the time the injury occurred, up to his majority, properly discounted. We have seen that such is not the rule by which the jury should be restricted.

The evidence shows that the boy lost all of his right hand, except the thumb and index finger, and that these are permanently stiff; that his skull was fractured, and, up to the time of the trial, that he would have sudden and acute pains in his head, and dull aching, and hemorrhages from the nose; and that his mind was not active, and his memory not good. But it shows that, up to the time of the injury, he was unusually large and healthy, and fully up to, if not above, the average in intellect. Under these facts, we think it was within the province of the jury to find that, whereas, without the injury his services, which had already begun to be worth to his father \$2 or \$3 per week, and "probably more," would likely have greatly increased in value with the boy's growth and development, yet, under the actual facts of his physical injury and resultant mental impairment, his services would be of little if any value. The subject was for the careful and conscientious consideration of the jury, and we are not convinced that they erred. *Strohm v. N. Y. & L. E. R. Co.*, 32 Hun (N. Y.) 20; *Seltzer v. Saxton*, 71 Ill. App. 232; *Central Mfg. Co. v. Cotton*, 108 Tenn. 66, 65 S. W. 403; *Rosenkranz v. Lindell R. Co.*, 108 Mo. 9, 13 S. W. 890, 32 Am. St. Rep. 588; *O'Mara v. Hudson River R. Co.*, 38 N. Y. 445, 98 Am. Dec. 61.

No error being shown, the judgment of the lower court is affirmed.

Affirmed.

TYSON, C. J., and SIMPSON and ANDERSON, JJ., concur.

(158 Ala. 639)

STOWERS FURNITURE CO. v. BRAKE.

(Supreme Court of Alabama. Dec. 17, 1908.)

1. PARTIES (§ 95*)—AMENDMENTS—PROPRIETY.

Where the complaint did not show whether the defendant company was a partnership or a corporation, it was properly amended to show that it was a corporation.

[Ed. Note.—For other cases, see Parties, Dec. Dig. § 95.*]

2. PLEADING (§ 246*)—AMENDMENTS.

Where the declaration alleged that defendant by its servants entered plaintiff's house, assaulted her, and carried off her goods, etc., it was properly amended by additional counts alleging the location of the house and charging the wrongfulness of the act to defendant itself, that defendant's agents were acting within the scope of their employment, that plaintiff's injuries were permanent, and that defendant wrongfully and wantonly committed the acts complained of.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 246.*]

3. PLEADING (§ 64*)—DUPLICITY—JOINDER AT COMMON LAW—TRESPASS.

Allegations of trespass *vi et armis* to the person and trespass to property and *de bonis asportatis*, conjunctively, may be joined in a single count, where the alleged trespasses are parts of the same transaction; and allegations that defendant entered plaintiff's house, assaulted her, and carried away her goods sufficiently showed that the several trespasses alleged were part of the same transaction, so as to permit them to be joined in one count.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 134-137; Dec. Dig. § 64.*]

4. TRESPASS (§ 40*)—ACTIONS—COMPLAINT—ALLEGATIONS OF TITLE AND POSSESSION.

A complaint alleging that defendant, by its agents, entered plaintiff's house and took from her possession and carried away her household furniture, etc., was not demurrable for not sufficiently alleging that plaintiff was rightfully possessed and was the owner of the goods, and had possession thereof as against defendant, or that plaintiff's possession was superior to the rights of defendant.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 81; Dec. Dig. § 40.*]

5. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—PREJUDICIAL EFFECT.

Where matter alleged in special pleas could have been proved under the general issue, which was pleaded, it was not reversible error to sustain demurrers to such special pleas.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4093; Dec. Dig. § 1040.*]

6. TRESPASS (§ 27*)—DEFENSES.

The owner of personal property, who is entitled to possession, may take possession thereof wherever it is; but the taking must be a peaceable one.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 59; Dec. Dig. § 27.*]

7. SALES (§ 479*)—CONDITIONAL SALE—RECOVERY OF POSSESSION BY SELLER.

The seller in a contract of conditional sale may take possession of the property, wherever it may be, after breach of condition; but the taking must be peaceable.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 479.*]

8. TRESPASS (§ 41*)—PLEADING—SUFFICIENCY OF PLEA.

Where the complaint alleged that defendant entered plaintiff's house and assaulted her and carried away goods, a plea alleging that the

property taken belonged to defendant, and that only such force was used as was reasonably necessary to take peaceable possession and control of the property, construed most strongly against defendant, did not clearly show that a breach of the peace was not committed, so that a demurrer thereto was properly sustained.

[Ed. Note.—For other cases, see Trespass, Dec. Dig. § 41.*]

9. TRESPASS (§ 41*)—ACTIONS—DEFENSES—PLEAS—SUFFICIENCY.

Where the complaint alleged that defendant, by its servants, entered plaintiff's house, assaulted her, and carried away property, a plea which merely alleged that the property belonged to defendant, and did not traverse the averment of assault committed by defendant, was demurrable.

[Ed. Note.—For other cases, see Trespass, Dec. Dig. § 41.*]

10. EVIDENCE (§ 127*)—RELEVANCY—RES GESTÆ—DECLARATIONS OF SICK PERSONS.

Declarations of a sick person as to the symptoms and nature of his disease or injury, whether made to a physician or other person, are admissible as *res gestæ*, in explanation of the condition of declarant.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 377-382; Dec. Dig. § 127.*]

11. TRIAL (§ 89*)—RECEPTION OF EVIDENCE—RESPONSIVENESS OF ANSWER—MOTION TO STRIKE.

Where an answer was not responsive, the proper remedy was by motion to exclude it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 238; Dec. Dig. § 89.*]

12. APPEAL AND ERROR (§ 248*)—PROCEEDINGS BELOW—EXCEPTIONS—NECESSITY.

An assignment of error will not be considered on appeal, where no exception was reserved to the ruling of the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1432; Dec. Dig. § 248.*]

13. APPEAL AND ERROR (§ 204*)—PROCEEDINGS BELOW—OBJECTIONS.

Where a question was not objected to, and the answer was responsive, a motion to exclude the answer was properly overruled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1258; Dec. Dig. § 204.*]

14. EVIDENCE (§ 121*)—COMPETENCY—RES GESTÆ.

In an action against defendant for damages caused by its servants in entering plaintiff's house, assaulting her, and carrying away goods, what was said and done by those who seized the property was admissible as *res gestæ*.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 308; Dec. Dig. § 121.*]

15. APPEAL AND ERROR (§ 1048*)—HARMLESS ERROR—PREJUDICIAL EFFECT.

Assignments of error to the overruling of objections to questions will not be sustained on appeal, where the questions were not answered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4159; Dec. Dig. § 1048.*]

16. APPEAL AND ERROR (§ 738*)—ASSIGNMENTS OF ERROR—JOINT ASSIGNMENTS—EFFECT.

Where an assignment of error to rulings as to evidence embraced two rulings, both rulings must be reversible error in order to sustain the assignment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3033; Dec. Dig. § 738.*]

17. EXECUTION (§ 471*)—WRONGFUL EXECUTION—EVIDENCE—ADMISSIBILITY.

In an action against defendant for trespasses to person and property committed during

the levy of an execution, plaintiff could prove by her husband, as against a general objection, the condition of the house when he arrived at night; the wrongful acts having occurred late in the afternoon.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 471.*]

18. APPEAL AND ERROR (§ 204*)—PROCEEDINGS BELOW—OBJECTIONS—ADMISSION OF EVIDENCE.

Where there was no objection to a question, and no ground was stated for a motion to exclude the answer, error in allowing the question will not be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1258; Dec. Dig. § 204.*]

19. TRIAL (§ 82*)—RECEPTION OF EVIDENCE—OBJECTIONS—GROUNDS—NECESSITY OF STATING.

Where no ground of objection was assigned to a ruling overruling a question, the trial court was not bound to discover a ground for the objection.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 194; Dec. Dig. § 82.*]

20. TRIAL (§ 91*)—RECEPTION OF EVIDENCE—MOTION TO STRIKE—NECESSITY OF PREVIOUS OBJECTION.

Where questions were not objected to when asked, the trial court was not bound to allow a motion to exclude the answer.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 242-244; Dec. Dig. § 91.*]

21. APPEAL AND ERROR (§ 1053*)—HARMLESS ERROR—PREJUDICIAL EFFECT.

Any error in admitting testimony was harmless, where it was subsequently excluded by the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4178, 4179; Dec. Dig. § 1053.*]

22. WITNESSES (§ 240*) — EXAMINATION — LEADING QUESTIONS.

An objection was properly sustained to a leading question.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 837; Dec. Dig. § 240.*]

23. SHERIFFS AND CONSTABLES (§ 98*)—LIABILITIES—TRESPASS TO PERSON—PROTECTION BY PROCESS.

Even if a writ under which goods were seized was valid, the officers executing it would not be protected, where they were guilty of trespasses to person and property in levying it.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 153; Dec. Dig. § 98.*]

24. EXECUTION (§ 473*)—WRONGFUL EXECUTION—ACTIONS—JURY QUESTION.

In an action for trespasses committed in levying an execution, whether defendant was liable by having ratified the acts of the levying officers held for the jury.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 473.*]

25. EXECUTION (§ 462*) — WRONGFUL EXECUTION—PERSONS LIABLE.

Where the writ under which property was seized was void on its face, and the property was seized at the instance of defendant, it would be liable as a trespasser in the same manner as the levying officer.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 1390, 1391; Dec. Dig. § 462.*]

26. TRIAL (§ 261*)—INSTRUCTIONS—REQUESTS—REQUESTS IN BULK.

Where charges were requested in bulk, if even one of them were bad, all of them were properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 660; Dec. Dig. § 261.*]

27. NEW TRIAL (§ 39*)—GROUNDS—ERROR IN INSTRUCTIONS.

Where instructions requested in bulk were properly refused because some of them were bad, a motion for new trial because of the refusal of such instructions was properly denied.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 60; Dec. Dig. § 39.*]

28. APPEAL AND ERROR (§ 730*) — ASSIGNMENTS OF ERROR—SPECIFIC ASSIGNMENTS—INSTRUCTIONS.

Assignments of error, based upon parts of an oral charge, which do not explicitly point out the parts of the charge claimed to be erroneous, need not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3013; Dec. Dig. § 730.*]

29. EXECUTION (§ 472*)—WRONGFUL LEVY OF EXECUTION—EXEMPLARY DAMAGES.

Where defendant caused goods to be levied on under a writ void on its face, and received and retained the goods with knowledge that the officers had committed an assault in making the levy, exemplary damages were allowable, in the jury's discretion.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1404; Dec. Dig. § 472.*]

Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge.

Action by N. G. Brake against the Stowers Furniture Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The complaint is as follows: "Plaintiff claims of defendant the sum of \$5,000 as damages, for that heretofore, to wit, on or about the 17th day of October, 1905, the defendant, its servants, agents, or employes, while acting within the scope of their employment, entered into the house occupied by plaintiff, and then and there assaulted and beat her, and then and there took from her possession and carried away her household furniture, goods, chattels, and jewelry. Plaintiff avers that as a proximate result of said wrong she has been deprived of the possession of said property, has been caused to suffer much physical and mental pain and anguish; that she was greatly distressed, her peace and comfort destroyed, and her health impaired; that she has been caused to lose much sleep and rest, has been caused great inconvenience and vexation," etc. This count was amended by adding the words "a corporation" after the words, "Stowers Furniture Company." Count A is practically the same as count 1, except that it gives the number of the house and its location, and alleges the wrongfulness of the acts complained of. This count alleges the wrongs to defendant itself. Count B: Same as count A, except that it alleges that the agents, servants, or employes of defendant, acting within the line and scope of their duties and employment, committed the acts complained of in the third count. It is further alleged in count B that her injuries are permanent. Count C alleged that defendant wrongfully, willfully, and wantonly committed the acts complained of in count 1, and also the permanency of her injuries. Count D is

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the same as C, except that the acts are alleged to have been committed by the servants, agents, or employes of defendant, while acting within the line and scope of their employment.

Demurrers were interposed as follows: To the first count, "because it is not averred that defendant committed the wrongs therein complained of; (2) it is averred in said complaint in the alternative that the defendant, its agents, servants, or employes, committed the wrongs therein complained of, without averring that the agents, servants, or employes, at the time of the commission of the alleged wrong, were acting within the line or scope of their employment or authority." Defendant replied demurrers interposed to count 1 to each of the other counts separately, with the following additional grounds: "(1) The counts fail to allege that plaintiff was rightly possessed of the goods; (2) that plaintiff was the owner of the goods; (3) that plaintiff had possession of the goods as against defendant. (4) It fails to allege that plaintiff's possession was superior to the rights of said Reynolds and Denegre, charged with being the actual tort-feasors."

Plea 3 was as follows: "Defendant says that all the property that was taken from plaintiff's house, or the house occupied by plaintiff, was the property of defendant, and that it had the right to immediate possession thereof; and defendant avers that only such force was used as was reasonably necessary to take peaceable possession and control of said property, and that so taking possession and control of said property constitute the acts complained of in plaintiff's complaint." Plea 8: "Defendant says and avers that the property taken from the house occupied by plaintiff was its property; that on the — day of —, 1905, the defendant, by and through its counsel, filed a suit in detinue for the property so taken from the said house in the justice court of R. B. Watts, who was holding himself out and exercising the powers and jurisdiction of the justice of the peace in Jefferson county, Ala.; that on the — day of —, 1905, after a service of the complaint on plaintiff in said cause, said R. B. Watts rendered a judgment in defendant's favor for said property; that thereafter, to wit, on the — day of —, 1905, said R. B. Watts, while exercising said power and jurisdiction of such justice of the peace, issued a writ of restitution on said judgment, and placed the same in the hands of J. T. Burton, who was at the time an acting constable in and for precinct 21, Jefferson county, Ala., the precinct in which said property was located; that said constable or one of his deputies took said property under said writ of restitution, which was regular on its face, and turned over and delivered said property to defendant as bailee. And defendant avers that it took no part in the taking of said property, and never ratified any alleged

wrongful act of said Reynolds and Denegre."

Charge 17 was as follows: "If the jury believe the evidence in this case, they cannot find in favor of plaintiff."

Ward & Rudolph, for appellant. Arthur L. Brown and Sumter Lea, for appellee.

DENSON, J. The complaint as originally filed contained only one count. In it the defendant was described as "Stowers Furniture Company," without any averment to show whether it was a partnership or a corporation. The court properly allowed the amendment showing that the defendant is a corporation. *Ex parte Microsi*, 103 Ala. 104, 15 South, 507. Nor did the court err in allowing counts A, B, C, D, and E as amendments to the complaint.

The action, then, is against a corporation; and each count of the complaint alleges trespass *vi et armis* to the person, and trespass *vi et armis* and *de bonis asportatis*, conjunctively. This is permissible in this jurisdiction, when the alleged trespasses are parts of the same transaction. Here they are sufficiently shown to be parts of the same transaction, and the demurrer in this respect was properly overruled. *Henry v. Carleton*, 113 Ala. 636, 21 South, 225; *Birmingham, etc., Co. v. Lintner*, 141 Ala. 420, 38 South, 863, 109 Am. St. Rep. 40; *Southern Suspender Co. v. Van Borries*, 91 Ala. 507, 8 South, 387; *L. & N. R. Co. v. Mothershed*, 97 Ala. 261, 12 South, 714.

The other grounds of demurrer to the complaint are fully answered by the allegations of the several counts.

The defendant pleaded eight pleas, Nos. 1 and 2 of which being the general issue. Under these pleas of the general issue, all matters set up in the other pleas (except, perhaps, that contained in pleas 3 and 8, might have been proved; consequently the court cannot be put in error for sustaining demurrers to said pleas.

As to the sufficiency of plea 3, it is argued that the owner of personal property has the right to take peaceable possession wherever he may find it, if he is entitled to the immediate possession. This is true, and the principle may be extended to a vendor in a conditional sale contract, after breach of the condition; but the taking must, indeed, be a peaceable one. Here the complaint avers the commission of an assault and battery as the accompaniment of the taking; and, construing plea 3 most strongly against the defendant, it is apparent that it does not clearly show that a breach of the peace was not committed. The demurrer takes the point, and the court properly sustained it. *Fuller's Case*, 115 Ala. 66, 22 South, 491.

In respect to plea 8 it will be observed that it falls to negative or traverse the averments of the complaint to the effect that an assault and battery was committed by defendant's servants while acting within the scope of

their employment. For this reason, as well as for others, the demurrer to this plea was well sustained.

We come now to consider questions presented by the bill of exceptions. It is the subject of express decision by this court that declarations of a sick person, relative to the symptoms and nature of the disease or injury under which he is laboring, whether made to a physician or other person, are admissible as original evidence. "Such declarations are admissible as explanatory of the present condition of the declarant, upon the principle of *res gestæ*, as well as upon the necessity of the case." *Rowland v. Walker*, 18 Ala. 749; *Eckles & Brown v. Bates*, 26 Ala. 655, 659; *Phillips v. Kelly*, 29 Ala. 628; *Birmingham, etc., Co. v. Hale*, 90 Ala. 8, 8 South. 142, 24 Am. St. Rep. 748; *Montgomery St. Ry. Co. v. Shanks*, 139 Ala. 489, 501, 37 South. 166; *Birmingham Ry., Light & Power Co. v. Rutledge*, 142 Ala. 195, 202, 39 South. 338; *Kansas City, M. & B. Ry. Co. v. Matthews*, 142 Ala. 298, 311, 39 South. 207.

According to this principle, rulings of the court challenged by the ninth, tenth, and eleventh grounds in the assignment of errors, even if the questions were properly presented, could not be sustained. We note that no exception was reserved to the rulings of the court in respect to the matters embraced in the ninth and tenth assignments, while, in respect to the eleventh assignment, the former part of the question falls within the principle above alluded to; but the answer of the witness was not responsive, and the defendant should have adopted a motion to exclude as the remedy against the answer.

In respect to the twelfth ground in the assignment of errors, it is sufficient to say that no exception was reserved to the ruling of the court.

It does not appear from the bill of exceptions that the question to the witness Stancil, "Then what was said, if anything?" was objected to. The answer thereto was responsive, and the motion to exclude it was properly overruled. Therefore the thirteenth ground in the assignment of errors cannot be sustained. *Southern Ry. Co. v. Leard*, 146 Ala. 349, 39 South. 449, and cases there cited.

Furthermore, all that was done and said by the parties who seized the property was competent as parts of the *res gestæ*; and within this principle falls also the matter embraced in the fourteenth, sixteenth, and twentieth grounds in the assignment of errors.

The fifteenth, seventeenth, and nineteenth grounds in the assignment cannot be sustained, for the simple reason that the questions objected to were not answered.

The eighteenth ground in the assignment of errors embraces two rulings of the court: First, the overruling of defendant's objection to a question to witness Hockholzer; and,

second, the refusal of the court to exclude an answer to the question. Assigned in this manner, both rulings must constitute reversible error, or the assignment cannot be sustained. It is clear that the first ruling, even if erroneous, cannot avail defendant anything. It was not excepted to.

Upon the same principle the twenty-first ground in the assignment is not sustainable. It purports to embrace two rulings, one of which was not made by the court, and there was no motion to exclude.

The evidence shows that the acts complained of occurred late in the afternoon. It was competent, against the general objection to the question made by the defendant, to prove, by the husband of plaintiff, the condition of the house on his return that night, and the twenty-second ground in the assignment cannot be sustained.

The twenty-third ground of error is not insisted upon in brief of counsel.

There was no objection to the question, "What became of the vases and ornaments?" and no stated ground for the motion to exclude the answer. Therefore the twenty-fourth ground in the assignment of errors is without merit. *McCalman's Case*, 96 Ala. 98, 11 South. 408; *Billingsley's Case*, 96 Ala. 126, 11 South. 409; *Washington's Case*, 106 Ala. 58, 17 South. 546; *Liner's Case*, 124 Ala. 1, 27 South. 438.

The twenty-fifth ground in the assignment challenges the ruling of the court overruling the question to plaintiff calling for testimony on the value of a necklace which the evidence tended to show was taken. No ground for the objection was assigned, and the court was under no duty to cast about for a ground for the objection. *Wallis v. Rhea*, 10 Ala. 453; *Eason v. Isbell*, 42 Ala. 456; *Riley's Case*, 88 Ala. 193, 7 South. 149. The ground of error cannot be sustained.

There are two grounds of error numbered 26. The witness who was being examined showed sufficient knowledge of the value of the goods to warrant the admission of her testimony on the question of value, and the first ground of error assigned by this number cannot be sustained. The second of the grounds numbered 26 cannot be sustained, because it is plain that defendant made no objection to questions calling for the evidence which is the subject of the motion to exclude, and the court was under no duty to grant the motion. *Liner's Case*, 124 Ala. 1, 27 South. 438.

The same observations are applicable to ground 27 in the assignment. Even if the court erred in admitting the testimony of plaintiff in respect to a conversation over the phone (*Western Union Tel. Co. v. Rowell* [Ala.] 45 South. 73), the subsequent exclusion of the evidence by the court rendered the admission of the testimony harmless.

The twenty-ninth ground of error embraces two rulings of the court, to one of which no exception was reserved. What has been

said in respect to the eighteenth ground in the assignment, therefore, is applicable to and condemnatory of this ground.

The question propounded to the witness Strickland, "What did the constable tell you, that it had or had not been done?" is hardly sufficiently intelligible to justify putting the court in error for sustaining an objection thereto. Besides, the question is a leading one. Consequently the thirtieth ground in the assignment of errors is not well taken.

The thirty-first ground in the assignment is without merit. It is conceded in this case that the writ under which the officers seized the goods was void, and afforded them no protection, even if the goods had been taken in a peaceable manner; but, if it had been valid, it would not have protected them against the consequences of conduct which the evidence for the plaintiff tends to show they were guilty of in this instance. They were liable for a trespass, and, it may be, for heavy damages. The question is, should the defendant be held liable?

The defendant's general manager, upon being notified by the officer that he had gained entrance to the house, and that, if he (the manager) would send a wagon over there, he could get the furniture, sent two of defendant's servants with a wagon; and the proof shows that these servants went into the house, took possession of the furniture, put it on the wagon, and carried it to the defendant's store, where it was retained even after the general manager was notified, the same night in which the goods were received, of the bad manner or conduct which characterized the parties in the seizure of the goods, and after demand was made by plaintiff for their return. On this phase of the evidence, the liability of the defendant was at least a question for the jury to determine, on the theory of ratification, if upon no other; and the charge numbered 17 was properly refused to the defendant. *Burns v. Campbell*, 71 Ala. 273, 290; *Murray v. Mace*, 41 Neb. 60, 59 N. W. 387, 43 Am. St. Rep. 664.

Furthermore, the process in the hands of Reynolds was void on its face, and the evidence tends to show that it was at the instance of the defendant the property was seized thereunder. In this state of the case the defendant was a trespasser in no less degree than was the constable. *Duckworth v. Johnson*, 7 Ala. 578; *Stetson v. Goldsmith*, 30 Ala. 602; *Oates v. Bullock*, 136 Ala. 537, 33 South. 835, 96 Am. St. Rep. 38.

There can be no doubt that the bill of exceptions shows that the charges of the defendant were requested in bulk; and, even one of them being bad, the court cannot be put in error for refusing all, nor for refusing to grant a new trial on the ground of error in their refusal (*Verberg's Case*, 137 Ala. 73, 78, 34 South. 848, 97 Am. St. Rep. 17; *Southern Ry. Co. v. Douglass*, 144 Ala. 351, 39

South. 268); and, this being true, the grounds of the motion for a new trial, based on the refusal of the written charges, were not well assigned.

The motion for a new trial contains, amongst others, two grounds (37 and 38) purporting to be based upon parts of the oral charge of the court. These grounds do not explicitly point out such portions of the charge, so as to bring them before us for review. However, looking to the oral charge, which is set out in full, we find the portions which seem more clearly to support the grounds set out on page 54 of the record; and these portions, at least abstractly considered, are without fault. Moreover, no exceptions thereto were reserved.

The only question for consideration is whether or not the verdict for \$1,500 is excessive. There can be no doubt, on plaintiff's theory of the case (and such theory finds support in the evidence), that Reynolds and Denegre, the persons who seized the goods, if they had been sued, would have been liable in exemplary damages. There is no plea of justification, and it is conceded that the writ under which the constable professed to act was void. The defendant was the cause of this void writ being placed in the hands of the officer for execution. Moreover, there is one phase of the evidence which warrants the inference of ratification of the seizure of the goods; and by this we mean that there is a tendency in the evidence to show that defendant received and retained the goods with knowledge of the circumstances which attended their seizure. In this view of the case, it cannot be said that the doctrine of exemplary damages is not applicable. *Lee v. Lord*, 76 Wis. 582, 45 N. W. 601; *Lienkauf & Strauss v. Morris*, 66 Ala. 406; *Street v. Sinclair*, 71 Ala. 110. This being true, it was in the discretion of the jury to award exemplary damages, and it is evident that they so did. We cannot say that the verdict is excessive.

No reversible error being shown by the record, the judgment will be affirmed.

Affirmed.

TYSON, C. J., and SIMPSON and ANDERSON, JJ., concur.

(158 Ala. 381)

BIRMINGHAM RY., LIGHT & POWER CO.
v. WILLIAMS.

(Supreme Court of Alabama. Dec. 17, 1908.)

1. STREET RAILROADS (§ 83*)—INJURY TO PERSON NEAR TRACK—TRESPASSERS—WHO ARE.

A street railroad employé, walking beside the track while going to his place of work in the usual way, was not a trespasser; the company having no exclusive or paramount right to the use of the part of the street occupied by its tracks, either as against other vehicles or as against pedestrians.

[Ed. Note.—For other cases, see *Street Railroads*, Dec. Dig. § 83.*]

2. STREET RAILROADS (§ 85*)—USE OF STREETS—DUTY OF RAILROAD.

The duty of a street railroad company to recognize the rights of persons in the lawful use of streets is imperative, and, while it has the right of way in case of meeting or overtaking a person on the track, it is bound to exercise a proper degree of care and such reasonable prudence and precaution as the attending circumstances may require to avoid injuring such person.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 193, 195; Dec. Dig. § 85.*]

3. STREET RAILROADS (§ 98*)—USE OF STREETS—DUTY OF ONE ON TRACK—CONTRIBUTORY NEGLIGENCE.

One using a street occupied by street railroad tracks is bound to exercise ordinary care and such reasonable prudence and precaution as the attendant circumstances may require to avoid being injured by a street car.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 204-216; Dec. Dig. § 98.*]

4. STREET RAILROADS (§ 93*)—INJURIES TO PERSONS ON TRACK—DUTY OF MOTORMAN—NEGLIGENCE.

It is the duty of a motorman, on seeing a pedestrian on the track or dangerously near it, to give warning of the approach of the car by sounding the bell or otherwise; and failure to give such warning may constitute negligence.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 195-200; Dec. Dig. § 93.*]

5. STREET RAILROADS (§ 117*)—INJURIES TO PERSON ON TRACK—QUESTIONS FOR JURY.

In an action against a street railroad for injuries to plaintiff, struck by a car while walking beside the track, the question whether the position of plaintiff when seen by the motorman was obviously perilous *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 244; Dec. Dig. § 117.*]

6. STREET RAILROADS (§ 93*)—INJURIES TO PERSON ON TRACK.

While a motorman may, on seeing a person on the track, assume that he will get out of the way, such assumption may not be indulged beyond the time when the person's danger is seen to be imminent.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 197; Dec. Dig. § 93.*]

7. STREET RAILROADS (§ 117*)—INJURIES TO PERSON ON TRACK—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.

In an action against a street railroad for injuries to plaintiff, struck by a car while walking beside the track, the questions of defendant's negligence and of plaintiff's contributory negligence *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 117.*]

8. NEGLIGENCE (§ 11*)—"WANTONNESS."

"Wantonness" is the conscious failure of one, charged with a duty to exercise due care and diligence, to prevent an injury after the discovery of the peril, or under circumstances where he is charged with a knowledge of such peril, and being conscious of the inevitable or probable results of such failure.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 13; Dec. Dig. § 11.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7386, 7387.]

9. TRIAL (§ 240*)—INSTRUCTIONS—ARGUMENTATIVE AND MISLEADING INSTRUCTIONS—INVADING PROVINCE OF JURY.

In an action against a street railroad for injuries to plaintiff through being struck by a car while walking beside the track, an instruc-

tion that plaintiff was not entitled to recover by reason of the fact, if it was a fact, that the motorman failed to discover plaintiff's danger as soon as he might have by reasonable care, and in the exercise of his duty to keep a lookout, and that, on the other hand, plaintiff was entitled to recover only in the event that the motorman was negligent in failing to conserve plaintiff's safety after he actually became aware of his danger, was properly refused as argumentative.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 561; Dec. Dig. § 240.*]

10. STREET RAILROADS (§ 118*)—INJURIES TO PERSON ON TRACK—ACTIONS—MISLEADING INSTRUCTIONS.

The instruction was also properly refused as misleading.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 118.*]

11. TRIAL (§ 194*)—INSTRUCTIONS—INVADING PROVINCE OF JURY.

The instruction was also properly refused as invading the province of the jury.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 194.*]

12. TRIAL (§ 194*)—INSTRUCTIONS—INVADING PROVINCE OF JURY.

In an action against a street railroad for injuries to plaintiff, struck by a car while walking beside the track, an instruction that plaintiff was negligent in allowing himself to be or remain in dangerous proximity to the car was properly refused as invading the province of the jury.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 194.*]

13. TRIAL (§ 253*)—INJURIES TO PERSON ON TRACK—INSTRUCTIONS.

Where, in an action against a street railroad for injuries to plaintiff, struck by a car while walking beside the track, the jury might have inferred wantonness on the motorman's part, instructions premitting any inquiry as to wantonness were properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

Appeal from City Court of Birmingham; H. A. Sharpe, Judge.

Action by Jack W. Williams against the Birmingham Railway, Light & Power Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The facts are sufficiently stated in the opinion of the court. The following charges were requested by defendant, and refused: (1) "If the jury believe the evidence, they cannot find for plaintiff under the first count in the complaint." (2) "The plaintiff is not entitled to recover by reason of the fact, if it be a fact, that the motorman failed to discover the danger of the plaintiff as soon as he might have discerned his danger by the exercise of reasonable care and in the exercise of his duty to keep a lookout. On the other hand, plaintiff is entitled to recover only in the event that the motorman was guilty of negligence in failing to conserve the safety of the plaintiff after he actually became aware of his danger." (3) Affirmative charge as to the second count. (4) "The court charges the jury that plaintiff is guilty of negligence in allowing himself to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

be or remain in a dangerous proximity to the car which struck him." (5) "If the plaintiff was guilty of negligence which proximately contributed to his injuries in the slightest degree, he cannot recover, although the jury may believe that the defendant is guilty of negligence." (6) "The plaintiff assumed the risk of injury in walking so near the track as to be in danger of passing cars, unless the jury are satisfied reasonably, from all the evidence, that the motorman was guilty of negligence in the operation of the car after the motorman actually discovered the peril of the plaintiff." There was judgment in the sum of \$500.

Tillman, Grubb, Bradley & Morrow, for appellant. Bowman, Harsh & Beddow, for appellee.

DENSON, J. The defendant's (appellant's) car line is constructed longitudinally on what is known as First avenue, a public street in the city of Birmingham. Defendant had the plaintiff, with others of its servants, employed in digging a ditch north of, and parallel with, its tracks in said avenue, between Twenty-First and Twenty-Second streets. At the noon hour of the day on which occurred the accident, the occasion of the injuries complained of, the plaintiff, with the other servants, went to the Twenty-Second street crossing and ate his dinner. After eating, and while all were returning to their work, walking beside the line of defendant's track, one of the defendant's cars, approaching from Twenty-Second towards Twenty-First street, ran against the plaintiff and injured him. Plaintiff testified, among other things, that "we were not on the track, but on the side of the track, where we always go down every day to get dinner. I was walking along there, and the car ran up from behind and struck me. The car did not blow any whistle, or ring any gong, or give any warning. There was no noise on the street by wagons or carriages, and the car was running fast. I could have heard it coming; but it never made any fuss. We did not hear the car coming. I had been working there at that place four days and a half when I got hurt, and during that time cars had been running back and forth. The East Lake car comes down every few minutes." The proof shows that plaintiff was a cripple, one of his legs being a "peg leg," and he was walking, his back toward the car, along by the side of the track, between it and the ditch, and behind the other servants.

The testimony, in respect to the distance from the rails to the ditch, variously placed same at from 3 to 5 feet, and was also in conflict as to whether plaintiff was walking within a safe distance from the track. That offered by the defendant tended to show that plaintiff was walking at a distance from the track safe from harm until the car drew quite near, when he staggered toward the car and within range of it; while plaintiff

testified that he never staggered, and was no nearer the track when struck than theretofore. The testimony for the defendant tended to show that the car was going at not exceeding 4 miles an hour; that its rate of speed was "very slow"; that it was a "big" double-truck car, about 28 to 30 feet long; that the motorman noticed the plaintiff ahead of the car about two car lengths, walking between the track and the ditch, and that when the car was within 6 or 7 feet of the plaintiff the motorman commenced ringing the gong; that when the car was within 5 or 6 feet of plaintiff he staggered near enough to the track to be struck, and was struck on his left shoulder by the arm hold on the side of the car; that the car ran 5 or 6 feet after striking plaintiff; that the motorman had been running cars for the defendant four years; that, when he saw plaintiff getting close enough to the track to be struck by the car, he "stamped" his gong and "put on the air in emergency to stop"; that that was the only way to stop a car, "unless you reverse it," and that that was about as quick as reversing, with the rate of speed at which he was then going. On cross-examination the motorman testified, among other things: "I could have reversed the car and put on the air; but, as the fellow says, I did not have time to do it—not hardly time."

The foregoing is a substantial statement of the testimony in the case necessary, in our opinion, to a correct determination of the legal points presented by the assignment of errors. The only errors assigned relate to charges requested by the defendant and refused by the court.

The first of the refused charges is in this language: "If the jury believe the evidence they cannot find for the plaintiff under the first count of the complaint." The first count counts for recovery on simple negligence, alleged in general terms. It is argued that this charge should have been given on either or both of two theories: First, that no negligence on the part of defendant's motorman was shown; second, if negligence on the part of the motorman was shown, yet the evidence shows that plaintiff was guilty of negligence which proximately contributed to his injury. It must be conceded that the plaintiff was not a trespasser on the track, and two reasons might be assigned as bases for this conclusion: First, "the company had not an exclusive or paramount right to the use of the part of the street occupied by its tracks, either as against other vehicles or against pedestrians (27 Am. & Eng. Ency. Law, 88); second, the plaintiff, as a servant of the defendant, was going to his place of work in the usual way.

The duty of the company to recognize the rights of persons in the lawful use of the streets is imperative. As the company is held to a high degree of care, to a degree commensurate with the circumstances of

each particular case, so likewise the citizen is held; for he cannot recklessly place himself in the way of danger and then complain of injury. He is bound, equally with the company, to the exercise of a proper degree of care, skill, and vigilance. He has no exclusive right to any particular portion of the street, and neither has the street railway company. The car has the right of way, in case of meeting or overtaking a person on the track; but each party, in order to avoid accident, is bound to exercise ordinary care and such reasonable prudence and precaution as the attending circumstances may require. These circumstances necessarily vary, in their relation to each other, in each particular case, and the conduct of the parties must be considered in the light of their surroundings at the particular time when they were called upon to act. What might be considered ordinary care in one case might, under the circumstances of another, amount to culpable negligence. The Supreme Court of the United States, in the case of *Grand Trunk Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485, said: "There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent and what shall constitute ordinary care under any and all circumstances. The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence." On these considerations it is manifest that the evidence of negligence in each case must depend upon the circumstances peculiar to it, and which surrounded the parties at the time of the occurrence on which the controversy is based. "Where negligence does appear, there are generally some prominent facts which show a want of due regard for the safety of others, or an absence of proper care and precaution, so as to avoid the casualty, or inaction or lack of skill in the use of dangerous instrumentalities in places obviously perilous, or the doing of an act which duty had forbidden, or the omission to do one which duty had commanded to be done. If, in any case, these facts, or any one of them, appear, and in addition thereto it is shown that, in consequence thereof, injury has been inflicted upon a person who was himself in the exercise of ordinary care and reasonable prudence, and not so connected with the author of the injury as to have assumed the hazard, then it is a case of negligence authorizing a recovery of damages."

Duty requires of a motorman, upon seeing a pedestrian on the track or dangerously near to it, to give warning of the car by sounding the gong or bell, or otherwise; and failure to give such warning may constitute

negligence. 27 Am. & Eng. Ency. Law, 64, 65, and cases cited in note 1 to the text. We have seen that there is, in this case, a tendency in the evidence to prove that the motorman discovered the plaintiff when the latter was at least 60 feet ahead of the car; and the question of the position of the plaintiff at that time—whether obviously perilous, or otherwise—was at least one for the determination of the jury. We have also seen that there is a tendency in the evidence to the effect that the motorman ran the car fast and without any warning of its approach until it was within 6 or 7 feet of plaintiff, and that plaintiff was unaware of its approach. The testimony shows that the plaintiff was a cripple, and that this might have been observed by the motorman, who was looking towards him—saw him. While it is true that a motorman may, upon seeing a person on the track, assume that he will turn aside from the dangerous position and out of the way of the car, yet the law does not accord to him the right to indulge the assumption beyond the time when the person's danger is seen to be imminent. The evidence of the motorman was that the plaintiff was walking at a safe distance from the track all the while until the approaching car reached a point within 6 or 7 feet of him, when he staggered towards the car. On the other hand, the plaintiff testified that he did not stagger towards the car; and the effect of his evidence is that he maintained the same distance from the car all the while until he was struck. So it was open to the jury to infer that plaintiff was dangerously near to the car track all along, and that the motorman realized his dangerous position with time to stop the car and avoid the injury, notwithstanding plaintiff may have been at fault in remaining on the track too long. In the light of all these considerations, the court is of the opinion that it cannot be said, as matter of law, that the defendant was not guilty of negligence, nor that the plaintiff was guilty of negligence which, in a legal sense, contributed to the result. Therefore charge 1 was properly refused. *Grand Trunk Railroad Co. v. Ives*, supra; *Inland, etc., Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270.

The second count of the complaint is predicated upon wanton or willful injury, and the affirmative charge, requested by defendant in proper form, in respect to this count, was refused by the court. Wantonness "is the conscious failure of one charged with a duty to exercise due care and diligence to prevent an injury after the discovery of the peril, or under circumstances where he is charged with a knowledge of such peril, and being conscious of the inevitable or probable results of such failure." *Birmingham, etc., Co. v. Pinckard*, 124 Ala. 372, 28 South. 880. Without pursuing further the tendencies of the evidence, the court, after consideration of the evidence in its entirety, concurs with

the trial court in the opinion that it was open to the jury to infer wantonness on the part of the motorman in the infliction of the injury, and consequently must hold that charge 3 was properly refused. 3 Mayf. Digest, 712, § 36.

Charge 2, refused to defendant, is argumentative, misleading, and invasive of the province of the jury.

Charge 4 is invasive of the province of the jury, and is outside of the matters set up in the pleas of contributory negligence.

Charges 5 and 6 premit any inquiry as to wantonness, and were therefore properly refused.

No error being shown, the judgment of the trial court is affirmed.

Affirmed.

TYSON, C. J., and DOWDELL and SIMPSON, JJ., concur.

(158 Ala. 484)

AMERICAN BOLT CO. v. FENNELL

(Supreme Court of Alabama. Dec. 17, 1908.)

1. MUNICIPAL CORPORATIONS (§ 706*)—USE OF STREETS—SIDEWALKS—USE BY PEDESTRIANS.

A complaint stating that, while plaintiff was walking on the sidewalk of a public street, where he had the right to be, he was struck from behind by a team driven by defendant's servant, and run over, and that his injuries were due to the negligence of defendant's servant, is not demurrable for failure to show any violation of duty toward plaintiff, or that he was guilty of any negligence in regard to him; plaintiff being entitled to the uninterrupted use of the sidewalk.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 706.*]

2. MUNICIPAL CORPORATIONS (§ 706*)—USE OF STREETS—NEGLIGENT USE—PLEADING—SUFFICIENCY OF COMPLAINT.

In an action for injuries to a pedestrian while on the sidewalk, the complaint was not demurrable for not alleging that the sidewalk was for the exclusive use of pedestrians; that fact being implied.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 706.*]

3. MUNICIPAL CORPORATIONS (§ 706*)—USE OF STREETS—PLEADING—COMPLAINT—NEGLIGENCE.

A general allegation that plaintiff, while walking on the public highway, was injured by defendant's negligence in driving mules was a sufficient allegation of negligence.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 706.*]

4. NEGLIGENCE (§ 113*)—PLEADING—CONTRIBUTORY NEGLIGENCE—NECESSITY OF PLEADING.

Contributory negligence is a matter of defense, and need not be negated by the complaint.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 186-193; Dec. Dig. § 113.*]

5. MUNICIPAL CORPORATIONS (§ 705*)—USE OF STREETS—USE BY PEDESTRIANS.

A pedestrian may walk along or across the streets, and has equal rights therein with vehicles, and each should recognize the rights of the other, and the drivers of vehicles should

keep them under control, so as not to injure pedestrians who are properly on the street.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1515; Dec. Dig. § 705.*]

6. MUNICIPAL CORPORATIONS (§ 706*)—USE OF STREETS—ACTIONS FOR NEGLIGENCE—SUFFICIENCY OF ALLEGATIONS—PROXIMATE CAUSE.

In an action for personal injuries caused by defendant's negligence in driving a vehicle in the street, an allegation that defendant so carelessly drove the mules that, by reason of his negligence, one of them struck plaintiff, and that defendant's negligence proximately caused the injury, sufficiently showed the causal connection between the negligence and the injury.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 706.*]

7. MASTER AND SERVANT (§ 329*)—INJURIES TO THIRD PERSON—ACTIONS—PLEADING—CONSTRUCTION.

In an action for injuries to a pedestrian by the negligence of defendant's servant in driving a mule team, an allegation that the servant, while acting within the scope of his duties, so carelessly drove and managed the mules that by reason of his negligence one of them struck plaintiff, knocking him down, etc., simply meant that the servant, while acting within the scope of his duty in driving the team, performed the duty so negligently as to cause the injury, and did not mean that it was within the scope of his duty to run over plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 329.*]

8. EVIDENCE (§ 472*)—OPINIONS—MATTERS DIRECTLY IN ISSUE.

In an action against a master for injuries to a pedestrian by the servant's negligence in driving a mule team, a question whether it was negligent to strike the mules, under the circumstances, was properly excluded; the issue of negligence being for the jury, and not for the witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2186-2195; Dec. Dig. § 472.*]

9. EVIDENCE (§ 507*)—OPINION EVIDENCE—EXPERT TESTIMONY—MATTERS OF COMMON KNOWLEDGE.

Expert testimony was unnecessary to determine whether it was negligence to strike a mule, which ran over plaintiff in the street after being struck; the nature of the animal and the effect of striking it being common knowledge, so that the jury could determine the question.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2310; Dec. Dig. § 507.*]

Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge.

Action by Ed Fennell against the American Bolt Company. From a judgment for plaintiff, defendant appealed. Affirmed.

Complaint was as follows: "(1) Plaintiff claims of defendant the sum of \$5,000 as damages for this, to wit, that heretofore, on, to wit, the 15th day of February, 1907, about 5 o'clock in the afternoon, the plaintiff was proceeding on foot on the sidewalk, where he had a right to be, along Thirty-Second street, from First avenue towards Fifth avenue, in Jefferson county, Ala., according to the map and plan of the city of Birmingham, and when plaintiff had proceeded a short distance from First avenue he was

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

struck from behind by a team of two mules drawing a heavy dray, owned by the American Bolt Company, in charge of defendant's servant, who was driving said team, acting within the line and scope of his duty, whose surname was Howard, but whose Christian name was unknown to the plaintiff. Plaintiff avers that he was knocked down by said team, and run over by the front and rear wheels of said dray, and his leg was broken between the knee and ankle; and plaintiff avers that by reason of the above he suffered great bodily pain, and experienced great physical and mental suffering, and was put to large expense for medicine and medical attention, and the care of the physician in trying to effect a cure, and was confined to his bed; and plaintiff avers that he was knocked down and run over, and his said injuries received by reason of, and as a proximate consequence of, the negligence of defendant's servant in allowing said team to run over plaintiff." (2) Same as 1, down to and including the words "confined to his bed," with this additional averment: "And plaintiff avers that he was so knocked down and run over, and his said injuries received, by reason of, and as a proximate consequence of, the negligence of defendant's servant, in charge of said team, in and about the driving of said team." (4) Same as 1 down to and including the words "confined to his bed," with the following: "That plaintiff was knocked down and run over, and received his said injuries, by reason of, and as a proximate consequence of, the negligence of defendant's servant, in charge of said team, in and about the management of said team." "(X) Plaintiff claims of defendant the sum of \$5,000 as damages for this, to wit, that on the 15th day of February, 1907, plaintiff was walking along the public highway near the city of Birmingham, Ala., along a street known as Thirty-Second street, near First avenue; that defendant was a proprietor of a dray and two mules, which were then passing along said highway in the possession of one Howard Fowler, defendant's servant, who was driving the team; that said Howard, defendant's servant, acting within the line and scope of his duty, so carelessly drove and managed said mules and dray that by reason of his negligence said mules, or one of them, struck the plaintiff, knocking him down, and one of the front and rear wheels of said dray ran over him, or over his leg, and his leg was broken, whereby plaintiff was bruised, and made sick and sore, and confined to his bed and was for a long time prevented from attending to his business, and was put to great expense in endeavoring to be healed of his hurts in the way of medicine and medical attention, and in the employment of a physician, and he suffered great bodily pain, and experienced great physical and mental suffering; and plaintiff avers that his said injuries are of a

permanent nature, and that he will be less able to earn money. Plaintiff avers that said negligence of said servant of defendant, said Howard Fowler, proximately caused plaintiff's said injury." Plaintiff amended his first count by inserting before the words "and when plaintiff had proceeded" this clause: "Which said street, at and prior to the time of plaintiff's said injury, was habitually used by the public as a highway, a portion of said streets being for vehicles, and along the same the sidewalk being used by pedestrians."

Demurrers were interposed to the first count, "because (1) that it does not show that defendant violated any duty it owed plaintiff, or that it was guilty of any negligence towards plaintiff; (2) it does not show that, when plaintiff was injured, defendant's team and mules or dray were not where they had a right to be; (3) it is not shown that defendant's team and dray had not the right to be on the sidewalk along which plaintiff was proceeding. No facts are alleged showing negligence." To the second count the same as to the first with the additional grounds that it is not shown in what the negligence consisted, and was not shown how defendant's servant was guiding said team. To the fourth count, the same grounds as to the third, and the additional grounds that it is not shown what was the management of the team by defendant's servant, and because the allegation of management was a conclusion. To count X, "because it appears that the alleged negligence of defendant driver was not the proximate cause of the injury; (2) because it does not appear that plaintiff was in the exercise of due care; (3) it appears from said count that the act complained of was the wrong of the servant, for which defendant was not liable; (4) for that it appears that it was in line with the man Howard's employment, while driving defendant's team, to knock down and run over plaintiff, which is not an actual negligence."

Ward & Rudolph, for appellant. W. K. Terry, for appellee.

SIMPSON, J. The action in this case was brought by the appellee against the appellant for damages on account of injuries received from being run over by a team of mules, drawing a dray, belonging to the defendant. The general affirmative charge was given, as to the third and fifth counts of the complaint, in favor of the defendant, leaving only the first, second, and fourth counts, and count X, for consideration.

It is insisted, first, that the demurrer should have been sustained to the first count of the complaint, because said count does not show that the defendant violated any duty which it owed to the plaintiff. The count alleges that plaintiff was walking on the sidewalk of Thirty-Second street, a public street and highway of the city, where he

had a right to be, when he was struck by defendant's team, and that it was the result of the negligence of defendant's servant, in charge of said team, in allowing said team to run over him. Pedestrians have a right to the uninterrupted use of the sidewalk, and the said count is not subject to the demurrer. *Fielder v. Tipton*, 149 Ala. 608, 42 South. 985, 8 L. R. A. (N. S.) 1268.

For like reasons the demurrer to the second count in the complaint was properly overruled, as was also the demurrer to the fourth count. It was not necessary to allege that the sidewalk was for the use of pedestrians only, as the law affixes that use to a sidewalk. *Fielder v. Tipton*, supra; *Elliott on Roads & Streets*, p. 17. Moreover, the amendment did allege that the sidewalk was for the use of pedestrians.

Under our decisions, the general statement of negligence in count X was sufficient, and, if the plaintiff was not exercising proper care, that was a matter of defense. The plaintiff and the defendant had equal rights in the street, and, while the sidewalk is the place for pedestrians alone, yet pedestrians have the right also to walk across or along the streets, and it is the duty of both pedestrians and travelers by vehicle to recognize the right of each to be upon the street, and it is the duty of travelers by vehicle to keep the same under control, so as not to injure pedestrians in the proper exercise of their rights. *Kathmeyer v. Mehl* (N. J. Sup.) 60 Atl. 40; *Hennessey v. Taylor*, 189 Mass. 583, 76 N. E. 224, 8 L. R. A. (N. S.) 345; *Elliott on Roads & Streets*, p. 622.

The casual connection between the negligence and the injury is sufficiently shown by the allegations of said count, and there is no merit in the suggestion that the allegation that the defendant's servant was "acting within the line and scope of his duty" means that it was within the line and scope of his duty "to run over and knock down appellee." That expression means simply that, while acting within the line and scope of his duty—to wit, driving the dray in the business of the master—he performed that duty so negligently and carelessly as to cause the injury.

There was no error in sustaining the objection to the questions to the witnesses as to whether it was negligent to strike the mules in order to urge them across the track. The question of negligence vel non was for the jury to determine on the facts related, and not on the opinions of others. Besides, it does not require any expert testimony to tell whether it is negligence to strike a mule. The nature of the animal, and the relation of lashes to his good behavior, are matters of common knowledge, known to the jury as well as to any witness. *Ferguson v. Hubbell*, 97 N. Y. 507, 49 Am. Rep. 544.

There was no error in overruling the motion for a new trial.

The judgment of the court is affirmed.

TYSON, C. J., and DOWDELL and DENSON, JJ., concur.

(158 Ala. 391)

LOUISVILLE & N. R. CO. v. LOWE.

(Supreme Court of Alabama. Dec. 17, 1908.)

1. MASTER AND SERVANT (§ 285*)—LIABILITY FOR INJURIES TO SERVANT—ACTIONS—BURDEN OF PROOF.

When a servant's cause of action is based on Code 1907, § 3910, subd. 1, making the master liable, as if he were a stranger, for any injury to a servant caused by a defect in the machinery used, the plaintiff has the burden of proving, not only the existence of the alleged defect and that it was the proximate cause of the injury, but also that the defect arose from, or had not been discovered or remedied owing to, the negligence of the master, or some servant charged with the master's duty.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 900-906; Dec. Dig. § 285.*]

2. MASTER AND SERVANT (§ 285*)—LIABILITY FOR INJURIES—ACTIONS—QUESTIONS FOR JURY—CAUSE OF INJURY—DEFECT IN RAILROAD TRACK.

Evidence in an action for injuries to a flagman examined, and held insufficient to go to the jury on a count of the complaint alleging that a defect in the railroad track was due to defendant's negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1021; Dec. Dig. § 285.*]

3. NEGLIGENCE (§ 119*)—ACTIONS—ISSUES AND PROOF.

Where the complaint charges specific acts of negligence as the cause of personal injuries, the plaintiff is confined to proof of the negligence specified; but if it charges negligence generally, without specifying any particular acts, subsequent negligence may be proved.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 208; Dec. Dig. § 119.*]

4. MASTER AND SERVANT (§ 296*)—LIABILITY FOR INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS—APPLICABILITY TO ISSUES.

Where the complaint in an action for injuries to a flagman contained two counts, the first being for a defect in defendant's railroad track, and the second being for negligence in the failure of defendant's engineer, in charge of the locomotive which plaintiff was endeavoring to flag, "to keep a proper lookout," a charge permitting a recovery upon proof of the engineer's negligence occurring after discovering plaintiff's peril, notwithstanding plaintiff's contributory negligence in going on the track, was erroneous; the engineer's subsequent negligence being outside the issues.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1194; Dec. Dig. § 296.*]

5. MASTER AND SERVANT (§ 270*)—LIABILITY FOR INJURIES TO SERVANT—ACTIONS—ADMISSIBILITY OF EVIDENCE—CONDITIONS AFTER INJURY.

In an action for injuries to a flagman caused by a defect in defendant's railroad track, plaintiff was entitled to show the condition of the track where the injury occurred on the morning following the night of the accident; there being no evidence of a change in the meantime.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 917; Dec. Dig. § 270.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge.

Action by Edmund M. Lowe against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

The facts are sufficiently stated in the opinion of the court. The following portion of the court's oral charge was excepted to: "Now, the plaintiff, though he is guilty of negligence himself, is not necessarily precluded from recovery; because, even if he was guilty of negligence, if the engineer saw him and knew of his perilous position in time to prevent the injury, and failed to do it, still plaintiff would be entitled to recover, because the law says that the subsequent failure of an engineer to use the means at his command to prevent an injury would be the proximate cause, and not the other—the other being simply the creation of a condition upon which the negligence of the engineer operated." The first count was for defect in the ways, works, plant, etc. The second count was for negligence in the failure of the person, in charge or control of the engine which plaintiff was attempting to flag, to keep a proper lookout. There was judgment for plaintiff in the sum of \$4,000.

Tillman, Grubb, Bradley & Morrow, for appellant. White & Edwards, for appellee.

DENSON, J. When a cause of action is based on subdivision 1 of the employer's liability statute (Code 1896, § 1749; Code 1907, § 3910), in order to make a case of liability against the master, the plaintiff carries the burden of proving, to the reasonable satisfaction of the jury, not only the existence of the alleged defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the master or employer, and that the defect was the proximate cause of the injury alleged, but also that the "defect arose from, or had not been discovered or remedied owing to, the negligence of the master or employer, or of some person in the service of the master or employer." *L. & N. R. R. Co. v. Davis*, 91 Ala. 487, 494, 8 South. 552; *Seaboard Mfg. Co. v. Woodson*, 94 Ala. 143, 147, 10 South. 87; *Tuck v. L. & N. R. R. Co.*, 98 Ala. 150, 152, 12 South. 168; *L. & N. R. R. Co. v. Blin-ion*, 98 Ala. 570, 574, 14 South. 619; *L. & N. R. R. Co. v. Baker*, 106 Ala. 624, 632, 17 South. 452; *Birmingham Rolling Mill Co. v. Rockhold*, 143 Ala. 115, 126, 42 South. 96; *Tutwiler, etc., Co. v. Farrington*, 144 Ala. 157, 165, 39 South. 898; *Dresser's Employer's Liability*, p. 233, § 49; 2 *Dresser's Employer's Liability*, p. 96. The defect is alleged to have "consisted in a spike used to fasten the rail to the cross-tie on said railroad track at the point where the plaintiff was injured being loose and sticking up so as to catch plaintiff's foot and throw him down."

The only testimony disclosed by the record

in respect to the defect is that of the plaintiff and his witness Fred. Jones. The plaintiff testified that he hung his foot under a spike that was in the cross-ties in hollow of the rail, and fell. "I did not see any spike at all. I judge, from the way my foot was caught, that it was a spike." Jones testified that, about 10:30 a. m. of the day after the night plaintiff was injured, he examined the defendant's railroad track where plaintiff got hurt, and saw there a spike pulled up and laid in the middle of the track, and some spikes that were out of the ties (two or three, he thought) around there, a little bit up out of the ties next the flange of the rail. "I did not see where the spike that was loose in the middle of the track came from, I just saw it lying there. I measured the spike that was sticking up with my finger, and from its head to the flange of the rail was the length of the second knuckle of my finger." Assuming that the evidence showed the defect, it is manifestly true that it falls short of showing, or of tending to show, any negligence on the part of the defendant, or on that of its employes, in respect to its existence or to failure to discover it; and in this state of the proof the affirmative charge, requested in writing by the defendant, touching the first count of the complaint, should have been given. *Birmingham, etc., Co. v. Rockhold*, 143 Ala. 115, 126, 42 South. 96; *Kansas City, etc., Co. v. Webb*, 97 Ala. 157, 162, 11 South. 888; *United States, etc., Co. v. Weir*, 96 Ala. 396, 402, 11 South. 436, and other authorities supra; *Woodward Iron Co. v. Cook*, 124 Ala. 349, 27 South. 455.

The second count alleges that the negligence consisted in the failure of the engineer in charge or control of the locomotive of the train which plaintiff was endeavoring to flag "to keep a proper lookout." There can be no doubt that under the first, as well as under this count, the plaintiff should have been confined to proof of the negligence specified, and that he could not recover for negligence not specified. *Conrad v. Gray*, 109 Ala. 130, 134, 19 South. 398; *Prestwood v. McGowan*, 148 Ala. 475, 41 South. 779. Under counts specifying the negligence of the defendant or of its servant, although the negligence specified may be shown to the reasonable satisfaction of the jury, yet, if the evidence should also reasonably satisfy the jury that the plaintiff was guilty of negligence in going on the track, or in attempting to mount the pilot of the engine, such negligence of the plaintiff should be held a contributing cause of plaintiff's injury; and, being considered along with any antecedent negligence, alleged and proved, on the part of the defendant or of its employes, should bar recovery by plaintiff. Consequently, the negligence upon which the plaintiff relied to fix liability being specifically set out in the complaint here—any negligence on the part of the defendant's servant, occurring after discovering plaintiff's peril, is not embraced in

the count, and cannot afford ground for a recovery; and this, notwithstanding the contributory negligence of the plaintiff. Such subsequent negligence was outside of the issues.

But if the complaint had shown negligence generally, without specifying any particular acts, it would have embraced such subsequent negligence, and it would have been within the provable issues made by the complaint. *Central of Georgia Ry. Co. v. Foshee*, 125 Ala. 199, 27 South. 1006. On these considerations, the error involved in that part of the oral charge of the court expected to be apparent. *Johnson v. Birmingham R., L. & P. Co.*, 149 Ala. 529, 43 South. 36.

There is no merit in the exception reserved to the ruling of the court on the admissibility of Jones' testimony in respect to the conditions found by him at the point on defendant's track where the injury occurred. *Jackson Lumber Co. v. Cunningham*, Adm'x, 141 Ala. 206, 37 South. 445.

What has been said will afford a sufficient guide for the trial court, should the cause be again tried.

Reversed and remanded.

TYSON, C. J., and HARALSON and SIMPSON, JJ., concur.

(158 Ala. 340)

FULLER et al. v. CLEMMONS.

(Supreme Court of Alabama. Dec. 17, 1908.)

1. EQUITY (§ 363*)—PLEADING—MOTION TO DISMISS FOR WANT OF EQUITY.

In determining a motion to dismiss a bill for want of equity, the facts stated in the bill are to be taken as admitted.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 766; Dec. Dig. § 363.*]

2. ATTORNEY AND CLIENT (§ 192*)—COMPENSATION—LIEN—ENFORCEMENT.

A bill to enforce an alleged lien for attorney's fees on a money decree obtained by the attorney's services is not a bill to alter or disturb that decree, and hence need not be filed at the term of court at which the decree was rendered.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. § 426; Dec. Dig. § 192.*]

3. ATTORNEY AND CLIENT (§ 174*)—LIEN OF ATTORNEY.

An attorney has a lien upon a judgment or decree for services rendered by him as attorney in the particular case in obtaining the judgment or decree.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. § 378; Dec. Dig. § 174.*]

4. ATTORNEY AND CLIENT (§ 186*)—LIEN OF ATTORNEY.

The fact that the amount of a decree was paid by the defendant to assistant counsel for plaintiff in the case, who had authority to receive it, having themselves a lien upon the decree for their services as attorneys, could not in equity operate to defeat the lien thereon of plaintiff's principal attorney.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. § 393; Dec. Dig. § 186.*]

5. ATTORNEY AND CLIENT (§ 192*)—LIEN—ENFORCEMENT—AMOUNT OF DECREE PAID INTO COURT.

If the amount of a decree were paid into the registry of the court, the more orderly procedure by an attorney to enforce a lien thereon for attorney fees would be by petition to the chancellor, instead of by an original bill.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. § 426; Dec. Dig. § 192.*]

Appeal from Chancery Court, Mobile County; Thomas H. Smith, Chancellor.

Bill by J. I. Clemmons against Mildred Fuller and others. A motion to dismiss for want of equity was overruled, and respondents appeal. Affirmed.

Henry Chamberlain, for appellants. T. J. Torrey, for appellee.

DOWDELL, J. The appeal in this case is taken from the decree of the chancellor overruling the respondents' motion to dismiss the bill for want of equity. The purpose of the bill is to effectuate and enforce an alleged lien for an attorney's fee in favor of the complainant on a moneyed decree obtained by his services rendered as such attorney in favor of the respondent Mildred Fuller against one Charles H. Schwaeemme.

On a motion to dismiss a bill for want of equity, the facts stated in the bill are to be taken as admitted. After averring complainant's employment as attorney, the services rendered, and the procuring of the decree, it is stated and averred in the bill "that said sum of \$500 was paid into the hands of said Boyles & Kohn (respondents), who had become associated with your orator as assistant solicitors at a very late stage of the proceedings; * * * that said sum is still in their hands, and retained by them for a proper disposition of the same, and subject to orator's lien upon the same for his services as solicitor in said cause, and upon which they are advised, believe, and admit he has such lien."

The "first" insistence of counsel for appellant in brief and argument, that, the term of the court at which the decree in question was rendered having adjourned before the filing of the present bill, the court has lost all control over the same, is without merit. To alter or disturb that decree in any manner is entirely foreign to the purpose of the bill. The lien of an attorney upon the judgment or decree for services rendered by him as such in the particular case, in obtaining the same, as stated in former decisions of this court, has long been a settled question in the jurisprudence of this state. *Higley v. White*, 102 Ala. 602, 15 South. 141; *Jackson v. Clopton*, 66 Ala. 29; *Ex parte Lehman, Durr & Co.*, 59 Ala. 631; *Warfield v. Campbell*, 38 Ala. 527, 82 Am. Dec. 724. The existence of the lien in the present case is admitted, and it is further admitted that the fund representing the decree is in the hands

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of the respondents, Boyles & Kohn, and is held by them "for proper disposition subject to the lien." This, taken in connection with other averments in the bill, is quite sufficient to impart equity to the bill.

Under the particular facts stated in the bill, the lien given by law upon the decree attached to the funds in the hands of Boyles & Kohn. The fact that Boyles & Kohn as associate solicitors received into their hands from the defendant in the decree the amount of the decree, as they were authorized to do, having themselves a lien upon the decree for their services as attorneys, could not in equity operate to defeat the complaint's lien.

It is urged as a defense against the equity of the bill that the fund was not paid into the registry of the court. This is of no importance under the facts of the bill. The only difference that this could make would be in the procedure by the complainant for relief. If the fund had been paid into the registry of the court, the more orderly procedure would have been by petition to the chancellor, instead of by an original bill; but not having been paid into court, and having been paid into the hands authorized to receive the fund, and who were not parties to the cause in which the decree was rendered, the remedy was by original bill to enforce the lien under the particular facts in the case.

The decree of the chancellor is affirmed.
Affirmed.

TYSON, C. J., and ANDERSON and McCLELLAN, JJ., concur.

(158 Ala. 578)

WESTERN UNION TELEGRAPH CO. v. WALKER.

(Supreme Court of Alabama. Dec. 17, 1908.)

1. APPEAL AND ERROR (§ 1040*) — REVIEW — HARMLESS ERROR — DEMURRER — INSTRUCTIONS.

In an action for damages for the negligent transmission of a telegram, the complaint alleged that the company negligently failed to deliver the telegram to the addressee. The telegram as set out in the complaint showed that the telegram was to be sent to a named place, to be mailed therefrom to the addressee. *Held*, that any error in overruling a demurrer to the complaint for the variance was harmless, where the defendant had the benefit of a charge of the court on the trial absolving the defendant from liability if the telegram was sent and properly mailed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4098; Dec. Dig. § 1040.*]

2. PRINCIPAL AND AGENT (§ 143*) — NEGLIGENCE TRANSMISSION OF TELEGRAM — PERSON WHO MAY SUE — UNDISCLOSED PRINCIPAL.

An undisclosed principal can sue for the failure to deliver a telegram to his agent, where the message is sent by one acting as his agent for the purpose of sending the telegram.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 502, 503; Dec. Dig. § 143.*]

Appeal from Circuit Court, Hale County; B. M. Miller, Judge.

Action by Charles D. Walker against the Western Union Telegraph Company for the negligent transmission of a telegram. From a judgment for plaintiff, defendant appeals. Affirmed.

The complaint is in the following language: "Plaintiff claims of defendant \$500 as damages, for that heretofore, on, to wit, the 27th day of March, 1903, said defendant, a corporation as aforesaid, was in the control and operation of a line of telegraphs running through Hale county, Ala., and held itself out to the public on said day as willing and ready to transmit telegraphic messages over said line for all persons complying with its reasonable rules and regulations, and who would pay it the compensation charged by it for the transmission of said message; and plaintiff avers that on the 27th day of March, one Robert Poellnitz, who, plaintiff avers, was the agent of plaintiff, for the purpose of sending said message, filed with the defendant, in compliance with its reasonable rules and regulations for transmission by it, a message in words and figures substantially as follows: 'Jesse Pauley, Myrtlewood, Alabama. Mail at Linden. River sixty-one and a half feet at Tuscaloosa rising foot an hour. Robert Poellnitz'—and paid to defendant the sum charged by it for transmitting said message, which sum said defendant received and still retains. And plaintiff avers that said message was delivered to said defendant at his office in Greensboro, Ala., on, to wit, the 27th day of March, 1903, by said Robert Poellnitz, and that the said defendant thereupon accepted the same for transmission to the addressee therein. And plaintiff avers that said defendant owed him the duty to promptly transmit and deliver said message, and he avers that said defendant negligently failed to deliver said message to said Jesse Pauley, the addressee therein. And plaintiff avers that said Jesse Pauley was the agent of plaintiff for the purpose of pasturing stock belonging to plaintiff. And he avers that said stock was pastured near the river, and that he had previously instructed and agreed with said Pauley that he would have said Pauley informed of the condition of said river, and instructed said Pauley in the event said river became dangerously high, to remove said cattle from dangerous proximity to said river. And he avers that said telegram was intended to inform said Pauley of the dangerous condition of said river, but that, on account of the negligent failure of defendant to deliver said message to said Pauley, he had no notice of the condition of said river, and did not remove said stock from the neighborhood of said river. And plaintiff avers that the river

overflowed its banks on, to wit, the 30th day of March, 1903, and one yoke of steers, of the value of \$100, the property of the plaintiff, then in the care of said Jesse Pauley, were drowned, to the damage of plaintiff in the sum of \$100, for the recovery of which he brings this suit. And plaintiff avers that said loss and damage was occasioned by the negligent failure of the defendant to deliver said message to said Pauley, and that if said message had been promptly delivered to said Pauley said loss would not have occurred."

The following demurrers were interposed: "(1) It does not show any causal connection between the injury alleged and the negligence averred. (2) The count is *ex contractu*, and shows no actual damage. (3) The count sets out a contract, and avers a breach of the same, which breach is outside the terms of the contract. (4) The contract sued on shows that the message was to be mailed at Linden to Myrtlewood, yet said count avers the breach to be that the said message was not delivered at Myrtlewood. (5) It fails to aver that the failure of defendant to transmit and deliver the message was the proximate cause of the damage claimed. (6) Said complaint does not aver that plaintiff was ignorant of the rise in the river. (7) It shows on its face that the contract between plaintiff and defendant was to mail said telegram at Linden, yet it fails to aver that defendant failed to mail said telegram at Linden. (8) It fails to aver or show that if said telegram had been promptly transmitted to plaintiff at Myrtlewood, it would have reached him in time to prevent the loss claimed. (9) The complaint shows that the contract made was between defendant and a third person. (10) It shows that Poellnitz was simply acting under an agreement with plaintiff, and not as his agent. (11) It does not aver or show that said river was in a dangerous condition at the time said telegram was sent, or during the time when it should have been transmitted. (12) Said complaint shows that the contract entered into by defendant was to transmit a message, and not to deliver it; yet said complaint claims damages for a failure to transmit and deliver." Motion was made to strike certain parts of the complaint, based on the grounds set out in the demurrers.

The charge referred to as curing the error is as follows: "I charge you, gentlemen of the jury, that if you are reasonably satisfied from the evidence that when the telegram was received at Linden, if you are reasonably satisfied that it was so received, that it was placed in an envelope, stamped and addressed to Jesse Pauley at Myrtlewood, and deposited in the post office at Linden without delay, then the defendant had performed its duty, and the plaintiff cannot recover."

There was judgment for plaintiff in the sum of \$112.12.

Pettus, Jeffries & Pettus, for appellant.
De Graffenried & Ewins, for appellee.

SIMPSON, J. This was an action for damages for failure to deliver a telegram. There is no bill of exceptions, and the only questions raised relate to the overruling of a demurrer to the complaint.

The appellant insists that said demurrer should have been sustained, because the telegram, as set out in the complaint, shows that the only obligation on the defendant was to transmit the message to Linden and there place it in the mail, while the breach alleged is that said company "failed to deliver said message to the said Jesse Pauley, the addressee therein." If there was error in this ruling, it was without injury, as the defendant had the benefit of the construction of the telegram contended for under the charge of the court. *W. U. Tel. Co. v. Pauley (Ala.) 47 South. 654.*

The record does not raise the question whether every one whose stock was lost by the overflowing of the river could sue and recover on account of the failure to deliver. The complaint alleges that the party to whom the telegram was addressed was complainant's agent, in care of the stock, with instructions what to do when warned that the river was rising, and that the sender of the message also was his agent for the purpose of sending said warning. The rule that an undisclosed principal can sue for failure to deliver a telegram sent by his agent applies where the message is sent by the agent, for the principal, to a third person. *Thompson on Law of Electricity, § 433.*

It may be further said that there is no cause of demurrer which specifically raises this point. The eleventh cause raises merely the point that the contract was not made with the plaintiff, and the complaint alleges that the message was sent by the agent of the plaintiff.

The judgment of the court is affirmed.

TYSON, C. J., and DOWDELL and DENSON, JJ., concur.

(157 Ala. 428)

CITY OF BESSEMER v. SOUTHERN RY. CO.

(Supreme Court of Alabama. Dec. 17, 1908.)

1. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—RULINGS ON DEMURRER.

The error, if any, in sustaining a demurrer to the complaint, is harmless, where an amendment was filed under which the same evidence was admissible as would be necessary for recovery on the original complaint.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4096; Dec. Dig. § 1040.*]

2. MUNICIPAL CORPORATIONS (§ 957*) — ASSESSMENT—RATE.

Bessemer City Charter, § 45½, authorizing the city tax assessor to ascertain the length of any railroad in the city, the number of engines and cars in the city, etc., to make an assessment of the property of such company in the city, basing the valuation on the assessment of the railroad for state and county taxes for the previous year, and "at as nearly the same rate as the state board as he can," is void, as contrary to Const. § 216, providing that no city shall levy a higher rate of taxation in any one year on the property situated therein than one-half of 1 per cent. of the value of such property as assessed for state taxation during the preceding year.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 957.*]

3. DISCOVERY (§ 70*)—FAILURE TO ANSWER INTERROGATORIES.

As the court has a discretion, under Code 1907, § 4055, as to which of several courses to be adopted on the refusal of a party to answer interrogatories submitted, plaintiff is not entitled as of right to judgment on refusal of defendant to answer interrogatories.

[Ed. Note.—For other cases, see *Discovery*, Cent. Dig. §§ 84, 85; Dec. Dig. § 70.*]

Appeal from City Court of Bessemer; William Jackson, Judge.

Action by the City of Bessemer against the Southern Railway Company for the collection of taxes. From a judgment for defendant, plaintiff appeals. Affirmed.

B. G. Perry, T. T. Huey, and Pinkney Scott, for appellant. Weatherly & Stokely, for appellee.

SIMPSON, J. This action is by the appellant against the appellee; the complaint originally being for the recovery of a certain amount claimed to be due for municipal taxes on the rolling stock of the defendant for the years 1901, 1902, 1903, and 1904. Demurrers were sustained to the complaint, and the plaintiff then amended the complaint by adding counts 2, 3, 4, and 5, simply claiming for "taxes assessed against it for years 1901, 1902, 1903, 1904, and 1905," or due by account for assessment, etc. Demurrers were again interposed to the amended complaint, which were overruled. The plea of the statute of limitations of three years was interposed; and the court, without a jury, found the issues in favor of the defendant, from which judgment the plaintiff appeals.

If there was error in the sustaining of the demurrers to the original complaint, it was without injury, as the amended counts were claims for taxes generally, under which the same testimony could have been introduced, as would be necessary for recovering for taxes or rolling stock merely.

But the main point which is sought to be raised by this assignment comes up again in the fifth and sixth assignments of error, to wit, the validity of section 45½ of the charter of the city of Bessemer, and the legality of the assessment against the rolling stock of the defendant in this case. Said sec-

tion 45½ authorizes the tax assessor of said city to ascertain the length of any railroad in the city, including right of way, roadbed, side tracks, and main tracks, also the number of engines and cars situated in said city, to make the average number of such cars in the city the basis for an assessment thereon, and to make an assessment of the property of such company situated in the city, basing and taking his valuation from the assessment of the said railroad for state and county taxes for the previous year, by fixing the value of the track so assessed at the same rate per mile as fixed by the state board for the county, and by fixing the value of the personal property at as nearly the same rate as the state board as he can. Section 216 of our Constitution provides that "no city * * * shall levy or collect a higher rate of taxation in any one year, on the property situated therein, than one-half of one per centum of the value of such property as assessed for state taxation during the preceding year."

For the purpose of arriving at a proper assessment of the right of way, roadbed, and rolling stock of the railroads in the state, a state board of assessment is organized, to whom the railroad companies make returns of the number of locomotives and of the cars of various kinds, and said board determines the value of said property and assesses the same for taxation, and it is made the duty of the Auditor, who is a member of the state board, to notify the tax assessor of each county of the proportionate value of such property taxable in said county. No provision is made by the general laws for assessment of such property by the cities and towns. It is true, as a general proposition, that all property situated in a city and subject to state and county taxation is also subject to municipal taxation. It is also true that nothing that has not a situs in the municipality is subject to taxation therein as property. So the question arises: Has a car, which merely passes through a city, such a situs therein as to be subject to municipal taxation?

It has been frequently stated as a principle of the common law that personal property follows the owner and its situs is that of the owner. For certain purposes this is true; and, while there are some early cases to the contrary, yet it is now settled by the decisions of our highest court that, for the purposes of taxation, personal property can acquire a situs other than that of its owner, and that the rolling stock of a railroad company may acquire such a situs in the state where it is constantly used as to be subject to taxation in that state; also that, for purposes of taxation, the state may provide for an assessment by a state board, on the basis of the average number of cars used in the state; and that said board may distribute

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the ratable amount of taxation to be allowed to the counties and municipalities in the state. *Atlantic & Pacific R. Co. v. Lesueur*, 2 Ariz. 428, 19 Pac. 157, 1 L. R. A. 244; 2 Elliott on R. R. § 755; *State R. Tax Cases*, 92 U. S. 576, 580, 607, 611, 23 L. Ed. 663; *Marye v. B. & O. R. R.*, 127 U. S. 117, 123, 8 Sup. Ct. 1037, 32 L. Ed. 94; *Pullman Car Company v. Pennsylvania*, 141 U. S. 18, 22, 23, 26, 29, 11 Sup. Ct. 876, 35 L. Ed. 613; *Columbus Southern Railway v. Wright*, 151 U. S. 470, 482, 14 Sup. Ct. 396, 38 L. Ed. 238; 27 Am. & Eng. Ency. Law, 927, 928; *Id.* 942, 944. Our own court has several times passed upon the question of a situs of personal property apart from the owner. *National Dredging Co. v. State*, 99 Ala. 463, 12 South. 720; *Trammell v. Connor*, 91 Ala. 398, 8 South. 495; *Mayor, etc., Mobile v. Baldwin*, 57 Ala. 61, 29 Am. Rep. 712.

The principles on which this character of tax has been sustained are, first, that it lies within the power of the state to separate the situs from the ownership of personal property, as to that class of personal property which is so continuously kept and used in the state as to render it just that it should bear a part of the burden of taxation; and, second, that although no particular car can be said to have an abiding place in the state, yet at all times the company has substantially the same number of cars in the state, and that average number forms a proper basis of taxation. *Pullman Car Company v. Pennsylvania*, 141 U. S. 26, 11 Sup. Ct. 876, 35 L. Ed. 613. Under these principles, doubtless, it would be within the power of the supreme legislative department of the state, in fixing the situs of this class of property and providing for its assessment, to make provision for municipal taxation as well as for county taxation. In the general law on this subject, our Legislature has not made any provision for taxation of rolling stock by cities and towns. Indeed, it would be difficult to say that, because a certain number of cars are continuously in the state, a proportionate number would be continuously in any city or town in the state. The conditions of business are so different—one city or town having industries in which it would detain a number of cars continuously, while in another the cars merely pass through, and in small numbers—that it would seem that only a deliberative body should be charged with the duty and responsibility of making such a distribution.

Coming to section 45½ of the charter of the city of Bessemer, the writer of said section seems to have realized the impossibility of complying with section 216 of the Constitution; for under our statute, by which the state board ascertains the value of the entire rolling stock in the state, it is impossible to tell just what value was placed upon the cars

which passed through Bessemer, "for state taxation, during the preceding year." It is true the Auditor had certified to the tax assessor of Jefferson county, the proportionate value of such property taxable in said county; but what would be a proper proportion of that sum between the various cities and towns in that county the state board has not decided, and there is no rule by which the tax assessor can ascertain it. To authorize a tax assessor to fix the value of the property "at as nearly the same rate as the state board as he can" is not a compliance with section 216 of the Constitution. Consequently said section 45½ of said charter is void, and there was no error in the refusal of the court to admit the testimony showing the assessments in Jefferson county.

As to the assignments on the refusal of the court to give judgment for the plaintiff, because of refusal to answer some of the interrogatories propounded to the defendant, it is sufficient to say that, even if the testimony sought was pertinent and legal, the statute gives the court the discretion as to which of the several courses pointed out it shall adopt, and does not give the party propounding the interrogatories the absolute right to a judgment. Section 4055, Code 1907; *Oulver, Adm'r, v. Alabama Midland Railway*, 108 Ala. 330, 334, 18 South. 827.

The judgment of the court is affirmed.

TYSON, C. J., and DOWDELL and DENSON, JJ., concur.

(157 Ala. 521)

ROSE v. LEWIS.

(Supreme Court of Alabama. Dec. 17, 1908.)

1. SALES (§ 36*)—VALIDITY OF CONTRACT—ABSENCE OF PARTIES.

In the absence of fraud or misrepresentations on the part of the buyer, or inability of the seller to read, it is no defense to an action for breach of contract that the contract of sale contains an item of property which defendant alleges that he did not know of or which he inadvertently overlooked at the time it was executed.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 63; Dec. Dig. § 36.*]

2. TRIAL (§ 62*)—ORDER OF PROOF.

The fact that, in making his case, plaintiff's evidence incidentally relates to matters pleaded in defense, does not prevent plaintiff offering evidence in rebuttal of defendant's evidence in support of such defense.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 148; Dec. Dig. § 62.*]

3. LOGS AND LOGGING (§ 34*)—SALE—PERFORMANCE OF CONTRACT.

Where the contract for the sale of lumber to be shipped by boat was silent as to who should charter the boat, there was a compliance with the contract where the boat was ready at the time fixed, without regard to the question as to who furnished it.

[Ed. Note.—For other cases, see Logs and Logging, Dec. Dig. § 34.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. CUSTOMS AND USAGES (§ 15*)—EXPLANATION OF CONTRACT—EVIDENCE OF CREDIT OF BUYER.

Where the contract of sale requires the buyer to furnish a confirmed bank credit, but is silent as to when this should be done, a general custom in such business, if any, may be shown.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 30; Dec. Dig. § 15.*]

5. CUSTOMS AND USAGES (§ 19*)—EVIDENCE OF CUSTOM.

A general custom as to the time evidence of bank credit should be furnished by a vendee cannot be shown by particular transactions.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 45; Dec. Dig. § 19.*]

6. WITNESSES (§ 406*)—CONTRADICTION—EVIDENCE OF CUSTOM — PARTICULAR TRANSACTIONS.

Where a witness has testified to a general custom, he may be contradicted by evidence of particular transactions.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1276; Dec. Dig. § 406.*]

7. SALES (§ 85*) — EVIDENCE OF CREDIT BY BUYER—TIME TO FURNISH.

Where a contract of sale requires the vendee to furnish evidence of bank credit, but is silent as to the time such evidence should be furnished, in the absence of a general custom, it should be furnished within a reasonable time.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 85.*]

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

Action by Alfred Rose against James A. Lewis. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Pillans, Hanaw & Pillans, for appellant. Gregory L. & H. T. Smith, for appellee.

DOWDELL, J. The contract sued on was in writing and signed by the parties. The second plea was an attempt to set up fraud in the execution of the contract. It is alleged that the plaintiff, by whom the contract was drawn, fraudulently inserted in the schedule of lumber items contained in the contract an item of 200,000 feet of lumber at \$15 per thousand, which the defendant had not agreed to sell at that price. There is no pretense of the existence of any confidential relations between the parties. The parties were dealing at arm's length with each other. There is no charge of any false statements or fraudulent misrepresentations, made by the plaintiff and relied on by the defendant, inducing an execution of the contract. There is no pretense of inability on the part of the defendant to read, nor is it pretended that in fact he did not read the contract before signing and executing the same. The allegations of the plea are insufficient to avoid the contract on the ground of fraud in its execution. That the defendant did not know that the said item was in the contract, or that he inadvertently overlooked it when he signed the contract, was his own fault. In the case of *Upton v. Tribilcock*, 91 U. S. 45, 50, 23 L. Ed. 203, it was said by the court: "It will not do for a man to enter in-

to a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract; and, if he will not read what he signs, he alone is responsible for his omission." The defendant says by his plea that the proposal reported to him as accepted by the plaintiff was for 1,620,000 feet of lumber at \$15 a thousand, and that in this amount of lumber, made up with various items, the 200,000 feet of more costly lumber was inserted by the plaintiff in drawing up the contract. The contract on its face describes the lumber and gives the total number of feet of the several items, which was 1,820,000. It is palpable that a reading of the contract would disclose the 200,000 feet to which the defendant makes objection, and it is not shown that the plaintiff practiced any artifice to prevent the defendant from discovering that the 200,000 feet described was included in the contract. In *Goetter, Weil & Co. v. Pickett*, 61 Ala. 387, 391, it was said by this court: "A party having full capacity and opportunity to read a paper, and to whom there is no misrepresentation of its contents, cannot set up his own want of attention—his failure to read it—as a fact to invalidate it"—citing other cases. The second plea was bad, and the demurrer should have been sustained.

In making out his case on the introduction of evidence, the plaintiff is not required to anticipate the defendant's evidence. He meets all of the requirements when by his own evidence he establishes a prima facie right of recovery, whereupon the defendant is put to his defenses. If, in making out a prima facie case by the plaintiff, the plaintiff's evidence should incidentally relate to matters of defense set up in the pleas, this will not prevent the plaintiff from offering evidence in rebuttal of the defendant's evidence introduced in support of his pleas. The plaintiff should have been permitted to introduce his evidence in rebuttal of the defendant's evidence in reference to the alleged fraud in the execution of the contract.

It was immaterial by whom the ship, which was to receive the lumber from the defendant, was to be chartered, or to whom consigned. As to this the contract was silent. It was a compliance with the terms of the contract when the ship was furnished and ready in the time fixed by the contract, no matter by whom chartered.

The contract required that the plaintiff should furnish a confirmed bank credit, but no time was specified within which this was to be done. In such a case it was competent for the plaintiff to show a general custom, if such existed, as to when the required bank credit should be furnished. But such general

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

custom could not be shown by evidence of particular transactions, although evidence of particular transactions may be given to contradict a witness who has testified to a general custom. *Syson & Co. v. Hieronymus*, 127 Ala. 489, 28 South. 967. If no general custom obtained, the contract being silent as to the time, then the law would imply a reasonable time, and this to be determined from the character and circumstances of the transaction. If, however, the defendant should repudiate the contract before the time required for furnishing the confirmed bank credit, this would absolve the plaintiff from any duty to furnish such credit.

There are other questions raised by the assignments of error on the record, but those considered above are the ones mainly relied on in argument by counsel for appellant; and for the errors indicated the judgment of the court will be reversed and the cause remanded.

Reversed and remanded.

TYSON, C. J., and ANDERSON and McCLELLAN, JJ., concur.

(157 Ala. 3)

STALLWORTH v. STATE.

(Supreme Court of Alabama. Dec. 17, 1908.)

CRIMINAL LAW (§ 211*)—FRAUD OF BOARDER—PROSECUTIONS—SUFFICIENCY OF AFFIDAVIT.

In a prosecution under Code 1907, § 6934, imposing a penalty upon any person who, by fraud, etc., obtains board from the landlord or keeper of any hotel or boarding house, where the affidavit did not allege that the person defrauded was a landlord, etc., and did not designate the misdemeanor by name, or by some other phrase which in common parlance designates it, as provided by section 6703, in case of arrest upon affidavit, the affidavit was fatally defective.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 420; Dec. Dig. § 211.*]

Appeal from Monroe County Court; I. B. Slaughter, Judge.

Will Stallworth was convicted of obtaining board by fraud, and he appealed. Reversed and remanded.

Omitting the formal part, the affidavit charges that one Fountain, being duly sworn, says that he has probable cause for believing and does believe that Will Stallworth did, by fraud or misrepresentation, obtain board from J. N. Gillis, and failed or refused to pay for the same in said county, within the past 12 months, etc. The demurrers to the affidavit are as follows: "The complaint fails to set out a very necessary, as well as essential, averment, in this: That J. N. Gillis ran, or was the keeper, landlord, or proprietor of, a hotel or boarding house."

Hybart & Burns, for appellant. Alexander M. Garber, Atty. Gen., for the State.

DOWDELL, J. The prosecution in this case was commenced on affidavit and warrant before the county court of Monroe county. The statute under which the prosecution was had (section 6934 of the Code of 1907) is as follows: "Any person who, by fraud or misrepresentation, obtains board or lodging from the landlord, proprietor, or keeper of any hotel or boarding house, and fails or refuses to pay for the same, must, on conviction, be fined not more than five hundred dollars, and may also be sentenced to hard labor for the county for not longer than six months." To constitute the offense denounced by the statute, the person defrauded must be "the landlord, proprietor, or keeper of a hotel or boarding house." This is an essential ingredient of the offense, and without it there is no offense.

The affidavit which is set out in the transcript, and on which the defendant was tried, failed to state or charge that the person defrauded was the landlord, proprietor, or keeper of a hotel or boarding house, nor was there any "designation of the misdemeanor by name, or by some other phrase which in common parlance designates it" (section 6703, Code 1907); and for the failure or omission of such averment, or designation of the offense, the affidavit was demurred to, which demurrer was overruled by the court. This presents the only question raised on the record.

The affidavit, while attempting to follow the language of the statute, failed to do so, in that it omitted, as we have seen, the statement or averment of an essential ingredient of the offense, and, failing to otherwise designate it as authorized by section 6703, was fatally defective. Under the decisions in *Miles v. State*, 94 Ala. 106, 11 South. 408, and *McGee v. State*, 115 Ala. 135, 22 South. 113, the demurrer should have been sustained.

Reversed and remanded

TYSON, C. J., and SIMPSON and DENSON, JJ., concur.

(157 Ala. 6)

ASKEW v. STATE.

(Supreme Court of Alabama. Dec. 17, 1908.)

CONVICTS (§ 10*)—CONTRACTS TO LABOR—CONSTRUCTION.

A contract providing that convicts are to work and labor in mining in and around the works and mines of a named company in specified counties in the state is sufficiently definite as to the place and kind of labor.

[Ed. Note.—For other cases, see *Convicts*, Cent. Dig. § 23; Dec. Dig. § 10.*]

Appeal from Circuit Court, Baldwin County; Samuel B. Browne, Judge.

Petition of Clem Askew for discharge on habeas corpus. From an order denying a discharge, he appeals. Affirmed.

See, also, 46 South. 751.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Clem Askew was convicted of a misdemeanor, and sentenced to hard labor in the county of Baldwin, and, while being detained by the sheriff pending the arrival of the hard-labor agent, he filed his petition, alleging that the sheriff was about to deliver him to the hard-labor agent, and that the county had no valid contract with persons to work convicts on the outside of the county, and had not provided for working them on public works, or any other kind, in the county, and in consequence there was no person to whom the sheriff could legally deliver him. The county had a contract with the Sloss-Sheffield Company for the hire of county convicts, which the petitioner alleged was void because the kind of labor and the place of labor of the convicts was not sufficiently and definitely stated and ascertained by the contract, so as to be within the purview of the statute on that subject.

Leslie Hall, for appellant. Alexander M. Garber, Atty. Gen., for the State.

ANDERSON, J. The sheriff had not held the petitioner an unreasonable time; for, so far as the record shows, he may have applied for the writ immediately after surrendering himself. It is insisted, however, that the sheriff was holding him for the purpose of delivering him to the hard-labor contractor, and that the contract under which petitioner was to be received and worked was invalid. Conceding, without deciding, that the contract can be questioned while the petitioner was in the hands of the sheriff, and that he did not have to wait until he reached the custody of the contractors, we are of the opinion that the contract was not subject to the infirmities suggested in brief of counsel. The contract provides that the convicts are to "work and labor in mining in and around the works and mines of the Sloss-Sheffield Company * * * in the counties of Jefferson and Walker in the state of Alabama," and is sufficiently definite as to place and kind of labor. Fuller v. State, 97 Ala. 27, 12 South. 392. In the case of Salter v. State, 117 Ala. 135, 23 South. 141, the contract was condemned because it required the defendant to work "elsewhere as they may direct," thus being indefinite as to place.

The order appealed from is affirmed.

TYSON, C. J., and SIMPSON and DENSON, JJ., concur.

(157 Ala. 422)

HARDEMAN v. WILLIAMS.

(Supreme Court of Alabama. Dec. 17, 1908.)
TRESPASS (§ 58*)—INADEQUATE DAMAGES.

One count was for trespass by defendant's agent upon realty and personality, and the other count was for trespass upon personal property alone. The evidence was that defendant's agent went as a volunteer with the constable to levy on plaintiff's goods, stating that plaintiff was a

bad woman and they might have to fight, and interfered when plaintiff struck the constable. The jury found for plaintiff for one cent damages. *Held*, that the verdict was properly set aside for inadequacy of damages.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 145; Dec. Dig. § 58.*]

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

Action by Sallie Williams against B. F. Hardeman. From an order setting aside a verdict for plaintiff, and granting a new trial, defendant appealed. Affirmed.

The facts and the pleading in the original case appear in a former report of the case in *Hardeman v. Williams*, 150 Ala. 415, 43 South. 726, 10 L. R. A. (N. S.) 653. The second ground for motion for a new trial is because "that, if plaintiff was entitled to recover, as the jury found she was, she was entitled to a verdict of more than one cent." The amended count A claims damages for "a trespass done or caused to be done by L. E. Meyers, an agent or servant of defendant, acting within the scope of his employment in or about the duties or business assigned to him as such agent or servant upon the following property: [Here follows a description of the property, which includes a dwelling house and certain personal property.]" Count B is the same as count A, except that the trespass is alleged to have been committed upon personal property. The testimony of the witness Hermann, referred to, was that Meyers and Falligant came to him to go with him to get possession of the furniture, and that Meyers stated that Sallie Williams was a bad woman, and that they might have a fight to get possession of the furniture, but that she could not throw them out, even if they had to choke her or overpower her to some extent, and that he does not recall that Meyers did anything, except to interfere when Sallie Williams struck him, the witness.

Inge & McAuley, for appellant. Charles W. Thompkins and Charles L. Bromberg, for appellee.

ANDERSON, J. We cannot say that the trial judge erred in granting a new trial in this case. If not justified for other reasons, the evidence warranted him in setting the verdict aside upon the second ground of the motion. Nor can we say that he erred because the defendant was entitled to the general charge. The evidence is materially different upon this appeal from what it appears to have been in the former report of the case (150 Ala. 415, 43 South. 726, 10 L. R. A. [N. S.] 653) as to Meyers' connection with the trespass and assault. See testimony of Hermann. Moreover, two additional counts were added after the case was reversed, and, if the plaintiff's right to recover stood upon

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

them alone, which we do not decide, they were proven, and the defendant did not prove his special pleas beyond dispute. The fourth plea justified under a mortgage then unpaid, and there was evidence that it was paid. The fifth plea justifies under process and at the request of the constable, "Hermann." Yet Hermann testified that Meyers went there as a volunteer.

The judgment of the circuit court is affirmed.

TYSON, C. J., and DOWDELL and McCLELLAN, JJ., concur.

(153 Ala. 637)

DAFFIN v. C. W. ZIMMERMAN MFG. CO. (Supreme Court of Alabama. Dec. 17, 1908.)

1. LIFE ESTATES (§ 13*)—ACTIONS BY LIFE TENANT—INJURY TO REALTY.

A life tenant cannot recover for timber cut from the land; the remainderman alone being entitled to recover therefor.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 32; Dec. Dig. § 13.*]

2. LIFE ESTATES (§ 28*)—TRESPASS—DAMAGES.

There being proof that the land was cut up and rendered less accessible to the life tenant by defendant's entry to cut timber, the life tenant was entitled to more than nominal damages, even though he could not recover for the timber; and the general charge for defendant was improper.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 54; Dec. Dig. § 28.*]

3. TRESPASS (§ 45*)—ACTIONS—ADMISSIBILITY OF EVIDENCE.

In trespass for damages to land by entering and cutting timber, evidence was admissible that the logs were delivered to defendant, as tending to show that the trespass was committed by defendant, and with its knowledge and consent.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 116; Dec. Dig. § 45.*]

Appeal from Circuit Court, Mobile County; W. J. Young, Special Judge.

Trespass quare clausum by William W. Daffin against the C. W. Zimmerman Manufacturing Company. From a judgment for defendant, plaintiff appealed. Reversed and remanded.

W. D. Dunn and A. L. McLeod, for appellant. R. W. Stoutz, Stevens & Lyon, and J. F. Aldridge, for appellee.

ANDERSON, J. When this case was here before (149 Ala. 380, 42 South. 858, 9 L. R. A. [N. S.] 663) it was held that the plaintiff, being only a life tenant, could not maintain trover or trespass for converting or taking the trees, but could maintain trespass quare clausum fregit, and recover such actual damages as he sustained to his possession, and the complaint was amended to meet this holding. The inquiry then was: What damage was done to the plaintiff's use and enjoyment of the premises, as distinguished from what might be termed a permanent in-

jury to the freehold? It is true the land was of such character and condition as to be susceptible of but little injury, other than denuding it of the timber, and for which the remaindermen, and not the plaintiff, are the proper ones to seek redress; yet there was evidence from which the jury could infer injury to the plaintiff's possession, and upon which they could predicate some damage, be it ever so little. There was proof that it was cut up by many deep roads and ruts and rendered less accessible to the plaintiff. In fact, it was said in the former opinion that the plaintiff was entitled to recover nominal damages, which would render the giving of the general charge improper. We may add that the proof on this trial could have justified more than nominal damages for the trespass. There was also proof from which the jury could infer that the defendant was liable for the trespass, and the trial court erred in giving the general charge for the defendant.

The plaintiff should have been permitted to prove that the logs hauled from the land were delivered to the defendant, as this was a circumstance tending to show that the trespass was committed by it and with its knowledge and consent. Conceding that the complaint, in this case comes within the influence of the case of City Delivery Co. v. Henry, 139 Ala. 161, 34 South. 389, there was evidence from which the jury could infer that the defendant ordered, directed, or sanctioned the trespass. Indeed, there was evidence unchallenged that the defendant had the hauling done (testimony of Commillion and Tompkins). Nor does the evidence show that the trespass was at intervals and so discontinuous in its character as to bring this case within the influence of Abercrombie v. Windham, 127 Ala. 179, 28 South. 387.

The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

TYSON, C. J., and SIMPSON and DENSON, JJ., concur.

(153 Ala. 369)

WESTERN STEEL CAR & FOUNDRY CO. v. CUNNINGHAM.

(Supreme Court of Alabama. Dec. 17, 1908.)

1. MASTER AND SERVANT (§ 259*)—INJURY TO EMPLOYÉ—NEGLIGENCE OF SUPERINTENDENT—PLEADING.

The complaint, in an action for injury to an employé, under Code 1896, § 1749, declaring the master liable when the injury is caused by the negligence of a person in the service of the master, who has any superintendence intrusted to him, whilst in the exercise of such superintendence, is not bad because alleging generally that he was injured by the negligence of a person in the service of defendant, who had superintendence intrusted to him, whilst in the exercise of such superintendence, without stating what the superintendence was.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 841; Dec. Dig. § 259.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. MASTER AND SERVANT (§ 265*)—NEGLIGENCE—RES IPSA LOQUITUR—NECESSITY OF RECOURSE TO DOCTRINE.

The essential import of the doctrine of *res ipsa loquitur* in any given case is that on the facts proved plaintiff has, without direct proof of negligence, made out a *prima facie* case; so that, whether or not the doctrine obtains in a case between master and servant, it need not be invoked where the servant in an action for his injury produces other evidence; that is, if there is any specific evidence, positive or circumstantial, bearing on the question of negligence.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 265.*]

3. MASTER AND SERVANT (§ 286*)—INJURY TO EMPLOYE—NEGLIGENCE OF SUPERINTENDENT—EVIDENCE.

Plaintiff, with other employes of defendant, under the charge of a superintendent, was engaged in moving lumber on a car, on tracks connecting by a turntable. While it was on the turntable, and after the table had been moved, it fell on him. The evidence showed the dimensions of the lumber and of the car, the manner in which the lumber was loaded, the description of the turntable, and tended to show that the load was unusually large, considering the length of the lumber, and, while plaintiff's witnesses testified that they did not know what caused the lumber to fall off, they testified that the car was standing perfectly still, and that there was no jar or shock. *Held*, that there was evidence for the jury that the accident was caused by the negligence of the superintendent in not seeing that the car was properly and securely loaded, and did not leave the question of the cause wholly in conjecture, as distinguished from inference.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 286.*]

4. MASTER AND SERVANT (§ 247*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Even if the employe should not have gone round with the turntable with a car of lumber on it, but should have used a stick, yet this did not proximately contribute to his injury, it having, in either case, been necessary for him to go under the car and latch the table when it stopped, and the lumber, which fell on him from the car, not having fallen till he was getting up after latching the table.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 705; Dec. Dig. § 247.*]

5. TRIAL (§ 178*)—INSTRUCTIONS—GENERAL AFFIRMATIVE CHARGE—FORM.

A requested charge, "The court charges the jury that they must find for defendant as to the second count of the complaint," is in bad form.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 178.*]

6. TRIAL (§ 191*)—INSTRUCTIONS—ASSUMPTION OF FACTS.

A requested charge that if the jury find plaintiff's negligence proximately contributed to his injuries they must find for defendant, though it was negligent, assumes plaintiff was negligent.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431; Dec. Dig. § 191.*]

7. TRIAL (§ 193*)—INSTRUCTIONS—CASTING SUSPICION ON EVIDENCE.

A requested instruction to find for defendant if the jury find plaintiff's negligence contributed to his injury, "even" though defendant was negligent, is bad, as casting distrust, doubt, or suspicion on plaintiff's evidence of defendant's negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 436-438; Dec. Dig. § 193.*]

8. TRIAL (§ 194*)—INSTRUCTIONS—ABSENCE OF PROPOSITION OF LAW.

The court need not give a requested charge that there is no evidence in the case that plaintiff was permanently injured, it asserting no proposition of law.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 194.*]

9. APPEAL AND ERROR (§ 1045*)—HARMLESS ERROR—CHALLENGING JUROR AFTER ACCEPTANCE.

For the court to allow plaintiff to challenge a juror after both parties had expressed themselves satisfied with him, on its subsequently being learned, before the completion of the jury, that though the juror had been discharged by he expected to go back to work for, defendant is not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1045.*]

10. TRIAL (§ 56*)—EXCLUSION OF EVIDENCE—REPETITION.

Sustaining objection to a question was justified, where, had witness answered, as was expected, his response would have been only a repetition of testimony already given by him.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 131, 132; Dec. Dig. § 56.*]

11. APPEAL AND ERROR (§ 724*)—ASSIGNMENT OF ERROR—MISTAKE.

An assignment of error mistaking the question sought to be reviewed cannot claim the attention of the court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 724.*]

Appeal from City Court of Anniston; Thos. W. Coleman, Jr., Judge.

Action by Sam Cunningham against the Western Steel Car & Foundry Company for damages, under subdivision 2, Employers' Liability Act (Code 1906, § 1749). From a judgment for plaintiff, the defendant appeals. Affirmed.

The facts are sufficiently set out in the opinion. The case was tried upon two counts, which are as follows: Count 2. Plaintiff claims of the defendant \$1,999 damages, for that heretofore, to wit, on the 17th day of January, 1907, plaintiff was employed by the defendant as a laborer in a lumber yard in Anniston, Calhoun county, Ala., and while plaintiff was acting within the line and scope of his said employment a large quantity of lumber or timber, which was piled on a car or timber buggy used in defendant's said lumber yard, fell on, upon, or against the person of plaintiff, severely bruising and wounding plaintiff in and on the shoulder and head, so that his cheek was cut to the bone, his eyes permanently injured, and his earning capacity greatly diminished. Wherefore plaintiff was kept out of work and was unable to work for a long time, suffered great physical and mental pain, and will continue to suffer great mental and physical pain, and has been rendered less able to earn a living; hence this suit. Said lumber fell on plaintiff and plaintiff was injured as aforesaid by reason and as a proximate consequence of the negligence of a person in the employment or service of the defendant, who

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

had superintendence intrusted to him, whilst in the exercise of such superintendence, to wit, one Frank Rich, in the exercise of such superintendence, negligently caused or allowed said lumber or timber to fall from said car or buggy. Count 3. Same as count 2 down to and including the words, "hence this suit," where they first occur therein. Plaintiff was injured as aforesaid by reason and as a proximate consequence of the negligence of a person in the service or employment of defendant, who had superintendence intrusted to him, whilst in the exercise of such superintendence, to wit, one Frank Rich, in the exercise of such superintendence, negligently caused or allowed said lumber or timber buggy to be improperly or dangerously loaded with said lumber or timber, so that said lumber or timber fell and injured plaintiff as aforesaid. Demurrers were interposed as follows: To count 2: (1) It does not appear therefrom what superintendence said Rich was in the exercise of at the time of plaintiff's injury. (2) It does not appear how or wherein said Rich negligently caused or allowed said timber to fall from said car or lumber buggy. (3) The averments of negligence upon the part of said Rich are not sufficiently and definitely set forth. (4) The averments of negligence on the part of said Rich are too indefinite and uncertain. To count 3: It does not appear from said count what superintendence said Rich was in the exercise of at the time plaintiff was injured. (2) It does not appear how or wherein said Rich caused or allowed said car or timber buggy to be improperly and dangerously loaded with said lumber or timber. (3) The allegation of negligence of said Rich as set out in said count is too uncertain and indefinite to support a recovery.

The following charges were refused to the defendant. "(1) The court charges the jury that there is no evidence in this case that plaintiff was or is permanently injured. (2) If the jury believe the evidence, they must find for the defendant. (3) The court charges the jury that they must find for the defendant as to the second count of the complaint." (4) Same as 3 as to third count of complaint. "(5) The court charges the jury that, if they find that Sam Cunningham's negligence proximately contributed to his injuries, they must find for the defendant, even though defendant was guilty of negligence." With reference to the juror Burgess, the bill of exceptions recites: "The court permitted plaintiff, over defendant's objection and exception, to challenge the juror named Burgess, after plaintiff expressed himself as satisfied, and after defendant expressed itself as satisfied with him and the jury, because subsequently and before the jury was completed it was learned, and Burgess admitted, that he had been discharged, but expected to go back to work for the defendant again." The sixth assignment of error is that the court erred in overruling the defendant's objection to

the question propounded to Henry Smart by plaintiff: "When the car is loaded with lumber, and lumber is projecting over each side of the car, what is the usual and ordinary way to latch and unlatch the table?" The question is misquoted, in that it assumed that the lumber projected over the ends instead of the sides of the car, and all the testimony tended to show that it was loaded so that it projected over the ends and not the sides of the car. The grounds for new trial were the same as assigned as error and treated in the opinion.

Willett & Willett, for appellant. Matthews & Matthews, for appellee.

DENSON, J. The complaint contained four counts, but the first and fourth are not here for review, the trial court having eliminated them by charges given at the request of the defendant.

The second and third counts are predicated upon the second subdivision of the employer's liability statute (section 1749, Code of 1896), which provides: "When the injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has any superintendence intrusted to him, whilst in the exercise of such superintendence, the master shall be liable to answer in damages." Demurrers to these counts, proceeding upon the theory of generality of averment as to the superintendence intrusted to the person named, and upon the further theory that the counts state only conclusions, were overruled. By appropriate assignments of error, the judgment of the court on the demurrers is presented for review.

Tested by the numerous decisions of this court, it is obvious that the counts are sufficient, and that the demurrers were properly overruled. *Williamson Iron Co. v. McQueen*, Adm'r, 144 Ala. 265, 40 South. 306, and cases there cited.

The plaintiff, as an employé of the defendant, with five others of defendant's servants, was on the 17th day of January, 1907, engaged in loading lumber on a "lumber buggy" or tram car and moving it, on the car, from one part of defendant's yard to another, all under the supervision of Frank Rich, defendant's superintendent. The car stood on a standard-gauge track, the sides projecting slightly over the track, and was 5 or 6 feet long, and the floor was 2 or 2½ feet above the track. Said lumber consisted of pieces 3¼x4 or 3¼x5 inches, 16 feet long, and these were being loaded onto the car lengthwise, in tiers, and over the entire width of the car. The testimony as to the height to which the lumber was thus stacked on the car varied the height from 2 feet to 4 feet. After being loaded, the car was rolled onto a turntable to be shifted to another track. The turntable was made fast by a latch which fitted into a slot. After the car was placed

on the table, the superintendent would command the servant in position nearest to the latch to unlatch the table. On this occasion the command was given to the plaintiff, and in obeying it he got upon his knees, in a "crouching position," lifted the latch and held it in his hand, and followed the table, as it turned, until it was brought into position from which the car might be run onto the track designated by the superintendent, when plaintiff (as the testimony offered by him tended to show) dropped the latch into the slot, "without any jar or concussion," making the table fast again. Plaintiff then started to move out from under the side of the car, whereupon two tiers of the lumber fell from the car upon him, inflicting a painful injury.

The first question presented for consideration by the charges refused to the defendant is whether or not the plaintiff was entitled to have the issue of negligence *vel non* passed upon by the jury, the insistence of the appellant (defendant) being that there is nothing in the evidence which would afford a reasonable inference that the falling of the lumber was the result of negligence on the part of defendant's superintendent. In this connection, appellant's counsel makes the point, broadly, that the doctrine or maxim *res ipsa loquitur* has no application in cases between master and servant, and, therefore, that the falling of the lumber itself cannot form a predicate for reasonable inference of negligence. While it must be conceded that this doctrine is more freely and appropriately applied in cases of passenger and carrier, yet not only has this court applied the doctrine in a case between master and servant (Tenn., etc., *Co. v. Hayes*, 97 Ala. 201-207, 12 South. 98), but—as will be seen by reference to cases cited in note 8 to text, page 2303, 2 Labatt, *Master & Servant*—courts of other jurisdictions have, under certain circumstances, applied the maxim in such cases. But, however this might be decided, the exigencies of the instant case do not require a determination of the question. The essential import of that doctrine in any given case is that, on the facts proved, the plaintiff has, without direct proof of negligence, made out a *prima facie* case. In other words, it seems there is no peculiar magic in the Latin maxim. As was said in the oft-quoted case of *Graham v. Badger*, 164 Mass. 42, 47, 41 N. E. 61, it is "merely a short way of saying that, so far as the court can see, the jury, from their experience as men of the world, may be warranted in thinking that an accident of this particular kind commonly does not happen except in consequence of negligence, and that, therefore, there is a presumption of fact, in the absence of other explanation, or other evidence which the jury believe, that it happened in consequence of negligence." And thus is brought out the fact clearly, "so often overlooked, that it is the jury which makes the presumption in giving proper effect to the

evidence, the jury which says *res ipsa loquitur*." See 66 Cent. Law J. No. 20, p. 383; *Bien v. Unger*, 64 N. J. Law, 596, 46 Atl. 593. Therefore, where the servant (plaintiff) produces other evidence than the mere fact of the accident—in other words, if there is any specific evidence, positive or circumstantial, bearing on the question of negligence, which will warrant a reasonable inference of negligence—there is no necessity for the invocation of the doctrine of *res ipsa loquitur* in aid of, or to establish, a *prima facie* case. This is clearly illustrated in a case, decided by the Missouri court, in which an employé was injured by the falling of a bridge. We quote: "Where all the details of the construction of a bridge and its inspection are before the jury, the case of a servant who is injured by the fall of the bridge does not stand merely on the fact that the structure gave way, and it is not error to leave the jury to say whether the defendant's want of reasonable care in the erection and inspection of the bridge occasioned the injury complained of." *Bowen v. Chicago, etc., Co.*, 95 Mo. 268, 8 S. W. 230.

In the case at bar the evidence shows the dimensions of the lumber, the dimensions of the car, the manner in which the lumber was loaded on the car, the description of the turntable, and, in addition, tends to show that the load was unusually large, considering the length of the lumber. Concerning it, a witness testified: "I call it an extraordinary large load for the length of it." The witnesses for plaintiff, it is true, testified that they did not know what caused the lumber to fall off, but they testified that the car was standing perfectly still, and that there was no "jar or shock." It cannot be doubted it was a duty the defendant company owed the plaintiff, to see to it, through its superintendent, that the car was properly and securely loaded. The superintendent was present for that purpose; he knew the conditions of the track on which the car was to run (or it was his duty so to be advised); he knew the dimensions of the car and of the lumber, and he saw how the lumber was loaded. Under the testimony, we think it more probable that the falling of the lumber was due to a cause for which defendant was responsible than to a cause for which it was not responsible. In other words, we think the testimony warrants the inference that the falling of the lumber might reasonably be attributed to overloading, or to the improper loading of the car, which would constitute negligence. As was aptly said by the trial judge, in response to the motion for a new trial: "It being the duty of the superintendent to oversee the loading and moving of the cars, it was certainly his duty to be acquainted with the conditions under which loading and transportation were to be done, and a failure to use proper care in loading with reference to such conditions would be negligence. If the

car was safely loaded, taking into consideration all the conditions, then the lumber did not fall under the circumstances recited by plaintiff's witnesses, or, at least, there is no probability that it did. But the lumber did fall, and unless accounted for by defendant's witnesses, it must have fallen because, under the conditions existing, it was not securely loaded. As the falling of the lumber could be reasonably accounted for, either as being due to unsafe loading or to the impact of the latch against the catch on the track, and as the defendant attempted to account for it on the latter theory and by direct testimony, the jury would not have been justified in accounting for it on some other imaginable theory, or in not accounting for it at all."

Upon the whole, the court is not of the opinion that the facts proved left the question as to what caused the injury wholly in conjecture, as distinguished from inference; but the court is of opinion that the trial court properly regarded the question of negligence *vel non* one for the determination of the jury, and committed no error in declining to exclude the evidence offered by plaintiff.

The testimony for the defendant tended to show that the lumber was caused to fall by the plaintiff's dropping the latch against, instead of in, the slot; and that this jarred the car to such an extent as to cause the lumber to fall. It also tended to show that the manner in which the plaintiff latched the table was not the proper way; that he should have used a stick, and not have gone around with the car. In respect to these two defenses, it should suffice to say the testimony was in conflict. Furthermore, even if the stick was the proper implement to be used in latching, and if it had been used by the plaintiff on the occasion here involved, yet the testimony tends to show that when the table stopped, whether the stick was used or not to latch the table, it was necessary for the person doing the latching to go under the car and latch with the hand. So it was a reasonable inference from the evidence that the failure to use the stick did not in this instance proximately contribute to plaintiff's injury.

Upon the foregoing considerations, it follows that the court committed no error in refusing charges 2, 3, and 4, requested by the defendant. It may also be said of charge 3 that it is in bad form.

Charge 5, requested by the defendant, is subject to the criticism, indulged by appellee's counsel, that it assumes that plaintiff was guilty of negligence. We think it subject also to the criticism that was placed upon charge 5 (defendant's series) requested in the Miller Case, 107 Ala. 40, 60, 19 South. 37.

The court was under no duty to give

charge 1. It asserts no proposition of law. Mobile, etc., Co. v. Walsh, 146 Ala. 295, 40 South. 560.

The court gave charge 10 at plaintiff's request. This action has been assigned as error, but appellant does not insist upon the assignment.

There is no reversible error in the ruling of the court allowing plaintiff to challenge juror Burgess. Adams v. Olive, 48 Ala. 551, and cases there cited; Haynes v. Crutchfield, 7 Ala. 189, 195.

This brings us to consideration of the rulings of the court upon the admissibility of testimony. Defendant asked its witness Worsham this question: "You have stated there was a safe way to have done it (latch the table). I will ask you whether getting under and taking the latch in your hand and going around with the latch was a safe way?" The ruling of the court, sustaining objection to this question, may be justified on two or more grounds; but it suffices to say that, had the witness answered the question as the defendant expected he would answer it, the response would have been only a repetition of testimony already given by that witness.

The sixth ground in the assignment of errors mistakes the question sought to be reviewed, and cannot therefore claim the attention of the court.

We have not been shown that the court should have granted the motion for a new trial.

No error appearing in the record, the judgment appealed from must be affirmed.

Affirmed.

TYSON, C. J., and SIMPSON and ANDERSON, JJ., concur.

(157 Ala. 487)

ENGLISH et al. v. McCREARY et al.

(Supreme Court of Alabama. Dec. 17, 1908.)

1. WILLS (§ 607*)—CONSTRUCTION—NATURE OF ESTATE CREATED—FEE TAIL.

A testator provided in his will that the respective shares "that I have given to my several daughters are given to them and their bodily heirs or the lawful heirs of their bodies and to their own individual control and not subject to debts contracted by their said husbands or any other person whatsoever." *Held*, that this clause, standing alone, created a fee-tail estate, which Code 1907, § 3397, converts into a fee-simple estate in their favor.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1369; Dec. Dig. § 607*.]

2. WILLS (§ 607*)—NATURE OF ESTATE CREATED—LIMITATIONS REPUGNANT TO ESTATE IN FEE.

A will, after words creating a fee tail, which by Code 1907, § 3397, would be converted into a fee simple, further provided: "Should any of my younger children die before having or leaving any heir, then their shares to be divided between the remainder or surviving part of said four younger children." *Held* that, if the clause quoted was intended as a restriction on the

estate of the daughters, it did no more than postpone the vesting of the fee until the birth of issue.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 607.*]

3. ESTOPPEL (§ 38*)—WARRANTY DEED—SUBSEQUENT VESTING OF FEE IN GRANTOR.

Where a fee in property conveyed with warranty vested in the grantor on having a child, it makes no difference as to the title of the grantee whether the child was born at the time of the conveyance or afterward.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 99; Dec. Dig. § 38.*]

4. WILLS (§ 594*)—CONSTRUCTION—NATURE OF ESTATE CREATED—MEANING OF "HEIR."

Where a will gives property to the testator's daughters and their "bodily heirs or the living heirs of their bodies," and then provides as to how the property shall go in case any of them should "die before having or leaving any heir," the testator, in using the word "heir," meant "child," or a definite failure of issue; and hence, when a daughter gave birth to a child, her estate became absolute and the limitation over was extinguished.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1310-1318; Dec. Dig. § 594.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3241-3264; vol. 8, pp. 7677, 7678.]

Appeal from Circuit Court, Monroe County; John T. Lackland, Judge.

Ejectment by W. K. English and others against James H. McCreary and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Plaintiffs are the heirs at law of Martha English, née Kemp. The defendants are the heirs at law of Samuel McCreary. Martha English was one of the four younger children of Samuel Kemp, whose will is referred to in the opinion of the court. She married English, at what time it is not shown, and the plaintiffs are the issues of the marriage. On the 9th day of December, 1854, Martha English and her husband conveyed to McCreary under warranty deed the lands here sought to be recovered in ejectment.

McCorvey & Hare, for appellants. Hunter H. McClelland, for appellees.

ANDERSON, J. The will in question provides that the respective shares "that I have given to my several daughters are given to them and their bodily heirs or the lawful heirs of their bodies and to their own individual control and not subject to debts contracted by their said husbands or any other person whatsoever." If this clause stood alone, it would create a fee-tail estate, which is by the terms of section 3397 of the Code of 1907 converted into a fee-simple estate, in favor of the daughters. *Mason v. Pate's Ex'r*, 34 Ala. 379; *Smith v. Greer*, 88 Ala. 414, 6 South. 911; *Slayton v. Blount*, 98 Ala. 576, 9 South. 241. See, also, the case of *Wilson v. Alston*, 122 Ala. 630, 25 South. 225, wherein the line of demarcation is drawn between these cases and the line of

decisions relied upon by counsel for appellants.

The will, however, further provides: "Should any of my youngest children die before having or leaving any heir, then their shares to be divided between the remainder or surviving part of said four younger children." Conceding, without deciding, that this was intended as a limitation upon the death of the daughter, and not of the testator, and that it was intended as a restriction upon the estate of the daughters, it did no more than postpone the vesting of the fee until the having of a child, as there is no attempt to entail the property, except in case the four youngest children die before having or leaving a child. It is therefore apparent that the testator did not wish to limit the fee, except in case the daughter died without having or leaving a child or children, and the limitation, if good at all, could do no more than postpone the vesting of the fee until the "having an heir" by the daughter. Martha had children, who are the plaintiffs in this case, and, as the remainder was dependent upon a condition never arising, the fee vested absolutely in her upon the birth of a child. Whether the fee vested in her before executing the deed to McCreary, or not, as the record does not show whether a child had been born at that time, makes no difference, as the deed was a warranty, and the fee did become vested upon the birth of her first child.

While the word "heir" is used in the attempted limitation, it is evident the testator meant "child," as the having of an heir eliminated the limitation, and the dying before "having an heir" evidently meant dying before giving birth to a child.

The judgment of the circuit court is affirmed.

TYSON, C. J., and SIMPSON and DENSON, JJ., concur.

(158 Ala. 532)

RANDLE v. BIRMINGHAM RY., LIGHT & POWER CO.

(Supreme Court of Alabama. Dec. 17, 1908.)

1. STREET RAILROADS (§ 93*)—OPERATION OF CARS—OBLIGATION OF MOTORMAN.

While a motorman may assume that a pedestrian will turn out of the way of the car, he cannot rest on such assumption so long as to reach a point where it will be impossible for him to control the car or to give warning in time to prevent injury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 187; Dec. Dig. § 93.*]

2. STREET RAILROADS (§ 102*)—INJURIES TO PEDESTRIANS—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE.

Where a motorman, after discovering that a pedestrian was unaware of the danger, failed to use reasonable care to avoid injuring him, the act of the pedestrian in placing himself

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in danger was the remote cause of the ensuing injury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 183, 194, 203; Dec. Dig. § 102.*]

3. STREET RAILROADS (§ 117*)—INJURIES TO PEDESTRIANS—NEGLIGENCE—QUESTION FOR JURY.

Whether a motorman realized that a pedestrian on the track was unaware of the danger, and whether he exercised proper care to avoid injuring him, are questions of law, where the facts are undisputed, and the inference to be drawn therefrom clear and certain; but where the facts are disputed, or, if undisputed, where fair-minded persons may arrive at different conclusions thereon, the questions are for the jury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 244-246; Dec. Dig. § 117.*]

4. STREET RAILROADS (§ 117*)—INJURIES TO PEDESTRIANS—NEGLIGENCE—QUESTION FOR JURY.

Whether the motorman, operating the car which struck a pedestrian on the track, was guilty of negligence in failing to exercise reasonable care to avoid injuring him after discovering that the pedestrian was unaware of the peril, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 244-246; Dec. Dig. § 117.*]

5. STREET RAILROADS (§ 117*)—INJURIES TO PEDESTRIANS—QUESTION FOR JURY.

Whether the sounding of the gong of a street car was sufficient to attract the attention of a pedestrian on the track *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-250; Dec. Dig. § 117.*]

6. EVIDENCE (§ 539½*)—OPINION EVIDENCE—EXPERTS—SUBJECTS OF EXPERT TESTIMONY.

In an action for the death of a pedestrian, struck by a street car, a witness who qualified as an expert as to the operation of cars might give his opinion as to the distance at which a car could be stopped running at the speed of the car in question.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2350, 2351; Dec. Dig. § 539½.*]

7. EVIDENCE (§ 576*)—EVIDENCE AT FORMER TRIAL—DEATH OF WITNESS.

Where a witness who qualified as an expert as to the operation of street cars gave his opinion as to the distance at which a car could be stopped running at the speed of the car in question, and no objection was raised on the ground that the question asked related to the distance the particular motorman could stop the car, the testimony of the witness, who died before the second trial, was properly received as against the objection that the question should have been as to the distance a properly equipped car could be stopped by a motorman of experience.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2401-2405; Dec. Dig. § 576.*]

Appeal from City Court of Birmingham; C. C. Nesmith, Judge.

Action by William J. Randle, administrator of John M. Randle, deceased, against the Birmingham Railway, Light & Power Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

See 43 South. 355.

M. M. Ullman, W. A. Denson, Frank S. White, and John L. Burnett, for appellant.

Tillman, Grubb, Bradley & Morrow, for appellee.

DENSON, J. According to the complaint this action is based upon negligence of the defendant subsequent to discovering the plaintiff's intestate's peril. As applied to the case in hand, the law may be stated thus:

The motorman of a street car is not obliged to stop his car when he sees a man walking along the line of railroad ahead of the car, but may continue to run the car in a proper manner until he is conscious of the fact that the pedestrian is unaware or heedless of danger. When he is thus conscious, it is his duty to use all reasonable care and diligence to avoid running the car onto the man. Seeing a man walking along the track, the motorman may assume that he will turn aside and out of the way of the car; but he cannot rest on such assumption so long as to reach a point where it will be impossible for him to control the car or to give warning in time to prevent injury to the man. In other words, "If a person be seen on the track of a railway, it may be assumed, if the person be an adult, that he will leave the track before the car reaches him; and this presumption may be indulged so long as danger does not become imminent, but no longer. From the time that danger is seen to be imminent it becomes the duty of the motorman to use the highest degree of care to arrest it, and a failure to do so will constitute culpable negligence, which may or may not fix liability, as that question may be affected by contributory negligence" on the part of the person injured, after realizing his perilous situation. *Railway Co. v. Bowers*, 110 Ala. 328, 20 South. 345; *Schneider v. Mobile, etc., Co.*, 146 Ala. 344, 40 South. 761; *L. & N. R. R. Co. v. Brown*, 121 Ala. 221, 25 South. 609; *Central, etc., Ry. Co. v. Foshee*, 125 Ala. 199, 218, 27 South. 1006; *Duncan v. St. Louis, etc., Co. (Ala.)* 44 South. 418, 422; *Frazer v. L. & N. R. R. Co.*, 81 Ala. 185, 1 South. 85, 60 Am. Rep. 145; *Galveston City, etc., Co. v. Hewitt*, 67 Tex. 473, 8 S. W. 705, 60 Am. Rep. 32. The rationale of this doctrine is that "the original negligence of the injured person, whereby he is placed in a perilous position, does not in a legal sense contribute to the result. It is a remote, not a proximate, cause. It is a condition, indeed, rather than cause, remote or proximate; and the law ascribes the disaster solely to a want of due care on the part of the person controlling the agency of the injury, but for whose negligence no hurt would have been done, notwithstanding the injured party's original fault." *Central, etc., Ry. Co. v. Foshee*, supra; *Frazer v. L. & N. R. R. Co.*, supra; 2 *Shearman & Redfield on Neg. (5th Ed.)* § 483.

The car which caused the death of plaintiff's intestate was being run along defend-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

ant's car line, which is laid longitudinally in Tenth avenue, in the city of Birmingham, and was going east to Gate City. According to the testimony offered by the plaintiff, her intestate, when killed, was walking along the track, ahead of the car, and had been so walking, for a considerable distance, and was near the point where defendant's car line crosses Forty-second street, when the car ran upon and killed him. There was a freight train, standing on the Southern Railway track, which was making considerable noise, which noise the evidence tended to show, affected the hearing of the passengers on defendant's car, and was also attracting intestate's attention. The testimony further tended to show that defendant's car was being run, when it struck the deceased, at a rate varying, according to the estimates of the different witnesses, from 8 to 30 miles an hour. It also tended to show that deceased, while walking along the track, held his hands behind him and was apparently unconscious of the approach of the car or of his peril; that the track was straight for half a mile westward from the point of accident, the direction from whence approached the car that killed intestate; that the motorman was on the front of the car, looking straight ahead; that no alarm whatever was given by the motorman, and there was no checking or slackening of the speed of the car until it was within 15 feet of the point where it ran upon deceased; and that it stopped 35 or 37 feet beyond or east of said point. Forty-Second street crossing was between the point where the accident occurred and where the Southern Railway track and defendant's track cross each other, and the evidence tended to show that the accident occurred near to and west of Forty-Second street, and about 50 yards from where the railroads crossed each other.

Howard Thomas, a witness for the defendant, testified that he was a passenger on defendant's car at the time plaintiff's intestate was killed; that he was standing on the inside of the car, looking out of the front door, and that deceased was in his plain view; that deceased was walking on the outside of defendant's track, in a path 3 or 4 feet out from the ends of the cross-ties; that when his attention was drawn to deceased he was 30 feet or farther from the car, walking along said path (his back to the approaching car) in the direction the car was pursuing; that about the time witness noticed the deceased the motorman sounded his gong, having sounded it several times before witness noticed him; that witness could see both the motorman and deceased, and that the deceased did not look back or stop before he got on defendant's track; that when the car got within 8 or 10 feet of where deceased was, in the path, deceased stepped right upon defendant's track in front of the moving car, whereupon the motorman immediately applied his

brake, and reversed the motor, and tried to stop the car; that the car stopped in a short distance after striking deceased; that the motorman was in plain view of the witness and looking directly ahead all the time; and that the car would have passed deceased safely, had he remained in the path in which he was traveling. Other testimony tended to show that the deceased was walking between the rails all the while.

According to the principles of law heretofore announced, it was the duty of the motorman to do all in his power, with the means at hand, to conserve the safety of the intestate, after discovering he was in peril and was unaware of the approach of the car. At what time the motorman discovered intestate's peril, or realized that he was not aware of it, and whether, after discovering the danger of a catastrophe, he exercised the proper degree of care toward averting it, must, of course, be determined from the evidence. This determination is a question of law, and to be decided by the court, where the facts are undisputed and the inference to be drawn therefrom is clear and certain. Where, however, the facts are disputed, or, if undisputed, where fair-minded persons may arrive at different conclusions thereon, the matter is for the jury. *L. & N. R. Co. v. Allen*, 78 Ala. 494, 502; *City Council, etc., v. Wright*, 72 Ala. 411, 47 Am. Rep. 422; *Tabler v. Sheffield, etc., Co.*, 87 Ala. 305, 6 South. 196; *McDermott v. Severe*, 202 U. S. 600, 612, 26 Sup. Ct. 709, 50 L. Ed. 1162; *Nugent v. Boston, etc., Co.*, 80 Me. 62, 12 Atl. 797, 6 Am. St. Rep. 151.

Furthermore, the evidence shows that the car was equipped with a gong; and it cannot be disputed that the sounding of the gong is a means at the command of the motorman by which persons in dangerous proximity may be made aware of the approach of the car. It may be an all-sufficient means, and in the instant case it might have been sufficient to attract the attention of the intestate in time to admit of his extricating himself from his perilous situation. *A. G. S. R. R. Co. v. McWhorter* (Ala.) 47 South. 84. These were also questions for the determination of the jury.

We cannot affirm that the evidence is so clear of doubt and free from inference adverse to the defendant as to make the case one for the determination of the court. We hold, therefore, that the court erred in giving the general affirmative charge in writing requested by the defendant.

When this cause was here on a former appeal, it was then determined, on the same evidence that is now presented, that witness Clayton was shown to possess that degree of experience and knowledge which would qualify him to testify, as an expert, as to the distance within which an electric car could be stopped, if running at the speed of the car in question, and that he could give his opinion on the subject. *Birmingham,*

etc., Co. v. Randle, 149 Ala. 539, 43 South. 353. We adhere to the ruling then made. Upon its being shown, however (on the last trial), that Clayton was dead, his testimony given on the former trial was proved and admitted; but the court sustained an objection of the defendant to the opinion of witness Clayton in respect to the distance in which the car could have been stopped. This ruling was based on the objection, interposed by defendant, "that the question asked was, within what distance could this particular motorman have stopped this particular car? rather than within what distance a car properly equipped, going at a given rate of speed, could have been stopped by a motorman of experience." This objection was not made on the former trial. We have considered this, as well as the other objections, with care, and, being of the opinion that they are not well made, hold that the trial court erred in sustaining them.

For the errors pointed out, the judgment of the city court is reversed, and the cause remanded.

Reversed and remanded.

TYSON, C. J., and DOWDELL and SIMPSON, JJ., concur.

(157 Ala. 608)

HOME ICE FACTORY v. HOWELLS MINING CO.

(Supreme Court of Alabama. Dec. 17, 1908.)

1. SALES (§ 179*)—CONTRACTS—PERFORMANCE—LIABILITY FOR PRICE.

One buying and using coal of a designated quality cannot resist payment of the price, unless the coal was valueless.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 460; Dec. Dig. § 179.*]

2. SALES (§ 181*)—PERFORMANCE BY SELLER—QUALITY OF GOODS—EVIDENCE.

Evidence held insufficient to show that the quality of coal delivered was not in accordance with the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 488; Dec. Dig. § 181.*]

3. SALES (§ 179*)—CONTRACTS—PERFORMANCE—LIABILITY FOR PRICE.

Where a buyer of coal kept and used it, and did not rescind the contract, that the coal was not of the designated quality might abate the price, but could not defeat the seller's right to recover, unless the coal was valueless.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 460; Dec. Dig. § 179.*]

4. EVIDENCE (§ 142*)—RELEVANCY—CONDITION OF PROPERTY.

Where the quality of coal was in issue, a party could show the quality of exactly the same kind of coal, though not a part of the coal involved.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 417, 420; Dec. Dig. § 142.*]

5. EVIDENCE (§ 244*)—ADMISSIONS—CORPORATE OFFICERS.

Admissions by the president and general manager of a corporation relating to the sale

of coal, made subsequent to the negotiations for the sale, are binding on the corporation.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 916-936; Dec. Dig. § 244.*]

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

Action of assumpsit by the Howells Mining Company against the Home Ice Factory. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The complaint was in the common counts. The pleas were: (1) The general issue. (2) That plaintiff agreed to ship defendant the best quality of coal, but instead of doing so it shipped such an inferior grade of coal that the cost of transportation from the mines to the plant of defendant was greater than the full value of the coal, and that defendant had to pay the costs of transportation. (3) That defendant ordered from plaintiff the best grade of coal at the price of \$1.50 per ton at the mines, all transportation expenses to be paid by defendant, and that, instead of sending the kind and quality ordered, the defendant sent a grade of coal of such an inferior quality that it was not worth more than the expense of transportation, which was paid by defendant, and that after receiving the coal and attempting to use it defendant notified plaintiff not to ship any more of said coal, whereupon plaintiff told defendant that the last car had already been shipped out, and asked defendant to make the best possible use of said coal, and that defendant did thereafter use said coal, but the inferior quality of the coal made it impossible to burn it without loss, except by mixing it with coal of superior quality. The evidence showed that the coal shipped was the run of mine coal, that it was shipped as ordered, and was kept by defendant. The other testimony sufficiently appears in the opinion. The charge given at the request of plaintiff is as follows: "The court charges the jury that if they believe from the evidence that run of mine coal is not the best quality of coal, and if they further believe from the evidence that defendant bought run of mine coal, then they must find for the plaintiff."

John W. McAlpine, for appellant. Erwin & McAleer, for appellee.

ANDERSON, J. The charge given by the court at the plaintiff's request merely met the defendant's special pleas, and instructed a finding for the plaintiff if the defendant bought "run of the mine coal," notwithstanding it may not have been the best quality of coal, as set up in the said special pleas. If the defendant bought "run of the mine coal," and received and kept it, he could not resist the payment of the entire purchase price, unless the coal was valueless; and there was no evidence that it was valueless.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

One witness testified that it was no better than "horse manure" for fuel, and that he would not give 10 cents for it, yet this evidence did not show that it was valueless. It is true one witness testified that it was not "run of the mine coal"; but the defendant kept it, and did not rescind the contract, and this fact could only abate the purchase price, and not defeat the plaintiff's right to recover, unless the coal received and kept was valueless, which fact was not proven. 4 Maysfield's Dig. p. 769, § 508. The charge did not ask a finding for any definite sum, simply instructed a verdict for the plaintiff under the facts hypothesized, and the trial court did not commit reversible error in giving same.

The quality of the coal was an issue in the case, and the witness Boseman had testified as to the coal used by him for the Pure Milk Company, some of which was returned to the defendant. It is true this was not a part of the coal involved; but, if it was exactly the same kind of coal, the defendant should have been permitted to prove this fact, as this proof would have rendered the testimony of Boseman of some value as to quality, etc. The trial court erred in not permitting the defendant to prove this fact by the witness French.

The defendant had the right to prove the special pleas, which were not questioned by demurrer, and had the right to prove any conversation with Howell, the president and general manager of the plaintiff, wherein he may have acknowledged getting an order not to ship the coal, and explaining why he shipped it, and whether or not he looked to the defendant to pay the contract price, as averred in the third plea. Howell was shown to be the president and general manager of the defendant—the defendant's alter ego, as distinguished from a mere agent; and any declarations or admissions made by him, relating to the subject-matter of the controversy, would be binding on the defendant, although subsequent to the negotiations.

The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

TYSON, C. J., and SIMPSON and DENSON, JJ., concur.

(157 Ala. 601)

RUSH v. MASONIC TEMPLE ASS'N.

(Supreme Court of Alabama. Dec. 17, 1908.)

LANDLORD AND TENANT (§ 48*)—GROUNDS—CERTAINTY.

Though plaintiff did not furnish defendant with elevator accommodations as agreed, and failed to properly heat his rooms at times, where there was no proof as to the difference between the value of the rooms properly heated and with elevator service, and without these accessories, and it did not appear that any loss resulted from defendant's patients being compelled to walk upstairs, or that prospective patients who did not go for treatment on certain days were not subsequently treated, and defendant did not

show that he would have been profitably engaged during the estimated time he lost by lack of heat and elevator service, loss caused by lack of heat and elevator service was so speculative that damages therefor were properly disallowed.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 114-116; Dec. Dig. § 48.*]

Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge.

Action by the Masonic Temple Association against R. A. Rush, in which defendant pleaded a set-off. From a judgment for plaintiff, denying the set-off, defendant appeals. Affirmed.

The action declares on eight promissory notes, of \$60 each, due and payable monthly. By way of defense defendant says that these notes were given for the rent of certain rooms for offices in a certain building, and that it was a part of the consideration that plaintiff contracted to furnish adequate elevator service to him, but that it failed to do so, resulting in damages of \$500 to the defendant, which are offered to be set off against plaintiff's demand with a judgment over for the excess; and for further plea he sets up that plaintiff also agreed, as a part of the consideration for said note, that it would furnish defendant adequate heat to heat said rooms, and that plaintiff failed to do so, to the damage of defendant of \$500, which is offered to be set off against the demand, and a claim made for the excess. The court, sitting without a jury, gave judgment for plaintiff in the sum of \$240, and nothing by way of set-off or recoupment.

Gregory L. & H. T. Smith, for appellant, Inge & Armbricht, for appellee.

ANDERSON, J. Conceding, without deciding, that there was an implied obligation to furnish the defendant elevator accommodations and to keep his rooms properly heated, and that there was an occasional failure to fully comply with this implied obligation, yet the defendant's evidence as to the damages he sustained is so uncertain, speculative, and conjectural that little or no data were furnished the trial court as a basis for ascertaining same. There was no proof of the difference in the value of the apartments, properly heated and with proper elevator service, and the condition in which the plaintiff permitted them to be during the defendant's occupancy. There were a few days when patients had to ascend the stairway to reach the defendant's offices, but this fact may not have entailed any financial loss to the defendant. It was also shown that a few would-be patients failed to be treated by him on certain days, because the elevator was not running, or because the rooms were not properly heated; but there is no proof that they were not at other times treated by the defendant, or that he incurred any fixed financial loss on those occasions. It is true the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

defendant estimated that he had sustained the average loss of over an hour per day; but there is nothing to show what he lost by not working these hours, or that he would have been profitably engaged all of this time, had the elevator been running and the rooms heated. So far as the record shows, he made as much under the conditions complained of as he would have made otherwise. Indeed, the defendant's collections seemed to have been better in August (the month when the elevator was more obstinate) than months when it was properly operated. We cannot say that the trial court, sitting as a jury, erred in not allowing the defendant any damages by way of recoupment, and the judgment of the trial court is accordingly affirmed.

Affirmed.

TYSON, C. J., and DOWDELL and McCLELLAN, JJ., concur.

(158 Ala. 491)

MOBILE LIGHT & R. CO. v. BAKER.

(Supreme Court of Alabama. Dec. 17, 1908.)

1. NEGLIGENCE (§ 80*)—CONTRIBUTORY NEGLIGENCE.

Where a count in a complaint is for simple negligence, contributory negligence is a good defense thereto.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 84; Dec. Dig. § 80.*]

2. STREET RAILROADS (§ 110*)—ACTION FOR INJURIES—PLEADING—COUNT FOR SIMPLE NEGLIGENCE.

A count in a complaint against a street railroad company for injuries caused by a collision set out the conditions surrounding the collision and averred that the injuries and damages were caused as a proximate consequence of the failure of defendant's servant to keep a proper lookout while operating a car on the highway. Held, that this was a count for simple, and not for willful or wanton, negligence; and hence it was error to sustain a demurrer to pleas setting up contributory negligence.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 110.*]

3. EVIDENCE (§ 121*)—RES GESTÆ—DECLARATIONS OR ADMISSIONS OF AGENT.

An agent's declarations or admissions as to an act then being done are admissible as a part of the res gestæ; but this does not apply to admissions as to past transactions.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 308; Dec. Dig. § 121.*]

4. EVIDENCE (§ 123*)—RES GESTÆ—DECLARATION OF MOTORMAN AFTER COLLISION.

Declarations by a motorman subsequent to a collision are not a part of the res gestæ, and should not be admitted over objection.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 365; Dec. Dig. § 123.*]

5. STREET RAILROADS (§ 104*)—COLLISIONS—WANTON MISCONDUCT.

Unless a car can be stopped in time to avoid a collision, after discovery of the peril, there is no wanton misconduct or subsequent negligence.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 220; Dec. Dig. § 104.*]

6. STREET RAILROADS (§ 93*)—COLLISIONS—ANTECEDENT NEGLIGENCE.

There is no negligence antecedent to a collision, unless the motorman discovers the attempt to cross in time to stop the car before the collision and negligently fails to do so.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 93.*]

7. STREET RAILROADS (§ 81*)—COLLISIONS—DUTY OF MOTORMAN.

It is the duty of a motorman to keep a lookout to avoid collisions at a point where the track is in or on a public highway.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 81.*]

Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge.

Action by Alfred C. Baker against the Mobile Light & Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The first count is in simple negligence for damage to the property and person of plaintiff while crossing the track of defendant at the intersection of a highway with said track, or in a highway over which said track was operated, and the negligence is alleged to be in the way and manner in which the car was managed. The second count sets out the conditions surrounding the collision, and avers that the injuries and damages were caused as a proximate consequence of the failure of defendant's servant in charge of the car to exercise due care and diligence to avoid injuring plaintiff or destroying his property after discovering the perilous situation of plaintiff. The third count is same as the second, but the negligence alleged is the failure to keep a proper lookout while operating a car on the highway. The pleas of contributory negligence were that plaintiff undertook to drive across the track in front of an approaching car, without stopping, looking, and listening for its approach, and that the plaintiff attempted to drive across the track in front of an approaching car without exercising reasonable prudence to ascertain whether or not the car was approaching. The grounds of demurrer are that the pleas are not an answer to the second and third counts, because they are counts in wanton or willful misconduct. The following questions were propounded to the witness Taylor, and objected to: "In your presence or hearing did not motorman of that car make any statement, right after the accident happened, as to how it happened?" This question was also propounded to plaintiff, and he was permitted to answer as follows: "Yes, sir; he said he was standing up against the door, with his head hanging down, on account of its raining awfully, and he never saw us."

Gregory L. & H. T. Smith, for appellant. Inge & Armbrecht, for appellee.

ANDERSON, J. The trial court erred in sustaining the demurrers to the defendant's

pleas 2 and 3 to the third count of the complaint as amended. This count was for simple negligence, and contributory negligence was a good defense to same, and whether the pleas were sufficient, as such, we need not determine, as the second ground of demurrer is the only one which questions the pleas as applicable to the third count, and they were not subject to the defect therein suggested. The pleas as refilled after amendment of the complaint went to each count thereof. It may be that the plaintiff intended to demur to them only so far as they answered the second count; but the second ground refers to the third as well as the second count, and the judgment entry shows that the demurrer was sustained to the pleas to both the second and third counts of the amended complaint.

Declarations or admissions of an agent as to the act then being done are admissible as a part of the *res gestæ*, but this does not apply as to admissions as to past transactions. *Tenn. Co. v. Kavanaugh*, 93 Ala. 324, 9 South. 395; *Chewning v. Ensley Ry. Co.*, 100 Ala. 493, 14 South. 362. The declarations made by the motorman were subsequent to the collision, were not part of the *res gestæ*, and should not have been admitted over the objection of the defendant. *M. & C. R. R. v. Womack*, 84 Ala. 149, 4 South. 618.

Whether the defendant was entitled to the general charge or not, upon the theory that plaintiff did not make out a *prima facie* case, with the improperly admitted declarations of the agent in, we need not decide, as the case must be reversed upon other grounds. It is sufficient to say, as a guide upon the next trial, that in the absence of some proof tending to show that the car could have been stopped, after the discovery of the plaintiff's peril, in time to avoid the collision, there was no wanton misconduct or subsequent negligence. Nor was there any simple antecedent negligence, unless the evidence tended to show that the motorman could have discovered the plaintiff in the attempt to cross in time to stop the cars before the collision, and negligently failed to do so. Under the averments of the complaint, and from the tendency of the evidence, the collision was at a street crossing; but, if not at a crossing, it was at a point where defendant's track was in or upon a public highway, and it was the duty of the motorman to keep a lookout. *Birmingham R. R. v. Brown* (Ala.) 44 South. 572; *Birmingham R. R. v. Brantly*, 141 Ala. 615, 37 South. 698. So, too, was it a fact that some little time elapsed between the time the horse started across the track and when the front wheels struck the opposite rail, which was the time of the collision; yet there was no proof of the distance of the car from the plaintiff when the horse first went upon the track, or of the rate of speed it was going, and whether or not it could have been stop-

ped between the time of the collision and when the motorman discovered the plaintiff's peril, or should have discovered it, had he kept a lookout.

The judgment of the law and equity court is reversed, and the cause is remanded.

Reversed and remanded.

TYSON, C. J., and SIMPSON and DENSON, JJ., concur.

(122 La. 600)

No. 17,405.

DUFFY v. HIS CREDITORS.

In re DUFFY.

(Supreme Court of Louisiana. Jan. 4, 1909.)
BANKRUPTCY (§ 9*)—EFFECT OF LAW—SUSPENSION OF INSOLVENT LAWS.

The enactment of a general bankrupt law by the United States suspends the operation of all state insolvent laws. This rule applies to the merger of respite proceedings into a cession of property, as provided by article 3098 of the Civil Code, when the creditors refuse to grant a respite to the debtor.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 7-9; Dec. Dig. § 9.*]

(Syllabus by the Court.)

Application by Albert O. Duffy for respite. Judgment homologating the proceedings and appointing a syndic, and the debtor applied for a suspensive appeal, and on refusal applied for writs of certiorari, mandamus, and prohibition. Decree vacated in part.

Harris Gagné, for relator. Respondent Judge, pro se. H. M. Wallis, Jr., for respondent creditors.

LAND, J. In September, 1908, relator filed his petition in the district court, Parish of Terrebonne, praying for a respite of four, eight, and twelve months. The court thereupon ordered a stay of proceedings and the convocation of a meeting of creditors to consider the question of granting the respite as prayed for by the relator. The creditors met, and almost unanimously voted against granting the respite, and recommended the appointment of a syndic, without bond, to administer the property of the relator under the state insolvent laws. Relator opposed the homologation of the proceedings of the creditors' meeting on various grounds, one of which is that the state insolvent laws have been suspended by the enactment of the national bankrupt act (act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]). The district judge rendered judgment homologating the proceedings, and appointing a syndic on his giving bond in the sum of \$2,500. Relator moved for and was granted an appeal, suspensive and devolutive, returnable to this court on January 4, 1900. Relator perfected his devolutive appeal by giving bond. Later, the district judge

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

appointed a provisional syndic vice the syndic who had refused to qualify, and ordered a meeting of the creditors to elect a definitive syndic. Relator applied for a suspensive appeal, which the district judge refused to grant. Whereupon the relator applied to this court for writs of certiorari, mandamus, and prohibition.

The facts are not disputed. The proceedings and decrees below seem to have been based on the theory that the relator by his application for a respite had estopped himself to plead the national bankruptcy act. The question is not one of estoppel, but whether the relator can be proceeded against under the insolvent laws of the state. There can be but one answer, and that is in the negative.

It has been held by this court that the respite and insolvency laws are perfectly distinct. The former rests upon the apparent solvency of the debtor, and are not suspended by the general bankruptcy laws of the United States. *Anderson v. His Creditors*, 33 La. Ann. 1155. This proposition is correct, with the reservation that the respite proceedings be not merged into a cession of the property of the debtor as provided in case of the refusal of the majority of the creditors in number and amount to grant a respite. Civ. Code, art. 3098. In such a contingency, this article provides for the cession of the property of the debtor to his creditors as in the ordinary case of a voluntary surrender under the insolvent laws of the state. Civ. Code, arts. 2170, 2184.

It is hornbook law that the enactment of a general bankrupt act by the United States suspends the operation of all state insolvent laws. *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. Ed. 524; *Beach v. Miller's Executors*, 15 La. Ann. 602; *Meekins, Kelly & Co. v. Their Creditors*, 19 La. Ann. 497; *Fish v. Montgomery*, 21 La. Ann. 446; also *Cyc.* 240, 241.

Hence the proceedings below, in so far as they tend to enforce the insolvent laws of the state of Louisiana against the relator and his estate, are mere nullities. The proceedings should have terminated with the refusal of the creditors to grant the respite prayed for by the relator, as there is no state law now in force to compel a cession of his property to his creditors. Their remedy is by ordinary suit or by proceedings under the federal bankrupt law of 1898.

It is therefore ordered that the decree homologating the proceedings of the meeting of creditors be restricted to their action in refusing the respite prayed for by the relator, and that in all other respects the said decree and all subsequent proceedings, orders, and decrees herein be vacated and annulled, and that the respondent judge be prohibited from enforcing said orders and decrees and from further proceedings in this cause.

(122 La. 602)

No. 17,391.

In re MRS. E. D. BURGUIERES PLANTING CO., Limited.

In re VIGUERIE et al.

(Supreme Court of Louisiana. Jan. 4, 1909.)

1. APPEAL AND ERROR (§ 71*)—JUDGMENTS APPEALABLE—INTERLOCUTORY JUDGMENT.

A judgment fixing the fees of a receiver after he had filed his final account containing an item in his favor for fees under his first appointment, which had been set aside, and after the person who had obtained the first appointment had filed a general opposition to the account, is an interlocutory judgment, binding on all parties to the proceeding, and is appealable.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 71.*]

2. APPEAL AND ERROR (§ 151*)—PARTIES IN INTEREST.

On a judgment fixing the fees of a receiver after he had filed his final account containing an item for fees under his first appointment, which had been set aside at the cost of the third person obtaining it, the third person was interested, and he might appeal therefrom.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 151.*]

In the matter of the receivership of the Mrs. E. D. Burguières Planting Company. Application for mandamus by F. C. Viguerie and another to compel the trial court to grant an appeal from a judgment fixing the fees of the receiver. Rule nisi made peremptory.

Foster, Milling & Godchaux, for relators.
Respondent Judge, pro se.

PROVOSTY, J. F. C. Viguerie applied for and obtained the appointment of a receiver to the Mrs. E. D. Burguières Planting Company, Limited. On appeal by the company, the appointment was set aside, and Viguerie was condemned to pay the costs. The company then itself applied for a receiver, and the same person was appointed who had been appointed at the instance of Viguerie. This receiver filed his final account. One of the items of the account was a charge, whereof the amount was indeterminate, in favor of himself for his fee under the first, or Viguerie, appointment as receiver. Viguerie filed a general opposition to this account, in these words:

"Denies the correctness of the items therein set out, and requires strict and legal proof to all the items therein set forth."

The judge fixed the said fee of the receiver at \$4,000. Viguerie moved to set aside this action of the court. His motion reads as follows:

"Now to this honorable court again appears Frank C. Viguerie, who has filed regularly his opposition to the final account of the receiver in the above receivership matter, and shows unto the court:

"That he has just discovered on the minutes of your honorable court, of date October 28, 1908, the following minute entry:

"12,138. In the Matter of the Receivership of

the Mrs. E. D. Burguières Planting Co., Ltd. Judgment rendered fixing fee of receiver at \$4,000.

"Your mover now shows that this judgment has never yet been signed, and that the order herein rendered should be vacated and set aside, and a trial had thereon contradictorily with the parties in interest before the amount of the receiver's fee is fixed herein, and for reason why said order should be vacated and set aside, he shows the following:

"(1) That he has filed an opposition herein, in which he opposes each and every item on the account, and that no item upon the account could be approved, or the amount fixed without giving your opponent an opportunity to be heard upon said question.

"(2) That the said order was rendered ex parte without the case being set down for trial, and was rendered without a hearing upon the final account, or without the introduction of any evidence whatever as to the value of the services rendered by the said receiver.

"(3) That, as the said receiver did not name any amount claimed by him for his services, the presumption is that he expected to have his fee fixed upon a quantum meruit, in which event each and every opponent would have had the right to have been heard and to administer his proof as to the value of said services. All of which was denied the said opponent herein, he or his attorney having no knowledge whatever of the application to have a judgment rendered as to this item.

"That as the final account of said receiver was filed, and as same was opposed throughout by your opponent, then the court is without authority to take up and decide the correctness of any one item without a hearing upon the whole account, and especially is this the case when the opponents are not notified of any application to have the court thus fix the fees.

"Wherefore he prays that the ex parte order rendered by your honorable court on October 28, 1908, as it appears upon the minutes of said date, fixing the fee of Wilson McKerral, Sr., receiver, at four thousand dollars, be vacated and set aside, and that the said amount to be fixed as fee of the receiver be determined upon the final trial of the opposition to the final account filed by said receiver, and that your opponent then be given an opportunity to be heard upon the said item and all other items opposed by him in said account."

The court denied this motion, assigning the following reasons:

"Plaintiff in this motion gives as a reason, why this judgment, or as he states it, should be vacated, is because it was rendered without a hearing upon the final account, of which it formed an item, and against his opposition thereto, without the introduction of any evidence as to the value of the service rendered, that he or his attorney had no knowledge whatever of the application to have a judgment rendered as to this item, that it was an ex parte proceeding, and that the court had no authority to decide on the correctness of any one item without a hearing on the whole account. This motion was submitted on the face of the papers, and a reading of the papers does not sustain the mover in the relief he asks. The account shows that the mover did not oppose the receiver's fees claimed (to be fixed), did not deny the right to fix these fees, but only contended that he (Viguerie) could not be forced to pay these fees. During the month of October, 1908, the attorney of the receiver moved in open court that the judge fix the fees of the receiver on the ground that there had been no opposition to the receiver's account asking for the fixing of this fee. The judge asked whether the submission of this question was a matter of con-

sent, or did the attorney of the opponent object to the submission. One of the attorneys was present, and another, who occupied with them, consulted together, and one shook his head. I said that I would not consider the matter unless there was no opposition. It was therefore submitted without objection. When a matter is submitted for judgment to the court by both parties, or with the knowledge in their presence, and without objection, it cannot be an ex parte order. The court in matters like this one has the power to fix the fees of a receiver, especially when there is no objection, and when the court has had the matter submitted to it without an objection and without introducing evidence. The complaint that mover had no notice of the application is an error, because his attorney was present and heard the application made. This is an interlocutory judgment, and such judgments need not be signed."

The court refused to grant an appeal from this judgment, or from the order fixing the fee of the receiver; and Viguerie gave notice that he would apply to this court for a mandamus.

It was Judge A. C. Allen who thus refused to set aside the order fixing the fee of the receiver, and refused an appeal; and the date was December 8th. Two days later, on the 10th, Judge Allen went out of office, and Judge Charles A. O'Neill went in; and Viguerie renewed his application for an appeal, and was joined this time by the Mrs. E. D. Burguières Planting Company, Limited. Judge O'Neill denied the application, and the matter which this court is now called upon to decide is whether he shall be ordered to grant it.

In his return to the rule nisi, Judge O'Neill says that he felt that—

"having no greater authority than his predecessor, he should not be called upon to review the action of his predecessor, especially when resort had already been had to this honorable court's supervisory powers to review such action."

Judge O'Neill embodies in his return the reasons of Judge Allen for refusing the appeal. They are that the said order fixing the amount of the fee of the receiver is res judicata of nothing, and binds no one; that the amount of said fee remains open to opposition; and that Viguerie is without interest to contest said fee, the question of whether the said fee is payable by him or by the receivership not having yet been determined.

We think the said order fixing the amount of the fee is an interlocutory judgment binding upon all parties to the proceeding in the course of which it was made, and that as such it is appealable. *Cary v. Richardson*, 35 La. Ann. 505. In effect, the question of what the amount of said fee should be was submitted to the decision of the court, and was decided; and, of course, the decision is a decision, and has effect as such.

Viguerie has an interest in the matter, since the judgment thus rendered may prove to be one against himself.

Let the rule nisi be made peremptory.

(12 La. 606)

No. 17,068.

MATHEWS v. KERLIN.

(Supreme Court of Louisiana. Nov. 30, 1908.
Rehearing Denied Jan. 18, 1909.)

1. MASTER AND SERVANT (§ 137*)—INJURY TO SERVANT—NEGLIGENCE OF MASTER.

The master is negligent when, through ignorance or indifference, he adopts an improper and unsafe mode of operating belts in his factory.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 273; Dec. Dig. § 137.*]

2. MASTER AND SERVANT (§ 89*)—WHEN RELATION EXISTS—VOLUNTEER.

A servant, hired by the day to perform certain work in a factory, was instructed by the foreman to look after the belts which operated the machine at or near which the servant was working, and while so doing was injured by the breaking of the belts. *Held*, that the servant was not a volunteer doing work beyond the scope of his employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 153; Dec. Dig. § 89.*]

3. MASTER AND SERVANT (§ 233*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where in such a case the danger of the breaking of the belts was not apparent, and they were handled in the customary manner by the servant, there was no contributory negligence on his part, and the doctrine of the assumption of risk has no application.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 233.*]

(Syllabus by the Court.)

Appeal from Third Judicial District Court, Parish of Bienville; James Edward Moore, Judge.

Action by Cleveland H. Mathews against T. J. Kerlin. Judgment for plaintiff, and defendant appeals. Affirmed.

Benjamin Pearce Edwards (Stubbs, Russell & Theus, of counsel), for appellant. Barnette & Roberts, for appellee.

LAND, J. This is a suit for damages for personal injuries sustained by the plaintiff while working in the stavemill of the defendant. The fact that plaintiff was injured by the breaking of two belts is not disputed, but the special defense is set up that plaintiff was employed only as a grader of staves, and when injured was doing work of his own volition beyond the scope of his employment, after working hours, and after having been warned of the danger by a fellow servant. Plaintiff's arm was badly fractured, he lost two fingers, and his little finger was crippled. There was a verdict in favor of the plaintiff for \$2,500. From a judgment pursuant to the verdict, the defendant has appealed.

While plaintiff may have been hired to grade staves, he performed other duties, such as oiling machinery, repairing and adjusting belts. Plaintiff testified that he was instructed by the foreman in charge of the mill to perform such additional duties. This evidence was not contradicted.

Plaintiff's work of grading staves was done

at or near the planer, which was operated by another man. From the power shaft two six-inch belts ran to an overhead countershaft, and thence to the planer. On the countershaft were two loose pulleys intended to receive the belts when they were shifted from the two fixed pulleys on the same shaft. But no lever was provided for the shifting of the belts in this manner. The two belts were shifted on the power shaft under such conditions that both of them necessarily fell on the shaft on the same side of the right-hand pulley. When thus shifted, the belts would frequently become lapped and wedged together, their combined weight producing undue pressure against the revolving shaft, resulting in a friction which at times evolved sufficient heat to scorch and burn the belts.

To plaintiff the foreman assigned the task of shifting the belts on the power shaft, and of separating them whenever it became apparent that they were being scorched.

On the evening of the accident, plaintiff, observing that the belts were burning, proceeded to separate them in the usual manner by pulling on the lower one. While so engaged, the belts became fast to the shaft and were wound around it. The belts were broken, and plaintiff's arm was fractured and his hand lacerated.

We do not think that there can be any serious dispute as to the negligence of the defendant. The countershaft was provided with loose pulleys for the express purpose of shifting the belts. Defendant failed and neglected to provide a lever necessary for the proper shifting of the belts. This appliance, costing a dollar or two, if it had been provided and used would have prevented any danger to the employé engaged in shifting the belts. Instead of furnishing this appliance, the defendant resorted to the crude, clumsy, and dangerous expedient of shifting the belts on the power shaft, which was not intended or fit for such purpose.

The special defense that the plaintiff was at the time of the accident doing something beyond the scope of his employment is not sustained by the evidence. It is true that plaintiff was hired to grade staves, but at the same time he was placed under the orders of the foreman of the mill, who instructed him to oil the machinery, to shift the belts, and to separate them when necessary. Plaintiff was working by the day, and it was certainly competent for the foreman to assign him duties that did not conflict with his special task of grading staves.

Contributory negligence was not pleaded, but it is argued that it is shown by the evidence. We do not think so. Plaintiff testified that he was attempting to separate the belts in the usual manner by pulling with his hands, and that this result could not have been accomplished in any other man-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ner. There is no sufficient evidence to the contrary. The only color for this contention is the testimony of several witnesses to the effect that soon after the accident the plaintiff, in answer to questions, said that he was careless or at fault. Plaintiff while suffering from his recent wounds was in no condition to be interrogated on the subject. He told the attending surgeon that he did not know the cause of the accident any more than his carelessness. He replied to another witness that he was partly in fault because "he could have left the belts alone." Two of the witnesses testified that plaintiff added that he had done the same work repeatedly. Plaintiff testified that he had no recollection of making any such statements. Be that as it may, the evidence shows that the direct and proximate cause of the injury was the unexpected winding up and breaking of the belts. Plaintiff had no reason to anticipate such an occurrence, and was not warned or instructed to handle the belts in any particular way to avoid injury. A general warning not to touch live belts had no application. The warning of a fellow servant to let the belt alone because it was the foreman's business to handle them was not heard by the plaintiff, and, if it had been, would have conveyed no indication of any particular danger. The foreman was not a witness in the case, nor was his deposition taken. That plaintiff, as a matter of fact, and as a part of his regular employment, shifted the belts and separated them when necessary, all under the eye of the foreman, cannot be disputed. That plaintiff was acting under the orders of the foreman is shown by the *res gestæ*, and is proven by his uncontradicted testimony. It is idle to talk of the assumption of risks under such circumstances. The danger was not obvious to the unskilled workman, and, even had some danger been apparent, the plaintiff had the right to rely upon the superior knowledge of the foreman under whose orders he was working. *Hunley v. Patterson & Co.*, 116 La. 736, 41 South. 54.

Judgment affirmed.

(122 La. 610)

No. 17,147.

REINACH v. JUNG.

(Supreme Court of Louisiana. Nov. 16, 1908.
On Rehearings, Jan. 18, 1909.)

1. VENDOR AND PURCHASER (§ 148*)—TENDER OF TITLE—NECESSITY.

Tender not necessary if contract is denied, and particularly if the vendee has refused to accept title.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Dec. Dig. § 148.*]

2. AUCTIONS AND AUCTIONEERS (§ 6*)—No LEGAL PROOF OF AUTHORITY.

The authority to the auctioneer given by the owner to sell his property should be given in writing; also the conditions of the sale. It

is the law's requirement. Without it, the one whose property is offered for sale is not bound, and it follows neither is he bound who becomes the adjudicatee.

[Ed. Note.—For other cases, see *Auctions and Auctioneers*, Cent. Dig. § 18; Dec. Dig. § 6.*]

3. AUCTIONS AND AUCTIONEERS (§ 7*)—PROCEDURE.

The one bidding should have reason to know at the time that his bid will be good, should he be the highest bidder.

[Ed. Note.—For other cases, see *Auctions and Auctioneers*, Dec. Dig. § 7.*]

4. AUCTIONS AND AUCTIONEERS (§ 6*)—RATIFICATION—ADJUDICATION—BIDDERS HAVE THE RIGHT TO ASSUME THAT AUCTIONEER IS AUTHORIZED.

There can be no ratification. The adjudication was null and void for absolute want of evidence.

It must be a complete act of adjudication, and cannot be made good some time afterward by an offer to supply that which should have been given in the first place. Civ. Code, art. 2606.

[Ed. Note.—For other cases, see *Auctions and Auctioneers*, Dec. Dig. § 6.*]

Land, J., dissenting.

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Thomas C. W. Ellis, Judge.

Action by Solomon Reinach against J. Charles Jung. Judgment for plaintiff, and defendant appeals. Reversed.

McCloskey & Benedict and Roger Meunier, for appellant. Benjamin Ory, for appellee.

BREAUX, C. J. This is an action by plaintiff to compel defendant to accept title to a certain square of ground in the Seventh district of New Orleans, within the area bounded by Strolitz, Palmetto, Live Oak, and Livingston streets.

Plaintiff represents that at the auction sale the property was adjudicated to the defendant by J. L. Onorato, auctioneer, as appears by his *procès verbal*, annexed to the petition.

His complaint is that notwithstanding repeated demands upon the defendant he has refused to carry out his agreement to purchase the property. That in June, 1906, a tender of a title was made through Benjamin Ory, notary public.

An exception of no cause of action was filed. Having been overruled, the defendant answered by a general denial.

The first ground of the defendant is that the *procès verbal*, before referred to and declared upon, was not complete; it was not signed by the auctioneer, but by one of his clerks.

After the objection had been raised during the trial, the court postponed the trial to another day, in order to enable the plaintiff to furnish the proper signature to the *procès verbal* of adjudication.

On the second trial it appeared that the auctioneer had signed and completed the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

procès verbal. It was admitted in evidence.

Ordinarily such a question should present very little difficulty to solve. It would in this case, were it not that it presents an appearance of completing a title after objection had been raised. But of this later.

The defendant next objected on the ground that no tender had been made of the title.

Really, tender vel non plays no part in the case. Moreover, the defendant denied the existence of the contract. Tender is not necessary if the contract itself is denied. *Beck v. Fleitas*, 37 La. Ann. 495.

Besides, the defendant had unequivocally refused to accept title. *Abels v. Glover*, 15 La. Ann. 247.

Were it not that the auctioneer was not authorized to sell the property, the order to cure the asserted defect in the procès verbal for want of signature would have been legal; also the order refusing to sustain the plea of want of tender; and the title would be good.

But the plaintiff had not authorized the auctioneer in writing, and had not furnished him with the written conditions for the sale. The only proof that could support the sale was written evidence. Civ. Code art. 2806.

The seller must proclaim the conditions of the sale in a loud and audible voice.

The failure to furnish the auctioneer with the writing required is fatal to the adjudication.

Plaintiff sought to prove the authorization by oral testimony. There was no written evidence at all. It will be borne in mind that the procès verbal of adjudication was completed after objection had been urged, and when it was completed it was not the written testimony required. It did not supply the missing authorization before mentioned. The attempted ratification is exclusively by oral testimony. That, as to real property, falls directly within the prohibition of the article of the Code in regard to the title to real estate commanding that it shall be in writing. Civ. Code, art. 2806.

If the title passed at all, it passed on January 4, 1906, the date of the adjudication, and did not pass on the 19th day of June, 1906, the day on which the seller sought to approve the act of the auctioneer by the declaration that the auctioneer was authorized to sell the property.

On the first day before mentioned there was not the written evidence required. On the second date the verbal testimony could not supply the missing deed. The seller cannot claim better vantage ground than the buyer, as he would have if he did not comply with the requirement of the law, for he could not be compelled to complete the sale, as it would be in his power to urge that no title can be made complete by verbal testimony.

Here the seller claims the right to compel the buyer, although he was not himself bound at the time. If the seller was not

bound, it must be held that the buyer was equally as free.

This was a commutative contract intended to be equally binding on both, one as seller and the other as buyer.

The case of *Pew v. Livaudais*, 3 La. 459, is not decisive of the question. In that case, the instructions were given in writing. The auctioneer had mislaid them; after the loss, the instructions were changed, and the sale made according to the oral alterations. The point decided was that parol testimony of oral alteration could not be received, and it was decided that defendant could not be compelled to take title. In that case, the possibility of an admission made some time after the sale was not, as in the pending case, an issue.

There is nothing impressive or pertinent in *Canal Bank v. Copeland*, 6 La. 552, particularly when we recall that the court held that there was no question of nullity in the sale in that case. The case was decided on another issue.

We also examined the case of *Bule v. Doyal*, 10 La. Ann. 575, relating to the want of authorization of a private agent in a sale other than at public auction. It was decided that the suit in that case was a ratification and stood in place of the original mandate. This was a private matter.

Here the sale is a public one through an officer. The auctioneer is directed to require writing, which we consider is imperative, otherwise the bidder, who has the right to expect a good and valid title, would be placed to considerable disadvantage. The sale was made through a public agency. The bidder cannot be subjected to await for a suit or for ratification in effect by verbal testimony. If it were otherwise, the seller, through an auctioneer, might offer any property without regard to right, and take chances as to whether he would ratify or not.

By reason of the law in favor of defendant and against the plaintiff, the judgment in this case is avoided, annulled, and reversed.

For reasons stated, it is ordered, adjudged, and decreed that plaintiff's demand is rejected at his costs in both courts.

LAND J. (dissenting). The jurisprudence on the point at issue is thus stated in *Hennen's Digest*:

"An auction sale of immovables or slaves not authorized nor ratified by the owner, and the conditions of which are not in writing, is invalid unless admitted by the party against whom it is sought to be enforced." *Id.* vol. 2, p. 1379, No. 3.

It is plain from the current of the decisions cited by Mr. Hennen that written assent or ratification by the vendor immediately after the adjudication supplies the absence of written authority to the auctioneer. In the case at bar there was no dispute as to

the terms of the sale, and when the vendor tendered the title the only objection was that he could not make a good title to the whole of the square adjudicated.

I, therefore, dissent from the opinion and decree rendered in this cause.

On Rehearings.

BREAUX, C. J. The opinion and judgment of this court is amended so as to decree that Solomon Reinach shall return to J. Charles Jung the sum of \$225, the amount deposited by him on the day of the contract of adjudication, viz., July 4, 1906.

This amendment being made, the application of the appellant for a rehearing is refused.

Now, as to the application of appellee for a rehearing:

The property was adjudicated to J. Charles Jung on February 4, 1906.

At that date the seller had not complied with Civ. Code, art. 2606. He had no written authorization. The article requires written evidence.

On the 19th day of June following, the seller tendered title.

His signature to the title was not equivalent to a written authorization.

A written authorization should have been given before the sale as provided in the article. There is not a scratch of a pen to show such authorization before the sale. The tender was made some six months after the adjudication.

Application for rehearings refused.

(122 La. 615)

No. 17,071.

STATE ex rel. BOARD OF COM'RS OF SALINE LEVEE & DRAINAGE DIST. v. CAPDEVIELLE, Auditor, et al. (BOARD OF COM'RS OF RED RIVER, A. & B. B. LEVEE DIST., Interveners).

(Supreme Court of Louisiana. Dec. 14, 1908. Rehearing Denied Jan. 18, 1909.)

1. MANDAMUS (§ 22*)—PERSONS ENTITLED TO RELIEF—PUBLIC OFFICERS.

The State Auditor, the Register of the State Land Office, and the Board of Commissioners of the Red River, Atchafalaya & Bayou Boeuf Levee District, all state officials and members of the executive department, with certain powers vested in and imposed on them by Acts No. 79, p. 63, of 1890, and No. 46, p. 50, of 1892, having so interpreted the mandate contained in those statutes as that the lands therein referred to have been conveyed by said Auditor and Register to said board, and by the latter sold to innocent third persons buying upon the faith of public statutes and public records, and who thereby acquired title emanating from the state and valid upon its face, and the state having apparently acquiesced in the action so taken, the Board of Commissioners of the Saline Levee & Drainage District, also a state agency, thereafter created, and exhibiting no special authority in the premises, has no standing to discredit such title, and hence has no standing

in applying for a writ of mandamus to compel said Auditor and Register to execute a deed of conveyance of the land in question to it.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 54; Dec. Dig. § 22.*]

2. MANDAMUS (§ 153*)—PARTIES—INTERVENTION.

An intervention may be allowed in a mandamus proceeding.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 204; Dec. Dig. § 153.*]

3. PARTIES (§ 40*)—INTERVENTION—WHO MAY INTERVENE—VENDOR.

A vendor of land has sufficient interest to give him a standing, as an intervener, in a proceeding the purpose of which is to discredit or nullify the title conveyed by him.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 62; Dec. Dig. § 40.*]

4. PARTIES (§ 42*)—INTERVENTION—TIME FOR.

An intervener is not entitled to delay the case, but he may come in at any time.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 69; Dec. Dig. § 42.*]

(Syllabus by the Court.)

Appeal from Twenty-Second Judicial District Court, Parish of East Baton Rouge; Harney Felix Brunot, Judge.

Mandamus by the State, on relation of the Board of Commissioners of the Saline Levee & Drainage District, against Paul Capdevielle, State Auditor, and A. W. Crandell, Register of the State Land Office, in which action the Board of Commissioners of the Red River, Atchafalaya and Bayou Boeuf Levee District intervened. Judgment for defendants and intervener, and relator appeals. Affirmed.

Foster, Milling & Godchaux, Alexis Brian, and Joseph Clifton Cappel, for appellant. Walter Guion, Atty. Gen. (Ruffin Golsan Pleasant and Adolph Valery Cocco, of counsel), for appellees Capdevielle and another. White & Thornton & Holloman, for appellee Board of Com'rs of Red River, A. & B. B. Levee Dist.

Statement of the Case.

MONROE, J. Relator prays for a writ of mandamus directing the defendants to execute a deed to certain lands which it alleges were conveyed to it by the state by Act No. 80, p. 125, of 1906. Defendants answer that the lands in question did not belong to the state at the date of the passage of Act No. 80 of 1906, having been previously conveyed by the state to the Red River, Atchafalaya and Bayou Boeuf Levee District, and by the Board of Commissioners of that district sold to John V. Moffet and Allen R. Dillon by acts of sale, duly recorded, and that they have no duty to perform in regard to them. The Board of Commissioners of the Red River, Atchafalaya and Bayou Boeuf Levee District intervene, and allege that the lands claimed were conveyed to it on January 27, 1900, under the authority of Acts No. 79, p. 63, of 1890, and No. 46, p. 50, of 1892, and were sold by it before the creation of the relator

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

board, and that the act of 1906, upon which relator relies, purports to convey to it only the lands within the limits of the district, "now belonging, or that may hereafter belong, to the state of Louisiana," which grant does not include the lands in question, the state's, and intervenor's, title to which had previously been divested. A motion was filed to strike out this intervention, on the grounds that intervenor is without interest, that the intervention came too late, and that an intervention is not permissible in a proceeding of this character.

The case, then, proceeded to trial, and the following facts were admitted or proved, to wit:

Admitted that the lands claimed were acquired by the state from the United States, under the swamp land acts, that they are located within the limits of the Saline Levee and Drainage District, as created by Act No. 80, p. 125, of 1906, and, also within the limits of the Red River, Atchafalaya and Bayou Boeuf Levee District, as fixed and described in section 1 of Act No. 79, p. 63, of 1890, and section 1 of Act No. 46, p. 50, of 1892; and that relator has made a legal demand on the Auditor and Register for a deed to said land, as required by Act No. 80 of 1906.

Act No. 79, p. 63, of 1890, establishes and defines the limits of the Red River Atchafalaya, and Bayou Boeuf Levee District (hereinafter called the "Red River District"), in the parishes of St. Landry, Rapides, and Avoyelles, creates a board of commissioners for the administration of its affairs, and vests the board so created with certain powers and imposes on it certain obligations. Section 6 of the act authorizes the board to levy such taxes on all property subject to taxation for levee and drainage purposes as may be authorized by article 214 of the Constitution (of 1879). Section 10 provides that, for the purpose of raising additional funds for the district, the board—

"shall have power to levy an annual assessment, upon all lands in said district, subject to taxation for levee and drainage purposes, not to exceed 5 cents per acre. That, in order to provide additional means, all lands, now belonging, or that may hereafter belong to the state of Louisiana, and embraced within the limits of the district, as herein constituted, shall be, and the same are, hereby, given, granted, bargained, donated, conveyed and delivered to said board, whether said lands are parts of the lands originally granted by Congress, or whether said lands have been, or may hereafter be, forfeited to, or bought in by, or for, or sold to, the state, at tax sale, for nonpayment of taxes. Where the state has, or may hereafter, become the owner of lands, by, or through, tax sales, conveyance thereof shall only be made to said board after the period of redemption shall have expired, provided, however, that any and all former owners of lands which have been forfeited to purchasers, by, or sold to, the state, for nonpayment of taxes, may, at any time within six months ensuing after date of the passage of this act, redeem said lands or any part of them upon paying all taxes due thereon down to the date of such redemption, but such redemptions shall be deemed and

taken to be sales of land by the state, and all and every sum or sums of money so received shall be placed to the credit of the Red River District. After the expiration of said six months, it shall be the duty of the Auditor and the Register, on behalf of, and in the name of, the state, to convey to the said board, by proper instruments of conveyance, the land hereby granted, or intended to be granted and conveyed, to said board, whenever, from time to time, said Auditor and Register, or either of them, shall be required to do so by the said board, or by the president thereof, and, thereafter, said president and board shall cause said conveyance to be properly recorded in the recorder's office, and, when said conveyances are so recorded, the title to said lands, with the possession thereof, shall, from thenceforth, rest, absolutely, in the said board, its successors or grantees; said lands shall be exempted from taxation, after being conveyed to, and while they remain in possession of, or under the control of, said board. Said board shall have the power to sell, or otherwise dispose of, said lands, in such manner, and at such time and for such prices, as said board shall deem proper, but all proceeds derived therefrom shall be deposited in the state treasury, to the credit of the Red River District, and shall be drawn out only upon the warrant of the president of said board.

"Sec. 11. That all money arising from, or that shall accrue from, said district, by taxation or otherwise, shall be placed to the credit of the Red River District, and shall be held and used, exclusively, for the necessary drainage, construction, repair and maintenance of any and all public levees in said district, which, in the opinion of the Board of State Engineers, will protect said levee district from overflow and for the payment of the members of said board and their secretary and the actual and necessary cost of organizing said board and putting this act into effect."

Section 13 provides that all moneys in the state treasury to the credit of the several parishes in which the Red River District is established shall be transferred to the district.

Section 15 reads:

"That, upon the application of the president of the police jury of any parish situated within this levee district, it shall be the duty of the levee board to have the Board of State Engineers examine any section of any parish, designated, to ascertain whether, on account of natural difficulties, it would be impolitic to attempt to protect the portion of said parish so examined, and, in case the report of said engineers should be adverse to the building of levees, then, such lands, unprotected by levees, shall be exempted from the provisions of this act."

The Board of Commissioners having been organized under the statute thus referred to, there was presented to it, on November 18, 1890, a petition signed by the president of the police jury of the parish of Avoyelles requesting it to have certain lands in the district, and in that parish, examined "with a view of having it pronounced impolitic to protect them by levees."

The board, accordingly, requested the engineers to make the desired examination, and, the engineers having reported "that it is impolitic, at this time, to attempt to protect" the lands in question, the board adopted a resolution (January 23, 1891) to the effect

that said lands "be exempted from the operation of Act No. 79, p. 63, of 1890."

On September 14, 1891, a petition was presented, numerously signed by property holders (owning lands, also, lying in the parish of Avoyelles and within said district), and indorsed by the president of the police jury, alleging and praying that certain (other) lands—"are unprotected by levees and are subject to overflow * * *, no likelihood of being protected, for some years, for which reason your petitioners respectfully ask that the lands comprised within the specified limits be exempted from the levee tax as fixed by the act creating your board."

This petition was also referred to the engineers, who reported, as before, that:

"On account of natural difficulties, it would be impolitic, at this time, for your board to attempt the building of levees in the said section of the parish of Avoyelles"

—to which they added:

"The Board of State Engineers would, furthermore, at this time, take occasion to express the opinion that the full intent of this exemption, when made, coupled with those already passed upon, is to relieve from the operation of Act No. 79, p. 63, of 1890, as far as the levying of taxes for levy purposes is concerned, all that part of the parish of Avoyelles, subject to overflow, north of Red river, and all that part, south of the same, bounded by Bayou des Glaizes, the Atchafalaya and Red rivers, and the public road running from David's Ferry, on Red river, to the Bayou des Glaizes, by way of Marksville, Mansura, and the long bridge at Bout du Bayou."

In 1892, the General Assembly passed the Act No. 46 of that year, entitled "An act to amend and re-enact Act No. 79, of 1890, creating the Red River, Atchafalaya and Bayou Boeuf Levee District," sections 1 and 10 of which (without going further) are identical with the sections bearing those numbers in the act of 1890. In other words, the delimitation of the district and the grant to it of all the state land therein contained, or thereafter to be acquired, are reiterated totidem verbis. No further action bearing upon the questions here at issue appears to have been taken until January 27, 1900, when, upon the application of the Board of Commissioners of the Red River District, the Auditor and Register, acting, as the deed recites, under the authority of Acts No. 79, p. 63, of 1890, and No. 46, p. 50, of 1892, executed a formal instrument, conveying to the board all the state lands, described in the instrument, situated in the parish of Avoyelles and embraced within the limits of that district, the lands described including those which had been the subject of the petitions and action in 1890 and 1891, heretofore referred to, and the instrument so executed being duly recorded, in the parish of Avoyelles, on January 30th following. The lands so conveyed were then sold by the board to John V. Moffet and Allen R. Dillon by act recorded March 17, 1900. Moffet and Dillon sold them to James B. Staley by act recorded June 17, 1901. And thereafter, by acts duly

recorded, down to March 12, 1904, they were sold by Staley to McCormick, by McCormick to the Avoyelles Company, and by the Avoyelles Company to the Louisiana Construction Company, which last-mentioned company appears to be the present holder of the title. In 1906 the General Assembly passed Act No. 80 of that year, converting into the Saline Levee and Drainage District that portion of the Red River District in which the lands heretofore referred to are situated, and granting to the new district "all lands, now belonging, or that may hereafter belong, to the state * * * and embraced within the limits of said district," whether said lands have been or hereafter be forfeited or bought in, etc. (the language of the grant being the same as in Acts No. 79, p. 63, of 1890, and No. 46, p. 50, of 1892).

Opinion.

The motion to strike out the intervention does not appear to have been finally acted on by the judge a quo, and is rather insisted on in this court. But, as the intervener asked for no delay, the intervention was not too late; as the title which emanated from the intervener is indirectly the object of attack, we think it has sufficient interest to authorize it to appear; and, as we have heretofore held that "the form of action cannot control the right to intervene" (*State ex rel. Southern Bank v. Pillsbury, Mayor*, 31 La. Ann. 1), we conclude that the grounds of the motion are not well taken.

On the merits of the case, or, rather, upon the question of relator's right to proceed by mandamus, it is evident, from the language of the second of the two petitions addressed to the Board of Commissioners of the Red River District, from the report of the Board of Engineers in response thereto, from the action of the commissioners in applying for the conveyance of the land here in question, of the Auditor and Register in making such conveyance, and of the commissioners in selling the land, six years before the Saline district was created, that, among the officials and others who were interested in the matter, and who have been called on to construe the provisions of Acts No. 79, p. 63, of 1890, and No. 46, p. 50, of 1892, the opinion has prevailed that the exemption provided for in section 15 of the act of 1890 related only to lands, owned by individuals, which might be subjected to taxation for levee purposes, but to which, by reason of natural difficulties, it might be found impolitic, for the time, to afford corresponding protection. In addition to that, we have the action of the lawmakers themselves, not alone in re-enacting, in 1892, in the same words, the grant contained in the act of 1890, but in referring, in the act of 1892, to section 15 of the act of 1890 as providing for an exemption of lands from taxation for levee purposes, and not as providing for their exclusion from the levee district. Thus, section 7 of the act of 1892

makes provision for cases in which the owners and the assessors disagree as to whether particular lands are subject to taxation under the act. Two neighbors are to be called in, and, if they fail to agree, the assessor is to report the fact to the president of the Board of Commissioners, who is authorized to call on the Board of Engineers to make surveys and take levels in order to determine whether the lands would be subject to overflow if there were no levees. If the Board of Engineers reports that the lands would not be subject to overflow, or, if the president of the Board of Commissioners fails to refer the matter to the engineers, the lands are to be exempted from taxation for the year. On the other hand, if the engineers report that the lands would be subject to overflow if there were no levees, or if the levees should break, then the lands are to be taxed for levee purposes under the act, "provided, that said lands have not already been exempted from taxation, under section 15 of Act No. 79, p. 69, of 1890." If, however, section 15, of the act of 1890, were intended to apply to lands conveyed by the state to the drainage district, it is clear that no question of exemption from taxation could arise since such lands are not subject to taxation. And, upon the other hand if the section refers to exemption from taxation, it is equally clear that it could have been intended to apply only to lands that were subject to taxation, i. e., lands belonging to individuals and not to the state or the levee board. Without pursuing this particular branch of the inquiry any further, and without entering upon the consideration of the question of the purpose, if such purpose existed, in withdrawing from the levee board, by section 15, of the act of 1890, lands which had been granted to it by section 10, enough has been said to show that the action of the Commissioners of the Red River District, in applying to the Auditor and Register for a deed to the lands in question and in subsequently selling the lands, and the action of the Auditor and Register in executing the deed as requested, presents a case, not of plain disregard of law and authority, but, of public officers discharging the duties imposed upon them in accordance with their reading of the mandate under which they hold their positions and are compelled to act. The commissioners were bound to interpret the law in order to know what assets they could rely on for the prosecution of the work they were expected to do, and, reaching the conclusion that the lands in question had been conveyed to them for that purpose, and had not been withdrawn, did no more than their duty in requesting the Auditor and Register to make them a merchantable title thereto. And the Auditor and Register were similarly situated; that is to say, as the law imposed on them the duty of executing a formal instrument, vesting in the Board of Commissioners title to the lands intended to be con-

veyed, they were bound to interpret the law in order to find out what lands they were to include in such instrument.

The record does not show that such was the case, but it may be that these several agents were advised by the law officers of the state. At all events, there is not the faintest suggestion that they did not, in good faith, exercise their best judgment in the matter, and there can be no doubt that they were acting within the scope of the general authority conferred on them by the state; the result being that there was placed on record, in the parish of Avoyelles, a title from the state to the board to certain lands which, by the terms of the law, had apparently been conveyed to the board by the state itself; that the board sold the lands, under authority equally patent upon the face of the law, to innocent third persons purchasing upon the faith of the record and of the law authorizing it; and that the board, having received the price, has devoted it to the purposes to which the law dedicated the lands, while the lands have, in the meanwhile, been sold and resold, and, perhaps, divided and improved, according to the views of those who, with such good reason, believed themselves to be the owners.

Matters having reached the condition thus stated, relator appears and shows that, nearly six years after the Auditor and Register had executed the instrument conveying the lands to the Red River Commissioners, and after the lands had been sold by the latter and resold by its vendees, it (the Board of Commissioners of the Saline Levee and Drainage District) had also been created an agent of the state, and that, in creating it, the state had granted to it, not the lands in question, but (speaking as of date July 5, 1906) "all lands, now belonging, or that may hereafter belong, to the state * * * and embraced within the limits of the Saline Levee and Drainage District"; and, upon the basis of the grant so worded, relator asks that the Auditor and Register be ordered, by mandamus, to execute deeds conveying to it the same lands that these officers, some seven years ago, conveyed to the Board of Commissioners of the Red River District. We can hardly assume, however, that, in creating the Saline Levee and Drainage District, the General Assembly acted in ignorance of the fact that the Auditor and Register, interpreting the grant contained in the acts of 1890, and 1892, had conveyed the lands to the Red River District, and we do not find that the act of 1906, or any other legislation enacted since the year 1900, repudiates or questions that conveyance. We can therefore discover no basis upon which to predicate the order prayed for. Relator's idea of what the Auditor and Register and the Commissioners of the Red River District should have done in the matter is, to say the least, no more authoritative than are the ideas upon which those other representa-

tives of the executive department have acted, and the state itself, through the lawmaking power, appears to have acquiesced in the view adopted by the latter.

In view of the situation as thus presented, and of the fact that title to the lands here claimed, made by the respondents, acting as state agents, within the limits of their apparent power, and valid upon its face, is outstanding in third persons, we are of opinion that relator, exhibiting no special authority in the premises, has no standing to discredit such title, and hence has no standing to prosecute this suit.

The judgment appealed from is, therefore, affirmed.

BREAUX, C. J., takes no part.

(122 La. 626)

No. 17,037.

COLEMAN v. FIRE INS. PATROL OF NEW ORLEANS.

(Supreme Court of Louisiana. Nov. 16, 1908. Rehearing Denied Jan. 18, 1909.)

1. CHARITIES (§ 45*)—FIRE INSURANCE PATROL—NEGLIGENCE—LIABILITIES.

Defendant, an association organized under Act No. 115, p. 186, of 1902, composed of insurance companies doing business in New Orleans, and having authority to maintain a corps of men and suitable apparatus to save life and property at and after fires, and which is supported by assessments levied on all persons, natural or artificial, engaged in the fire insurance business in said city, is a private association, whose, main purpose, as appears from a reasonable construction of the law under which it is established, is to minimize the losses and promote the pecuniary interests of its members, and is neither a public corporation nor a public charity, and it is liable in damages for injuries sustained by a member of the fire department, engaged in the discharge of his duties, as the result of the negligence of its servants in driving one of its vehicles through the streets of the city; and this, notwithstanding that the statute referred to includes the saving of life among the purposes for which such associations may be established, and prohibits them from charging for their services or from distinguishing between insured and uninsured property.

[Ed. Note.—For other cases, see *Charities*, Cent. Dig. § 103; Dec. Dig. § 45.*]

2. MUNICIPAL CORPORATIONS (§ 705*)—USE OF STREETS—RIGHT OF WAY—FIRE DEPARTMENT—INSURANCE PATROL.

Construing Act No. 83, p. 114, of 1894, granting the right of way through the streets of New Orleans to the fire department, with Act No. 115, p. 186, of 1902, granting a similar right to the fire insurance patrol, it is clear that whilst, as between the patrol and the public, such right is vested in the patrol, the right granted to the fire department is paramount to, and is wholly unaffected by, that granted to the patrol.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1515; Dec. Dig. § 705.*]

Provosty, J., dissenting.

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Fred Durleve King, Judge.

Action by David Coleman against the Fire Insurance Patrol of New Orleans. Judgment for plaintiff, and defendant appeals. Affirmed.

McCloskey & Benedict, for appellant. George W. Flynn, for appellee.

Statement of the Case.

MONROE, J. Plaintiff, who was one of the officers in charge of hook and ladder truck No. 4, of the New Orleans fire department, was injured, whilst going to a fire, as the result of a collision between the truck and fire patrol wagon No. 4, belonging to the fire insurance patrol of New Orleans, and, having brought this suit for damages, obtained judgment for \$1,600, from which the fire insurance patrol has appealed.

The facts, as they appear to us, from the evidence, are as follows:

On the night of June 23, 1905, between 11 and 12 o'clock, an alarm of fire was sounded from the corner of Ursuline and Broad streets, and the truck started to the fire. The wagon also started on the same mission (from its house, which is probably a mile or more from that of the truck), and approached the corner of Galvez and Dumaine streets, by way of Galvez, whilst the truck approached the same corner by way of Dumaine street; Galvez street being paved, and Dumaine street having a street car track, which was engaged by the wheels of the truck, neither street, at the point of intersection, being over, say, 35 or 40 feet in width. The truck carried nine men, and is said to weigh, with its load, some 7,200 or 7,500 pounds; the wagon carried seven men, and is supposed to weigh (also loaded) 5,000 or 5,200 pounds. Each vehicle was drawn by two horses. The night was dark, and we infer that the lights intended to be provided by the city were temporarily out of commission. The witnesses for plaintiff and defendant, respectively, testify that the gongs on the vehicles upon which they were riding were sounded as they approached the corner, but that they did not hear the gong of the other vehicle. The undisputed facts are: That the truck approached the corner, by way of the car track (on Dumaine street), at the speed at which such vehicles usually respond to the alarm of fire; that the wagon approached along the middle of Galvez street at a speed which will be the subject of further consideration; that, as the result of the collision, the truck, through its acquired momentum carried onward, past the point of collision and past the line of Galvez street, was turned over upon the further side of Dumaine street and its crew thrown violently to the ground, the driver being so seriously injured that he died within a couple of days, the captain, who was riding with the driver, and the lieutenant (plaintiff) being

knocked senseless, and the latter otherwise injured, and several other men receiving injuries of a less serious character; the truck itself not being very badly damaged. Upon the other hand, save for a slight scratch or abrasion of the skin, received by the captain, who was driving, no one on the wagon was injured, nor was the wagon overturned. The pole was, however, broken in two, the dashboard was damaged, and the horses, or one of them, received some injuries. The evidence satisfies us that the pole of the wagon came in contact with the truck at a point a short distance behind the near front wheel of the latter, from which we conclude that the heads of the truck horses were at that moment from 12 to 15 feet beyond the place of collision. There was some attempt to show, or rather to theorize to the effect, that the patrol people were at fault in not taking a more direct route (than by Galvez street) from their house to the fire, and that the collision might have been attributable to some defect in the sight of the driver of the wagon; and, on the other hand, one of the witnesses for the defendant, who was riding on the step at the tail of the wagon and saw nothing, propounds the theory that the truck was capsized by reason of the attempt of the driver to turn the hind wheels off the car track. We dispose of these theories by saying that they are not only unsupported by the evidence but are disproved. We find that King, a witness called on behalf of defendant, testified that, on the night of the accident, he was engineer of steam fire engine No. 26, which has its house, approximately, in the neighborhood in which the house of patrol wagon No. 4 is situated, so that, in going to the fire in question, they would ordinarily have taken the same route; and we infer that the witness was called to prove that the direct route was considered impossible, and thus explain why it was that the patrol wagon was driven by way of Galvez street, a route which seemed circuitous, and the witness testified that No. 26 was driven by the way of Galvez street for the reason stated. He also said that the wagon and No. 26 were driven down Galvez street for some distance, side by side, but that, shortly before they reached Dumaine street, he called to the driver of the engine to pull up; thus:

"Q. You were right behind the wagon? A. Yes, sir, we came down the woods side of Galvez street and they went down the river side, and we pulled up. I holloed from the bunker to the driver, 'Mike, pull up'; I didn't want no collision. We let the wagon go by us—pulled up—and we came in the wake of the wagon, and the truck had an accident. Q. As a matter of fact, weren't you and patrol 4 racing that night out Galvez street? A. No, sir; they were on the river side of Galvez and we were on the woods side, but we were side and side, opposite one another, and I was afraid, myself, there might be a collision, and I holloed from the bunker—I says: 'Pull up, and let the little wagon go by.' That team was the fastest; of course, the wagon (engine) driver had sense enough to do that himself. We always gave way to those people. By the Court: Never

mind that, Mr. Witness; just answer the questions. By Mr. Flynn (counsel for plaintiff): Q. Now, your team pulled up? A. Yes, sir; they went right on. Q. Did you see the wagon when it struck the track? No, sir, I didn't see that because I was a block behind it."

We also find that the other witnesses (five in number) who were called by defendant, and all of whom were on the wagon when the collision occurred, testify that the horses of the wagon were brought under control, and the wagon "slowed down" (or something to that effect), just before they reached Dumaine street. Thus: Manning, lieutenant and driver:

"Q. Now, just before you reached Dumaine street, upon which there is a car track, what did you do? A. I pulled up the horses, slacked their speed, and put the brake on, and had them under control."

Ray, an employé of the patrol, who was seated beside Manning on the wagon:

"Q. Do you recall anything that Lieutenant Manning did, just before he got to Dumaine street? A. He slowed up, as usual, to look out for the cars. Q. You recollect that, positively? A. Yes, sir; I do, sir."

Mouret, another patrolman:

"Q. * * * Now, do you know what the driver, Mr. Manning, did, before he arrived at Dumaine street? A. I know that Mr. Manning pulled up a little, as usual, as it was a car crossing. Q. Do you remember that? A. I am positive I do."

Timlin, captain of the patrol:

"Q. Well, do you remember whether or not Lieutenant Manning pulled up his horses that night, before he reached Dumaine street? A. Yes, sir; twice, after we crossed the bridge that night—at St. Peter street and at Dumaine street."

After plaintiff recovered consciousness, he was taken to the Charity Hospital, where his left foot was put up in a plaster bandage. He was then taken home, and he called Dr. De Grange to remove the bandage, which had become insupportable. The doctor says:

"I took it off and found that he had suffered a contusion of the foot, with a strain, or sprain, of the ankle. * * * Some of the ligaments on the anterior aspect of the foot, outer and lateral, were very likely torn. There was considerable swelling. * * * He was unable to walk, possibly, for a couple of weeks, and then he was unable to attend to his duties up to the time I sent him back to work."

Other evidence shows that plaintiff was able to get about on crutches at the end of two weeks, and that he was able to return to his work on November 6, 1908, something over five months after he had been injured. It also appears that a number of his teeth were knocked out, broken, or loosened in the collision, necessitating the services of a dentist, and that, save with respect to his teeth, his injuries are not permanent.

Opinion.

Defendant, after pleading the exceptions, "no cause of action" and "vagueness," an-

swered, denying negligence, and alleging that—

"your respondent was in the discharge of its duties upon the night in question; * * * that it was specially authorized to be where it was at the time of said collision, equally with the engine or apparatus of the New Orleans Fire Department, by virtue of the law in such cases made and provided, and especially of Act No. 115, p. 186, of 1902."

Turning to the act referred to, we find that it is entitled:

"An act to provide for the organization and maintenance of associations formed for the protection and saving of human life and property, in case of fire, in cities having a population of 50,000, or more, and providing for the enforcement of the provisions of this act,"

—and that it provides, in substance, as follows, to wit:

Section 1 authorizes the fire insurance companies, doing business in any city having 50,000 or more of population, to organize an association, to be known as the "Fire Insurance Patrol" of such city, for the purpose of protecting life and property from fire, and provides that the association shall make no charge for its services and no discrimination between insured and uninsured property.

Section 2 provides that every company regularly licensed and authorized to do business shall be eligible to membership in the association, and shall have one vote for each \$1,000 of premiums reported for assessment.

Section 3 provides that, when two-thirds of the companies in any city shall have formed an association, the officers shall file a copy of the constitution and by-laws and list of members with the Secretary of State, who shall give his approval if the association has been formed in accordance with the law.

Section 4 confers upon associations organized under the law power to provide and maintain a corps of men with suitable apparatus, to save and preserve life and property, at and after, fires, and authorizes such men to enter buildings and protect, save, and remove property—

"provided, however, that nothing in this act shall be so construed as to lessen, in any way, the authority of the fire department * * * or to warrant or justify any interference with them in the performance of their duties."

Section 5 provides that the teams and apparatus of such associations shall have the same right of way whilst going to a fire as the fire department—

"* * * and any violations of the street right of such associations shall be punished in the same manner as is, or may hereafter be, provided for the violations of the rights of fire departments," etc.

Section 6 authorizes the associations, in order to carry out the purposes for which they may be organized, to require a statement to be furnished annually, by all corporations, associations, underwriters, agents, or persons, of the aggregate amount of pre-

miums received for insuring real and personal property, in the cities in which such associations are domiciled, from loss by fire, for the 12 months next preceding the 31st day of December of each year—

"* * * said returns shall specify the amount of gross premiums written by such insurance company, association, or agent, during the said 12 months, on all policies of all kinds on risks located in cities in which fire insurance patrol associations may have been organized under the provisions of this act, deducting only return premiums paid and premiums paid for reinsurance in companies authorized to do business in the state of Louisiana, after deducting from such premiums paid for reinsurance, return premiums received on such cancelled reinsurance during the said 12 months. No reinsurance in companies not authorized to do business in Louisiana shall be deducted."

Section 7 authorizes the president, board of directors, or executive committee, of any association organized under the act to fix the assessments of the members in proportion to premiums returned as received, such assessments to be based on the estimated expenses for the year, and not to exceed 2 per cent. of such premiums, and to be paid quarterly, in advance.

Section 8 makes it the duty of the secretary of any such association to report to the Secretary of State any companies neglecting to make returns of premiums, and to pay the amounts assessed against them, and makes it the duty of the Secretary of State to collect such amounts and pay them over to the association.

Section 9 makes it the duty of the Secretary of State to revoke the license of any company failing to pay the amount of its assessment within 15 days from demand, such revocation to stand until payment shall have been made.

Section 10 authorizes associations already formed to continue upon accepting the provisions of the act.

The act contains no repealing clause, and, at the time of its passage, there was already on the statute books "an act to form a fire department for the city of New Orleans," etc. (being No. 83, p. 114, of 1894), section 15 of which reads:

"The officers and men of the fire department, with their apparatus of all kinds, when on duty, shall have the right of way to any fire and in any highway, street, or avenue, over any and all vehicles of any kind except those carrying United States mail; and any person, in, or upon, or driving, any vehicle who shall refuse the right of way, (to) or, in any way obstruct, any fire apparatus or any of said officers while in the performance of duty, shall be deemed guilty of a misdemeanor," etc.

Construing the two laws together, and considering that the purpose of the act of 1894 in providing a public necessity at public expense is wholly public, whilst the main purpose of the act of 1902 is to enable certain corporations, established for private gain, to protect their own interests, we think it clear that whilst, as between the insur-

ance patrol and the public, the patrol has the right of way in the streets for its apparatus, the paramount right granted to the fire department remains wholly unaffected, for it will be observed that, though section 5, p. 188, of the act of 1902, provides that the teams and apparatus of the association (or patrol)—

"shall have the same right of way, whilst going to a fire, as the fire department * * * and any violation of the street rights of such association shall be prosecuted in the same manner as is, or may, hereafter, be provided for the violation of the rights of the fire department"

—the preceding section (4), which authorizes the association to maintain and use its apparatus, etc., contains the clause (qualifying all the powers conferred by the act):

"Provided, however, that nothing in this act shall be so construed as to lessen, in any way, the authority of the fire department of the city in which such association shall have its domicile or to warrant or justify any interference with them in the performance of their duties."

The obligation which rests upon the officers and men of the patrol, in responding to a fire alarm, to be on the lookout for the apparatus of the fire department, is therefore more imperative than is that of the officers and men of the fire department to be on the lookout for the apparatus of the patrol.

But, apart from that obligation, we are of opinion that liability for the accident in question is fixed upon the defendant, with reasonable certainty, by the testimony, mainly, of its own witnesses. The testimony of King, to the effect that engine 28 and the patrol wagon came down Galvez street, side by side, and that he called to the driver of the engine to pull up and let the wagon get ahead, because it had the best team, and because he did not want a collision, presents an unmistakable picture to the mind; and the fact that the wagon reached Dumaine street 300 feet in advance of the engine does not imply that it had slackened the speed which had enabled it to secure that advantage, nor is there lacking affirmative testimony on the subject. Thus, Caverlo, the fireman of the truck, testifies that he saw the wagon as plainly as he saw the attorney who was interrogating him, that he did not jump off the truck, because he "never had the slightest idea that they were going to hit it," as they had plenty of room in which to slack up, but that "they just continued on at a full jump. If it had been a car, it would be the same thing; they would have gone clear through it." And the testimony of Reichert, a bystander at the time, is much to the same effect. But, accepting as true the testimony of all the witnesses who were on the wagon, to the effect that the driver pulled up the horses, slacked their speed, and had them under control, before the wagon "reached Dumaine street, upon which there was a car track," and we have the

unexplained, and unexplainable, fact that, with the horses under control, the wagon was allowed to run into the side of the truck, at a point some 12 or 15 feet behind the heads of the truck horses, with such force as to break its own pole and overturn the truck, though the latter is said to weigh about half as much again as the wagon.

Counsel for defendant propounds the theory that the fire insurance patrol, as authorized and established by the act of 1902, is a public charity, to which the doctrine of respondeat superior has no application, and they refer the court to certain authorities as supporting their view, to wit: A. & E. Enc. of Law (2d Ed.) vol. 20, p. 1205, to the effect that:

"As the duty to extinguish fires is a public service, a municipal corporation is not liable for the negligence of its firemen or the inefficiency of its fire department."

Beach on Public Corporations, vol. 1, p. 754, § 744, to the same effect.

The doctrine thus stated is founded upon the familiar principle that a municipal corporation is not liable in damages for its failure to discharge, or the manner in which it discharges, an obligation which is discretionary or judicial, as contradistinguished from those that are absolute or perfect, and that the obligation with respect to the maintenance of a fire department and the extinguishment of fires belongs to the latter class.

Yule et al. v. City of New Orleans, 25 La. Ann. 394, in which it was held that:

"The Firemen's Charitable Association has always been a voluntary one; its members are not paid; and the \$12,000 [should be \$120,000] per annum allowed them out of the city treasury is only a subsidy to enable the association to carry out its objects."

The only defendant before the court in the case cited was the city of New Orleans, concerning the relations of which with the plaintiff, the court said:

"There is no contract, expressed or implied, between the citizens and the city of New Orleans to indemnify them for any loss which may occur to them by reason of the burning down of their houses, except in cases specially provided by law"—

which doctrine is supported by a number of adjudications by the courts of other states mentioned in counsel's brief.

We are next referred to the case of "Fire Insurance Patrol v. Boyd, 120 Pa. 624, 15 Atl. 553, 1 L. R. A. 417, 6 Am. St. Rep. 745, from the opinion in which, the following excerpt is made, to wit:

"The insurance patrol company, whose object, as described by its charter, is 'to protect and save life and property in, or contiguous to, burning buildings, and to remove and take charge of such property or any part thereof, when necessary,' is a public charity, although the evidence shows that it is a corporation without capital stock or money capital, and that it is supported by voluntary contributions, derived from different insurance companies; it ap-

pearing that, in protecting property, no distinction is made between insured property and uninsured property, and that no profits and dividends are made and divided among the corporations. Such corporations, having no funds which have not been contributed for the purposes of charity, cannot be rendered liable for injuries occasioned by the negligence of servants or agents."

We are unable to concur in the view that, where private corporations, engaged in the business of insuring property against fire, in their own interest, and with a view to minimizing their own losses, employ agents to save the property insured by them, or to aid in the extinguishment of the fire insured against, they are to be considered charitable organizations, merely because, in the instrument under which they are allowed to associate themselves for the employment of such agents, it is declared that the purpose is to save life, as well as property, and that no discrimination is to be made between property that is insured and that which is not, nor yet because there is no provision in the instrument for the formal declaration of dividends. The Supreme Court of Massachusetts, in a case similar in most respects to that now under consideration, has disposed of the theory suggested by the learned counsel, and of the decision in the case above referred to, as follows:

"The chief grounds on which it is contended that the work of the corporation is a public charity are the language which refers to the preservation of life and property, in general terms, and the practice of the defendant to have no regard to ownership, and to make no distinction between insured and uninsured property. But these are of little significance in view of other provisions of the statute, and especially in view of the fact that it is impracticable for the defendant to conduct its business in any other way. The defendant places great reliance upon *Fire Insurance Patrol v. Boyd*, 120 Pa. 624, 15 Atl. 553, 1 L. R. A. 417, 6 Am. St. Rep. 745, which somewhat resembles the case at bar. But in that case membership in the corporation was open to everybody, and the expenses were wholly paid by voluntary contributions. The facts so differed from those of the present case that, if the decision were binding in this jurisdiction, it would not be decisive of the question before us. We are of the opinion that defendant is not a public charitable corporation, and that it is liable for the negligence of its servants. See *Donnelly v. Boston Catholic Cemetery Ass'n*, 148 Mass. 165, 15 N. E. 505; 5 New England Rep. 741; *Coe v. Washington Mills*, 149 Mass. 543, 21 N. E. 966." *Newcomb v. Boston Protection Department*, 151 Mass. 215, 24 N. E. 39, 6 L. R. A. 778, followed in *Bates v. Worcester Protective Department*, 117 Mass. 184, 58 N. E. 274.

We concur in the view thus expressed by the Supreme Court of Massachusetts, and, holding that defendant is not a charitable organization, find it unnecessary to go further and consider the question whether, if it could be so regarded, it would be immune from liability for damages resulting from a negligent killing or injury, by its agent, of a municipal officer, acting in the discharge of his

duty, upon a public street over which a right of way, paramount to that of defendant, is granted him by law.

Judgment affirmed.

PROVOSTY, J., dissents.

(122 La. 639)

No. 17,182.

LEE v. POWELL BROS. & SANDERS CO.,
Limited, et al.

(Supreme Court of Louisiana. Jan. 4, 1909.)

1. CORPORATIONS (§ 560*)—RECEIVERS—ACTIONS AGAINST—LIABILITY.

Where two co-receivers were sued by one of their employes for damages for personal injuries, and thereafter the corporation was substituted as sole defendant, and later the court retook the property and reappointed as receiver one of the original co-receivers, who qualified by giving bond, and was made a party defendant in his new capacity, *held*, that the original co-receivers having been eliminated from the suit, and not having again been made parties, no judgment can be rendered against them in the same action on the theory that their discharge was conditioned on the payment of all the debts of the receivership by the corporation.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 2259; Dec. Dig. § 560.*]

2. APPEAL AND ERROR (§ 879*)—PARTIES ENTITLED TO ALLEGE ERROR—PARTIES NOT APPEALING.

Defendants who do not appeal cannot avail themselves of an appeal taken by a codefendant. A judgment cannot be amended or reversed as between appellees.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3582; Dec. Dig. § 879.*]

(Syllabus by the Court.)

Appeal from Twelfth Judicial District Court, Parish of Vernon; John Bachman Lee, Judge.

Action by Nathaniel E. Lee against T. C. Wingate and the Interstate Trust & Banking Company, co-receivers of Powell Bros. & Sanders Company, Limited, and others Judgment for plaintiff, and the co-receivers appeal. Reversed as to the co-receivers, and in other respects affirmed.

White & Thornton & Holloman (T. M. & J. D. Miller, of counsel), for appellants. Edgar Williamson Sutherland and William Burke Williamson, for appellee.

LAND, J. This is a suit for damages for personal injuries originally instituted against J. C. Wingate and the Interstate Trust & Banking Company, co-receivers of Powell Bros. & Sanders Company, Limited, a corporation engaged in the sawmill business. After the appointment of said co-receivers, they by order of the court, continued the operation of the plant, and the plaintiff was by them employed as a stationary engineer in the sawmill of the company. While thus employed, the plaintiff was badly injured and crippled for life by the sudden and un-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

expected movement of the log carriage, alleged to have been occasioned by defective machinery and appliances and the negligence of the sawyer in operating a lever.

Plaintiff prayed for judgment against the co-receivers for the sum of \$20,000, with interest from judicial demand and costs.

The co-receivers answered, pleading the general issue, contributory negligence, and the assumption of risks.

Later, the company filed a petition representing that the court had entered a decree discharging the co-receivers and restoring its property to the company, and requiring it to make itself a party to the suit in the place of the co-receivers, and praying that the company might be so substituted as defendant. The court so ordered.

Thereupon the plaintiff filed a lengthy supplemental petition representing substantially that the co-receivers had been discharged from their trust by a decree of certain date restoring the property to the company on certain terms and conditions, including an assumpsit in writing of the liability of the co-receivers to the plaintiff as alleged in his original petition, and an undertaking on the part of the company to make itself party defendant to the suit; that the company had executed the written assumpsit, and had made appearance and been substituted as defendant in the place and stead of the co-receivers pursuant to said decree; and that the company was represented by W. H. Powell, as president, on whom citation and other legal process should be served.

In the same petition the plaintiff amended his original petition in many particulars, and prayed that the company be cited, and for judgment against it for the sum of \$20,000, with interest and costs as prayed for in the original petition. The company was duly cited through its president, and filed its answer.

Plaintiff, after the lapse of more than one year, filed another supplemental petition, reciting, in substance, that the original co-receivers had been discharged from their trust by decree of date December 20, 1906, and that under its requirements the company had made itself a party defendant in the suit, and filed its appearance therein, and had assumed to pay all the lawful debts and obligations contracted or created by said co-receivers, including the debt due to the plaintiff, and had given bond for the payment of the same; that, under the terms of said decree, the court reserved the right to retake the property of the company and place the same in the hands of its receiver or receivers, in case the company should fail to pay said debts and obligations within six months after the date of the decree; that the company failed to make such payments, and the court in consequence had retaken possession of said property and reappointed Thomas C. Wingate as receiver, and that the said receiver was in possession of the property of

said company under his said reappointment, and should be made a party to the suit as co-defendant with the company, and that said receiver and said company were liable in solido for the demands set up in the plaintiff's original and supplemental petitions.

Plaintiff prayed for the citation of Wingate as receiver under his reappointment, and for the citation of the company, and for judgment in solido against them for the sum, interest, and costs originally claimed of the co-receivers.

The co-receivers appeared in the suit, and filed an exception of no cause of action, based on the ground of their discharge and the substitution of the company as defendant. In this exception it was averred that the dismissal of the suit as to the Interstate Trust & Banking Company operated a release of the other "co-tort feasor," meaning Thos. C. Wingate. Wherefore "the defendants, the said co-receivers," prayed that the suit be dismissed as "to them." This exception was overruled by the court.

Then the co-receivers, reserving the benefit of their exception of no cause of action, for supplemental answer to plaintiff's petition, denied generally and specially all the allegations therein contained, and pleaded contributory negligence, and that the plaintiff was a fellow servant of the sawyer and other employes engaged in the work, and assumed the risk of their negligence.

The company and Wingate, receiver, pleaded the general issue, admitting, however, that the plaintiff had been once in the employ of the co-receivers. For further answer these defendants pleaded in bar contributory negligence and assumption of risk on the part of the plaintiff, and adopted the answer and amended answer of the co-receivers.

The co-receivers on the trial of the case objected to the introduction of evidence, on the ground that they had been eliminated from the suit and no judgment could be rendered against them under the pleadings. This objection was overruled, and the co-receivers excepted.

The case was tried before a jury, which rendered a verdict in favor of the plaintiff for \$15,000, and judgment was rendered in solido against the co-receivers, the company, and T. C. Wingate, receiver. The co-receivers have alone prosecuted their appeal from the judgment.

The first question to be considered and determined arises on the exception of no cause of action filed by the co-receivers.

This exception should have been sustained.

This exception seems to have been founded under the well-grounded apprehension that the plaintiff would attempt to recover judgment against the co-receivers notwithstanding their discharge and the substitution of the company as defendant. The co-receivers appeared only for the purposes of the exception, and were forced by the action of the court to defend the suit.

The substitution of the company as defendant necessarily eliminated the co-receivers from the suit. Thereafter the proceedings were had against the company alone, and when T. C. Wingate was reappointed receiver he was made a party as sole receiver by virtue of his reappointment. The contention that the co-receivers were only conditionally discharged, and that, as the conditions were never fulfilled, the court retained jurisdiction of the case and all the property and assets under the original receivership, might have been, but was not, raised by supplemental pleadings contradictorily with the co-receivers. The case as it stands on the pleadings presents the extraordinary feature of a judgment against persons not parties to the suit.

The question of the priority of plaintiff's claim as one arising under the co-receivership is not an issue in this suit, and its discussion is premature. Whatever rights of priority the plaintiff may have over ordinary creditors of the company are reserved, as a matter of course.

The other defendants did not prosecute their appeals, and cannot avail themselves of the appeal taken by the co-receivers. A judgment cannot be amended or reversed as between appellees. *Jaffray v. Moss*, 41 La. Ann. 548, 6 South. 520; *Berthelot v. Fitch*, 44 La. Ann. 508, 10 South. 867; *Hottinger v. Hottinger*, 49 La. Ann. 1635, 22 South. 847; *Succession of Trouilly*, 52 La. Ann. 281, 26 South. 851; *Schwartz v. Rosetta*, etc., Co., 110 La. Ann. 625, 34 South. 709; *In re Interstate Land Co.*, 118 La. Ann. 591, 43 South. 173.

It is therefore ordered that the judgment appealed from be annulled, avoided, and reversed as to T. C. Wingate and the Interstate Trust & Banking Company, co-receivers, and that said judgment be affirmed in all other respects; the plaintiff to pay the costs of this appeal.

(122 La. 644)

No. 17,188.

DICKINSON v. HATHAWAY.

(Supreme Court of Louisiana. Jan. 4, 1909.)

1. LIBEL AND SLANDER (§ 15*)—WORDS ACTIONABLE.

To condemn a person as a libeler, it must appear that the letter written by him was defamatory, and communicated in order to bring him into contempt, ridicule, or hatred.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. § 1; Dec. Dig. § 15.*]

2. LIBEL AND SLANDER (§ 25*)—PUBLICATION—LIBEL.

The letter written by the person charged with libel, addressed directly to the attorneys of the complainant, is not a libel in the sense of the law of libel. There was no publication.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 107, 108; Dec. Dig. § 25.*]

3. LIBEL AND SLANDER (§ 87*)—ACTIONS—PETITION—SUFFICIENCY.

Plaintiff failed to allege that the letter was untrue to the knowledge of the writer. Besides, it was intended for the attorneys of plaintiff, and no other persons.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. § 211; Dec. Dig. § 87.*]

4. LIBEL AND SLANDER (§ 83*)—ACTIONS—PETITION—SUFFICIENCY.

The malice charged does not necessarily give rise to the implication of untruth.

[Ed. Note.—For other cases, see *Libel and Slander*, Dec. Dig. § 83.*]

5. PRIVILEGED COMMUNICATION.

The whole letter related to the business in hand.

6. LIBEL AND SLANDER (§ 45*)—PRIVILEGED COMMUNICATIONS—LETTER TO ATTORNEY.

A private letter between a person who answers the attorneys of another relating to a special matter in which each is concerned is not ground for action.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. § 138; Dec. Dig. § 45.*]

(Syllabus by the Court.)

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; Edmund Dennis Miller, Judge.

Action by M. M. Dickinson, Jr., against George Hathaway. Judgment for defendant, and plaintiff appeals. Affirmed.

Mitchell & Rosenthal, for appellant. McCoy, Moss & Knox, for appellee.

Facts and Pleadings.

BREAUX, C. J. The plaintiff sued the defendant for \$5,000 damages. Libel against him by the defendant is the ground of the action.

The petition having been dismissed on an exception of "no right and no cause of action," we have made a summary of the allegations, as the facts alleged in the petition are admitted as true.

Plaintiff avers that he was the rice grader and warehouseman of the Lake Arthur Rice Milling Company, Limited, of which George Conovora is president, and George Hathaway manager.

For the year he was to receive for his services \$1,200.

He complains of his discharge by the manager on the 30th day of March, 1907, five months before the expiration of the year for which he was employed.

When he was discharged he was paid the sum of \$700.

He claims \$500 for the remainder of the year, dating from the day he was discharged. He avers that he was discharged without cause.

He placed his claim in the hands of Mitchell & Young, attorneys.

They wrote a demand to the company for the amount.

George Hathaway, manager, answered in a letter in which he stated that the company positively refused to pay plaintiff the

amount, as it had overpaid him. The manager added that plaintiff was incompetent, and on that account the company incurred losses. That the company would have no trouble in proving by all of its employes that he was incompetent, and that it would also prove that he was found incompetent in other ricemills; and he suggested that if the attorneys would make inquiry they would find that it was not his first discharge. He further stated that there were other good defenses that would not be to their client's credit; that the company did not think that the attorneys would bring suit if they knew the facts within the knowledge of the employes.

This letter was signed the "Lake Arthur Rice Milling Company, Limited," by George Hathaway.

Copy of the letter was inserted in plaintiff's petition. The petition amplifies the text of the letter, with comments such as that there was no cause and no ground for writing the letter; that it was false, scandalous, and malicious, defamatory of his plaintiff's good name and reputation to thus charge him with incompetency and dishonesty and that he was unreliable and untrustworthy of the confidence of his fellowmen.

As the case will be disposed of on the exception, we have not found it necessary to take note of the grounds set up in the answer. The answer was filed with full reservation of the grounds of exception. The letter from which we have quoted above is the only evidence upon which plaintiff relies; he has no other.

Discussion and Judgment.

At the outset of the discussion, a definition is in place:

Any person who publishes a defamatory letter concerning another, so as to bring him into contempt, ridicule, or hatred is guilty of libel.

It becomes necessary to determine whether the letter addressed to and received by the person defamed is a publication.

Such a letter will not in the ordinary course be held actionable in a civil suit for damages. It might be different in a criminal proceeding, in which the purpose is to prevent a breach of the peace. This being a civil suit, we are not concerned with decisions in other jurisdictions in criminal proceedings for libel.

A libel, to be actionable, must be published to some third person or the agent of that third person. An answer to a plaintiff or his agent is privileged if the answer does not extend further than the plaintiff's question. 25 Cyc. 392.

For illustration: If a letter were dropped by the writer on a sterile moor and was found by the person traduced, it would not be actionable. But it would be actionable if it were found by an agent of the same person not connected with or in any way concerned with this letter. But if it were to be

found by an agent who had in some way brought on the answer, it would be privileged.

The publication *vel non* of the asserted libel is another ground of controversy. The argument of the plaintiff on the subject finds no support in the facts which we have already anticipated. The argument is based on the idea that the letter was dictated to a stenographer, who retained a copy.

The petition avers that the letter was written by the defendant and mailed to plaintiff's attorneys.

The parties must be held to their pleadings. A contrary state of facts will not be assumed. Therefore, as relates to the publication of the alleged libel, there was nothing of the kind as relates to the contents of the letter. It was not shown that any one read it.

We pass to the next proposition; that is, that the attorneys who received the letter were the agents of plaintiff, and in sending it to them there was no publication.

The plaintiff left the writing of this letter to these attorneys. The defendant could not do less than answer this letter. Their writing to the defendant was really the act of the plaintiff. They cannot be thought of as third persons in all that related to the demand for payment of the amount. It was the same as if the answer to the letter had been addressed to the plaintiff himself, and for that reason it is to be considered as privileged.

Another ground of objection urged by the defense is that the petition does not sufficiently allege that a libel had been committed. This ground is based on the fact that plaintiff in his petition does not allege that the defendant knew that his letter was untrue.

If he wrote a calumny, it should have been alleged that defendant knew that his letter was false and untrue.

Plaintiff's petition does not contain that essential averment. True, it contains the averment of malice. This was urged by plaintiff as a sufficient averment, and that it was equivalent to the charge that defendant had written this letter knowing that it was untrue. It is not the equivalent.

The word "malice" has not such a broad meaning. Besides, it may relate to the truth. It does not require a bright imagination to conceive that a badly inclined person may so use the truth as to inflict greater injury than if an untruth were told. A physical ailment unknown and not injurious to any one, an unfortunate mental trait, though harmless, may be suggested and trumped up and made public only for the purpose of maligning; some unfortunate incident of the past, forgotten long since after years of remorse, may be recalled. Therefore, when a pleader in a civil suit for damages fails to plead that the one sued wrote an untruth knowing it to be untrue, he overlooks an important element in making out his case.

We have gone a step further and considered the relation of attorneys to their client.

They represented the plaintiff. Instead of writing himself, he left it to his attorneys.

The answer to the attorneys related exclusively to their demand. It was the same as if the letter had been addressed to the plaintiff. It was, therefore, privileged.

We pass to another phase of the case. The petition does not allege that the contents of defendant's letter were not true, and that defendant knew that they were not true.

Plaintiff, as already stated by us, seeks to meet this position by calling attention to the fact that he alleged "malice," in his petition, which gave rise to the implication of falsehood.

We have not found that under any circumstances the letter complained of was actionable.

Of course, it would have been best for the defendant to have informed the attorneys that the company refused to pay unearned wages by reason of the fact that plaintiff had been discharged for incompetency and to have said nothing more. It remains as a fact that had the contents of the letter been alleged in an answer in a suit, while useless, it would not have been actionable, as such answers are privileged.

We will briefly review the authorities cited by learned counsel, for plaintiff. They endeavor to distinguish the present case from *Coffee v. Smith*, 109 La. 440, 33 South. 554. True there is a difference between the present case and the cited case; but the case in hand is stronger for the defense than was the case cited. In the latter the attorney was written to by defendant's wife, giving her version, and with the view of avoiding a suit. It was not in answer to a letter as in this case.

We have referred to the other cases cited by plaintiff. They are not pertinent to an extent that would justify us in arriving at a different conclusion than we have.

In conclusion, we will state that it does seem that the letter was the letter of the company, and that if any one was suable it was the company. But we pass this without decision on that point. Our view upon the subject is not necessary, as we have determined to affirm the judgment on other grounds.

For the reasons above given, and the law and the evidence being with defendant, it is ordered, adjudged, and decreed that the judgment be, and the same is, affirmed.

(122 La. 650)

No. 17,173.

RION et al. v. REEVES et al.

(Supreme Court of Louisiana. Jan. 4. 1909.)

1. EVIDENCE (§ 429*)—PAROL EVIDENCE AFFECTING WRITINGS—SIMULATION.

This suit is brought to have an act apparently of sale from H. C. Drew to Johnson

Rion declared a simulation, and the property described therein to belong really to the succession of William M. Rion, the father of the apparent vendee. The suit is brought by the widow and forced heirs of William M. Rion. William M. Rion, having borrowed money from Drew, secured the loan by a special mortgage in the form of a sale with "right of redemption" in four months. Four months after the period for redemption William M. Rion paid the debt, and Drew, in retransferring the property, placed it (at the request of William M. Rion) in the name of his son, Johnson Rion. The father died while the legal title stood in the name of the son, and shortly after the son himself died, the property standing still in his name. The defendants are his minor heirs (grandchildren of William M. Rion). The trial court, over objection, allowed the plaintiffs to show, first, that the sale to Drew with "right of redemption" was in reality a mortgage, and, having shown it to have been such, to then show (using parol evidence) that the act from Drew to Johnson Rion was a simulation. The court rendered judgment in favor of the plaintiffs, and defendants appealed. *Held*, that the forced heirs had the right by parol to prove the second act simulated, after having, by proper testimony, shown that Drew was really never an owner, but a mortgagee.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1966, 1967; Dec. Dig. § 429.*]

2. MORTGAGES (§ 597*)—EXPIRATION OF TIME LIMITED FOR REDEMPTION—EFFECT.

Drew's status as a mortgagee did not become by the expiration of time for redemption that of owner, but, if it did, he had the right to waive the forfeiture, it being a matter in his interest.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 597.*]

3. OTHER CASE DISTINGUISHED.

This case differentiated from *Westmore v. Harz*, 111 La. 305, 35 South. 578, and *Wells v. Wells*, 116 La. 1065, 41 South. 316.

(Syllabus by the Court.)

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; Edmund Dennis Miller, Judge.

Action by Eugenia Rion and others against Annie Reeves and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Edward Franklin Gayle, curator ad hoc for minor appellants. Gayle & Porter, for other appellants. Winston Overton, for appellees.

Statement of the Case.

NICHOLLS, J. The plaintiffs are the widow of William M. Rion, and all of the children of her marriage with said deceased, with the exception of the two defendants, who are her grandchildren, issue of the marriage of her son Daniel Johnson Rion with Annie Cole. The plaintiffs allege that they are the widow in community and children and forced heirs of said William M. Rion; that he died intestate; that on the inventory of his succession there appeared certain real estate (which they described), containing 600 acres, more or less, of which property his succession was the true and lawful owner; that William M. Rion, in order to secure the payment of certain indebtedness, did, by act

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in the form of a sale with the right of redemption (said right of redemption being in favor of said William M. Rion), transfer said land to H. C. Drew, which deed is recorded in Book of Conveyances of the Parish of Calcasieu; that, William M. Rion having repaid H. C. Drew the amount of said indebtedness, Drew retransferred said land, but, in retransferring it, did (at the instance of said William M. Rion), and in accordance with previous arrangements between William M. Rion and one Daniel Johnson Rion, a son of William M. Rion (issue of his marriage with plaintiff, Eugenia Rion), deed said property to said Daniel Johnson Rion by private act, which deed was passed on or about July 27, 1896, and is recorded in Book 15 of Conveyances of the Parish of Calcasieu, all of which would more fully appear by reference to a certified copy of said deed attached.

That Daniel Johnson Rion paid nothing for said property; that the repayment of said indebtedness to Drew in order to recover said property was in truth and in fact paid by William M. Rion; that said land was by said deed from Drew put in the name of Daniel Johnson Rion, at the instance of William M. Rion, simply for the purpose of convenience, and for none other; that Daniel Johnson Rion did not by said deed intend to become the owner of said land, but simply to hold it for his father for said purpose; that at the same time William M. Rion was financially involved; that Daniel Johnson Rion never in reality claimed to be the owner of the same, but held it simply as aforesaid; that said deed from Drew inures to the benefit of the succession of William M. Rion; that it cannot stand as a donation from William Rion to Daniel Johnson Rion, because it is not evidenced by a public act, and furthermore, if permitted to thus stand, will be in violation of the community rights of said Eugenia Rion and of the rights of the remainder of petitioners, as forced heirs of said William M. Rion, and, besides, it was never intended that it should thus operate; that said Daniel Johnson Rion always recognized that said land belonged to his father, and then to his father's estate, and it has been so recognized by the family generally.

That Daniel Johnson Rion died after the death of his said father, and without deeding said land to his father's estate or to his father's widow or heirs, leaving matters in statu quo; that said Daniel Johnson Rion at the time of his death left a wife (Annie Cole), in community with him, and who was his wife at the time of the making of said deed from Drew to him, the said Daniel Johnson Rion; that Daniel Johnson Rion at the time of his death left three children, Zena Rion, Allen Johnson Rion, and Nellie Rion; that Zena Rion had since died, and while still a child; that said Allen Johnson Rion and said Nellie Rion were still minors; that

said Annie Cole, the widow of Daniel Johnson Rion, had since married, being now the wife of Will Reeves; that said Allen Johnson Rion and Nellie Rion have no tutor nor undertutor, nor have they ever had a tutor or undertutor, but have always been unrepresented; that they together, with their mother and their said stepfather, are residents of the parish of Calcasieu; that a curator ad hoc should be appointed to represent them; that said land should be recognized as belonging to the estate of William M. Rion; that the fact that the title to the same stands of record in the name of Daniel Johnson Rion operates as a cloud upon the title of the succession of William M. Rion to the same, and that said cloud should be removed; that said land is worth \$6,200.

In view of the premises, they prayed that a curator ad hoc be appointed to represent said minors; that said curator ad hoc, as the representative of said minors and Annie Reeves, be cited; that her said husband Will Reeves, be also cited for the purpose of authorizing his said wife to defend the suit and to stand in judgment; that petitioners do have and recover judgment against said curator ad hoc as the representative of said minors, and against said minors themselves, and against Mrs. Annie Reeves, recognizing and decreeing that said deed from said H. C. Drew inured to the benefit of the succession of said William M. Rion, and not to said Daniel Johnson Rion; that said Daniel Johnson Rion was a person interposed and paid nothing therefor, but that William M. Rion did, and that said land belongs to the succession of said William M. Rion. And petitioners further prayed for all further orders and decrees necessary, and for general relief.

The court appointed E. F. Gayle curator ad hoc to represent said minors. The curator accepted the appointment. He filed an answer pleading the general issue. Mrs. Annie Cole, widow of Daniel Rion (then Mrs. Reeves), also answered, pleading a general denial.

The following judgment (with reasons assigned) was rendered by the district court.

"Finding that said deed was given simply as security, and was, in effect, a mortgage, and that said William M. Rion repaid said Drew the money necessary to free said property of said instrument, but that said Drew, at the instance of said William M. Rion, in redeeding said property back, redeeded it for convenience to said D. J. Rion, who paid nothing for the same, which last-named deed operates to the injury of plaintiffs herein, the widow in community and forced heirs of said William M. Rion, deceased, and the law and the evidence being in favor of plaintiffs and against defendants, it is by reason of all of which ordered, adjudged, and decreed that plaintiffs, Mrs. Eugenia Rion, Joseph R. Rion, Benjamin F. Rion, John A. Rion, Charles R. Rion, Eva Bell Spears, and Winnie Louisa Carradine, do have and recover judgment against defendants E. F. Gayle, Esquire, as curator ad hoc of said minors, Allen Johnson Rion and Nellie Rion, and against said minors

themselves, and against Mrs. Annie Reeves, recognizing said succession of William M. Rion, as the owner of said real estate described in the petition herein and hereinafter set out, and that said deed from said Drew to said D. J. Rion inured to the benefit of said succession of W. M. Rion; that said D. J. Rion paid nothing on the same, but said William M. Rion did, which land is described."

Defendants have appealed.

Opinion.

The position taken by the plaintiffs is that the act sous seing privé from Drew to Daniel Johnson of the property therein transferred to the latter (apparently one of sale) did not create a new contract, but was in fact an act setting aside a former act, and extinguishing a debt for which that property stood secured by a mortgage given in the form of a "sale with power of redemption"; that the act from Drew to Daniel Johnson Rion, and a former one from William M. Rion (Daniel Johnson Rion's father) to Drew, must therefore be read together as one single transaction, of which each of the two acts mentioned is a part; that Drew never held the ownership of the property, and that the rules of evidence concerning the ownership of real estate and the transfer of the same from one person to another have no application to this case; that they have the right to show by the means and through evidence recognized by the Supreme Court of this state, as proper and admissible for that purpose, that Drew's status in respect to the property, whose legal title William M. Rion had placed in his name was that of a creditor, not an owner.

Proceeding on that theory, plaintiffs were properly permitted to establish the true character of the act from Wm. M. Rion to Drew, as being really of security for a debt due by Rion to Drew, and not one of sale. It was shown that the sum of \$450, the price declared in the act to Drew to be the price of the property transferred to him, was greatly below the value of the property; that Drew never took possession of it or exercised any rights of ownership over it (but the nominal vendor did); that the taxes were not paid by him; that he did not have the act recorded; and that Drew, when questioned touching his ownership of the property, with a view of making him a witness, declared that he had no recollection at all of the transaction. We think that the conclusion reached by the district court that the act from William M. Rion to H. C. Drew was really one of security to the latter for a loan made by him to Rion was correct, and that the object of the second act was to evidence the fact that he had been paid the debt for which the property was mortgaged to him, and to take the legal title out of his name. Where acts of mortgage have been made by the parties to take the form of a "sale with powers of redemption,"

it is a very common practice, and the most simple and convenient way of restoring matters to their real situation by an act placing the legal title back in the name of the borrower. We think this was done in this instance by the consent of both parties. *Marbury v. Colbert*, 105 La. 467, 29 South. 871; *Howe, Executor, v. Powell*, 40 La. Ann. 309, 4 South. 450; *Lawler v. Cosgrove*, 39 La. Ann. 488, 2 South. 34; *Davis v. Citizens' Bank*, 39 La. Ann. 523, 2 South. 401; *Jackson v. Lemle*, 35 La. Ann. 855. When Drew received payment of his debt, it was a matter of indifference to him as to the party in whose name the actual owner wished the legal title to be placed. The evidence shows that the legal title was placed by Drew, at the instance of William M. Rion, in the name of his son Daniel Johnson Rion, by and with the latter's consent. The evidence shows why this was done. The father was in embarrassed circumstances at the time; his creditors were about to proceed legally against him; and with a view of escaping from the effect of those proceedings, shielding his property from pursuit and seizure, the second act was made to take the form it did. There can be no doubt as to this under the evidence. The purpose and object of the second act was disclosed and discussed at an interview held between Wm. M. Rion, his son, Daniel Johnson Rion, and Mr. Shattuck, the brother-in-law of the first-named party, which interview was solicited by the two Rions for the purpose of obtaining Shattuck's advice as to whether this could be successfully accomplished. The latter advised against the course, but the two Rions none the less carried it out. They were at the time of this interview on their way to meet Mr. Drew. There was other evidence bearing on the same subject, and if further evidence was needed it was furnished by the conduct of Daniel Johnson Rion after the act was passed.

Matters after this conveyance continued, as to possession and control of this property, as they had before; he exercised no acts of ownership over it, and there is reason to believe that this litigation would never have arisen had he not been killed a short time thereafter, leaving a widow and two minor children. Out of the necessity of having recourse to legal proceedings to settle the rights of these two children seems to have sprung the idea of bringing this suit. The right to attack and set aside simulated sales executed by their father (even beyond their lifetime) is expressly conferred upon forced heirs by article 2239 of the Civil Code, as amended by Act No. 5, p. 12, of 1884.

Defendants contend that forced heirs have no right under that statute to have recourse to parol testimony for the purpose of "bringing" title to real property in the ancestor; that such evidence is not admissible for the purpose of showing that a third person was

interposed to receive or be invested with the title to real estate for the use of, instead of the intended vendee; that Drew's title, originating in a sale with a power of redemption, had become absolute when he transferred the property to Johnson Rion, by reason of the fact that William M. Rion had failed to exercise his right of redemption within the time fixed. The weak point of defendant's argument is in assuming as a fact that Drew's title was at the beginning a sale made to him by William M. Rion, with a right of redemption which became afterwards an absolute sale by reason of William M. Rion's failure to redeem. As we have stated, Drew never held title of that character; his position from the beginning of his connection with the property up to the time that he transferred it to Johnson Rion was that of a mortgagee. That title did not, and could not, ripen into one of ownership by failure to redeem. It remained, as it commenced, always a mortgage. Once a mortgage, always a mortgage. But were it otherwise, Drew had the right to waive his right to a forfeiture, as it was a matter in his own interest.

Plaintiffs do not attack Drew's title as a simulation; they recognize that the contract between him and Wm. M. Rion was real. What was done in this case was to make the form which the contract between them had taken conform to the actual facts. This the plaintiffs had a right to do, and to show that that contract had accomplished its purpose, and matters as between Drew and Wm. M. Rion had been brought back to their original position by execution of the same, by payment thereunder. Having shown this, they had the right to show then by parol evidence that the second act from Drew to Johnson Rion was in point of fact an act from Wm. M. Rion to his son Johnson, and that that second act was a simulation, in so far as Johnson Rion was made to appear as Drew's vendee; that the object of this suit is not to place the ownership of property which had been in Drew into the ownership of Wm. M. Rion for the first time, but to place back in Wm. M. Rion the legal title to property, the ownership of which he had always retained (and of which he had never divested himself), out of his son, who, holding that title, had in reality no ownership in the property. The facts in *Westmore v. Harz*, 111 La. 305, 35 South. 578, and *Wells v. Wells*, 116 La. 1065, 41 South. 316, differ from those in the present case.

Defendants contend that plaintiffs' petition is in form and effect an action en declaration de simulation, in which the act from H. C. Drew is sought to be declared a simulation, and that no attack is made upon the act from Wm. M. Rion to Drew; that there is no allegation in the petition that the act from

Rion to Drew was a mortgage, or other than what it appeared upon its face—a sale. We think the allegations of the petition sufficiently show the purpose and object of the suit and the grounds upon which judgment is asked. Defendants urge for the first time in argument in this court that H. C. Drew was a necessary party to the suit, but we do not think he was. If defendants thought it was necessary for the protection of any interests they had in the suit, they should have prayed that he be made a party. C. C. 2517, 2518; *Hoffmann v. Ackermann*, 110 La. 1074, 35 South. 293.

We are of the opinion that the judgment appealed from is correct, and it is hereby affirmed.

(122 La. 659)

No. 17,144.

CROSSETT v. CAMPBELL et al.

(Supreme Court of Louisiana. Dec. 14, 1908.

Rehearing Denied Jan. 18, 1909.)

FALSE IMPRISONMENT (§ 6*)—WHAT CONSTITUTES.

Plaintiff entered upon grounds which were lawfully in possession of schoolboys, who were giving a free picnic, and who had given notice, in advance, that later in the day a game of baseball would be played, to which a trifling admission fee would be charged. When the game was about to begin he refused, though repeatedly requested so to do, to pay the fee or go out, and he was thereupon taken by the arm by a citizen—one of the assembled guests or patrons—acting in behalf of the boys, though without special authority, and led in the direction of the gate, always with the privilege of paying and staying, and the alternative of not paying and going. Before reaching the gate, he paid the fee, and thereafter stayed and witnessed the game.

Held, that the restraint imposed was not total, and did not render it impossible for plaintiff to stay where he was or otherwise control his movements; that, being at all times able to release himself on payment of the fee, for which, if he stayed, he was morally and legally bound, the restraint imposed on him, merely as a means of his ejection, until he elected to pay, was the result of his voluntary persistence in an unlawful act, did not deprive him of "free egress," and affords no ground for an action in damages for false imprisonment.

[Ed. Note.—For other cases, see *False Imprisonment*, Cent. Dig. § 3; Dec. Dig. § 6.*]

(Syllabus by the Court.)

Appeal from Fifth Judicial District Court, Parish of Winn; George Wear, Judge.

Action by Fenner B. Crosssett against J. W. Campbell and others. Judgment for defendants, and plaintiff appeals. Affirmed.

John Henry Mathews, for appellant. Casimir Moss, for appellees.

Statement of the Case.

MONROE, J. This is an action for damages in which plaintiff appears before this court as appellant from a judgment rejecting his demands.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

He states his supposed cause of action by alleging that:

"Petitioner was in company with his wife and friends on an open lot, in the village of Dodson, * * * behaving himself, in every respect, as a good citizen should do; * * * that, while so situated, J. W. Campbell, the marshal of the town, * * * and W. C. Johnson, acting in conjunction with and aiding and assisting each other, did, with force and arms, unlawfully arrest, detain, and imprison your petitioner, by seizing hold of your petitioner's body and drawing a deadly weapon on your petitioner, and, in this manner, dragged your petitioner through a large assembly of people congregated there, and did in this manner forcibly detain petitioner, against his will, for some considerable time; * * * that there never did exist any warrant or legal process whatever authorizing either the said J. W. Campbell or the said W. C. Johnson to take petitioner in their custody or to detain or imprison him; * * * that said acts furnish an instance of false imprisonment for which they should be held liable in solido; * * * that, on account of said false imprisonment, he has suffered damages * * * in the sum of \$3,000; and he prays judgment against the defendants in solido."

An exception of no cause of action was filed and overruled, and, defendant having answered, the case was tried on its merits, developing the following facts: The boys of the Dodson High School, having decided to celebrate their commencement by giving a public picnic, to be followed in the afternoon by a game of baseball, secured from the Tremont Lumber Company the use of certain ground, owned by the latter, from which they removed the stumps and other obstructions, and which they inclosed by encircling it with a rope and a wire. No charge was made for participation in the picnic, but, in order to provide balls and bats, and to aid in paying the expenses of the visiting, Winnfield, High School team, the Dodson boys found it necessary to charge a fee of 25 cents to those who chose to remain, or to come, after dinner, within the inclosure and witness the baseball game, and notice of their intention in that respect was published in the Dodson paper, and was also served on many of the citizens by means of postal cards, plaintiff being one of those to whom such a card was mailed. He, however, seems to have conceived the idea that the charge was an imposition, and, before going to the grounds, announced his determination not to pay it. He says in his testimony:

"About 2 o'clock the professor got up on a stump and announced for everybody to go down to the gate so that they could collect their 25 cents. Most of the ladies went, and a good lot of men. Some of them stood around and did not go."

Plaintiff's wife was one of the ladies who "went." She gave the gate keeper 10 cents, and told him she would give him the remaining 15 cents (to make up the 25 cents for her admission) before she left the grounds, and her assurance was accepted, without discussion, as satisfactory. Plaintiff, though he had in his pocket more than enough money to

pay the charge, was one of those "who stood around and did not go." In that situation, appeals were made by the boys to plaintiff, and to those who assumed a like position, either to pay or to go out, and most of them did one thing or the other. Plaintiff did neither. One of the boys, being asked, "What did you propose to do if a person came on the ground that day and did not want to pay a fee," replied, "We did not think that any one would want to run over us in that way. * * * Didn't think very much about that." Campbell, the marshal, had had a talk with the mayor, in which the latter had expressed the opinion that no one could be arrested or otherwise dealt with under the town ordinances for refusing to pay the admission fee, and the marshal, acting on that opinion, contented himself with merely appealing to the recalcitrants either to pay or go out. He says he explained to plaintiff and others why the charge was made, and told them, "I believe I would pay or just go out, and not create any contrariness." He did nothing more. Johnson, a citizen of the town and a friend of the boys, seems rather to have urged the matter upon the few who persisted in holding out, and, it being said by some of them, "Everybody has gone out except that Dodson fellow [referring to plaintiff], and if he will go out we will go out too," he approached plaintiff, who had already been appealed to several times, and, at this point, there is some variance in the testimony. One or two witnesses say that Johnson asked plaintiff whether he had paid; that plaintiff replied that he had not; that Johnson then requested him to go to the gate, and took him by the arm; that plaintiff resisted, slightly, at first, and then walked in the direction of the gate, all the witnesses agreeing that he settled the matter by paying before reaching the gate. Plaintiff says that Johnson asked if he had been to the gate; that he replied, "No, my wife has made arrangement"; that Johnson then said, "Consider yourself under arrest for resisting an officer," and grabbed him by the arm; that he "finally got loose, * * * was not trying very hard, and, when he did, Johnson grabbed him again," and "threw his hand back like he was going to pull a gun"; that he (plaintiff) said, "You can't arrest me, for I am not bothering you"; that Johnson said, "Pay up, then, pay up," and that he went with Johnson for a distance of some 75 yards, when he paid up and was released. Johnson says: "I said, 'Mr. Crossett, everybody has gone out but you, and it don't look nice for you to stay;'" and I said, "If I was you, I would go out, and act nice about it," and he said, "My wife paid," and I said, "Did she pay for you?" and I asked Mrs. Crossett did she pay for him, and she said, "No," and I said, "Crossett, you will have to go out and (or) pay," and I took him by the right arm and started, and he said he would go, and then he stopped and asked me if I was going to

take him to the calaboose, and I told him, "No." We went to the other side of the cold drink stand, which I reckon was 20 or 30 steps—I guess it took about 20 or 30 seconds—and he said, "Hold on, I will pay you my quarter, and I will prosecute you." Plaintiff thereupon produced a dollar, from which the gate keeper, who came up at the moment, gave him 75 cents in change, and the matter ended, plaintiff returning to his wife and remaining, without further disturbance, to witness the game. A witness by the name of Dean says that Johnson had a pistol in the rear pocket of his trousers and partly drew it out at one time, but it is shown beyond question that he was in his shirt sleeves and was wearing linen trousers, and several witnesses testify that they saw no pistol and that they could not very well have helped seeing it if he had had one. Johnson himself swears that he had no pistol.

Opinion.

It will be observed from the foregoing statement of the facts of the case, as disclosed by the evidence, that instead, as he alleges, of being on "an open lot," plaintiff, at the time of the incident out of which this suit arises, was upon a lot, the use and enjoyment of which had been granted by the owner to the Dodson High School Baseball Team, which the members of that team had cleared of stumps and other obstructions and had inclosed, or partially inclosed, with a wire and rope for their own purposes, and of which they were in full possession; and that, instead of his "behaving himself, in every respect, as a good citizen should do," he was engaged in a most unreasonable and wrong-headed interference with a lot of schoolboys and other persons who were exercising, innocently, their legal right to amuse and be amused, upon property over which, for all the purposes of this case, they had absolute control. It will also be observed that, whereas plaintiff alleges that "on account of said false imprisonment" he suffered the damages for which he prays judgment, the facts are that he was given the alternative of staying where he was upon complying with a condition rightfully imposed, or of removing himself from premises where otherwise he was an intruder and a trespasser, and that, upon his refusal to do either the one thing or the other, he was in course—not of being imprisoned upon but—of being ejected from, the premises (with the privilege reserved to him of remaining where he was, on complying with the required condition, or of going elsewhere, without so complying, as he pleased), when he concluded to comply with the condition, and the trouble ended. There was, therefore, never an instant of time during which his release from the restraint imposed upon him was not entirely within his own control, and might not have been accomplished by his paying the trifling amount of money demanded of him, and he was never restrained from

doing anything, save the unlawful thing of remaining upon the boys' playground, against their wishes, in violation of their rights, and to their disturbance and the disturbance of their assembled guests. Our law (Rev. St. § 796) imposes a penalty for "false imprisoning," but does not define the offense. It is elsewhere defined as follows:

"False imprisonment is the unlawful and total restraint of the liberty of the person. * * *

The right violated by this tort is—

"freedom of locomotion. It belongs, historically, to the class of rights known as simple or primary rights (inaccurately called absolute rights), as distinguished from secondary rights, or rights not to be harmed. It is a right in rem; it is available against the community at large. The theory of the law is that one interferes with the freedom of locomotion of the other at his peril. * * * The right of freedom of locomotion is violated when one is wrongfully detained against his will, or is in any way deprived, as distinguished from obstructed or subjected to inconvenience, of his right to come, or go, or stay, when and where, he wishes. Some conduct imposing restraint or detention is essential, but any conduct resulting therein is sufficient. It is the unlawful interference with the wish or desire of plaintiff which the law seeks to compensate. Free egress must therefore be impossible; the restraint must be total." Cyc. vol. 19, pp. 319, 322.

A note to the paragraph last above quoted reads:

"If plaintiff is free to go where he wants, he cannot sustain an action of false imprisonment; if he is prevented from going where he may have a right to go, a mere partial obstruction to his will may be the basis of some other form of action, but not of the one here under consideration. *Bird v. Jones*, 7 Q. B. 742; * * * *Stevens v. O'Neill*, 51 App. Div. 364, 64 N. Y. Supp. 663.

"There is no legal wrong unless the detention was involuntary." Cyc. vol. 19, p. 323.

A note to this paragraph reads:

"One who submits to arrest and imprisonment rather than pay a small license fee, illegally exacted, but which he might have recovered back, without serious injury or damage, has no cause of action. *Cottam v. Oregon City (C. C.)* 98 Fed. 570."

And, again, we find that it has been held that:

"When the contest is for possession of personal property, and there is no intent to detain the person, false imprisonment is not made out. *McClure v. State*, 28 Tex. App. 102, 9 S. W. 853."

Applying the definition and interpretation thus given to the case at bar, it will be noticed that free egress from the baseball grounds was at all times possible to the plaintiff, and that Johnson's purpose was, not to imprison him in the grounds, but to eject him from them, though the privilege was accorded him of remaining there on his complying with a reasonable and lawful condition, and that it was entirely and at all times within his power to release himself from the restraint incidental to his proposed ejection by the

payment of the admission fee, for which, if he stayed, he was morally and legally bound. Such restraint was therefore of his own doing, and was not involuntary.

It is said that the defendant, Johnson, should be held liable in any event, because, disclaiming, as he does, authority either from the marshal or the boys, he was without right, as an individual, to interfere in the matter. It might, perhaps, be answered that an individual has the right to interfere where a breach of the peace or a misdemeanor is committed, or threatened, in his presence, and that, apart from the fact that plaintiff was unlawfully disturbing the boys in their enjoyment of the premises in question—a course of conduct the tendency of which was to provoke acts of violence—he was, by his unauthorized presence, disturbing and invading the rights of a peaceful assemblage of which Johnson was a member, in violation of a statute which denounces such disturbance as an offense punishable by fine and imprisonment. Rev. St. § 929.

We, however, prefer to base the decision upon the ground first stated, to wit, that the restraint of which plaintiff complains was voluntary, in that it always rested with him to terminate it by desisting from the doing of an unlawful act, and that "free egress" was always open to him.

Judgment affirmed.

(122 La. 667)

No. 17,248.

SHREVEPORT TRACTION CO. v. MULHAUPT.

In re SHREVEPORT TRACTION CO.

(Supreme Court of Louisiana. Nov. 16, 1908.
Rehearing Denied Jan. 13, 1909.)

1. CONTRACTS (§ 22*)—OFFER AND ACCEPTANCE—ACCEPTANCE BY ACTS.

Action, without words, is presumptive evidence of the acceptance of a proposition, when taken under circumstances that naturally imply such acceptance, and a timely suit, brought on the contract alleged to have resulted from a proposition and its acceptance, may in itself be an acceptance of the proposition.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 71-79; Dec. Dig. § 22.*]

2. CONTRACTS (§ 22*)—OFFER AND ACCEPTANCE—IMPLIED ACCEPTANCE.

Where a number of persons make, to a railway company, the proposition, "If you will build a railroad, along a certain route, on a certain grade, at your own expense, we will pay you certain sums when the rails are laid, or within 30 days after you begin operating the road," and the company at once builds the road in accordance with and in acceptance of the proposition, and thereafter operates it in accordance with other conditions contained in such proposition (with respect to fares and schedules, to be thereafter maintained), the action thus taken, considered in connection with a suit brought to recover the sums offered, amounts to an implied acceptance of the proposition, and

the company is entitled to judgment in the suit so brought.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 22.*]

(Syllabus by the Court.)

Action by the Shreveport Traction Company against J. T. Mulhaupt. Plaintiff had judgment, which was reversed by the Court of Appeal, and plaintiff applies for certiorari, or writ of review, to the Court of Appeal. Judgment of the Court of Appeal reversed, and judgment of the district court affirmed.

Wise, Randolph & Rendall, for applicant.
Alexander & Wilkinson, for respondent.

Statement of Case.

MONROE, J. Defendant and other citizens of Shreveport, desiring to have an electric railroad along a certain route to the Fair Grounds, made a proposition in writing to pay, each, a certain sum of money as a bonus if plaintiff would build and operate such road agreeably to the conditions mentioned in the proposition. Thereafter plaintiff, having satisfied the district court that it had done all that was required in order to entitle it to the amount (\$2,000) offered by defendant, obtained judgment against him therefor, and, the judgment so obtained having been reversed by the Court of Appeal, plaintiff now prays that the ruling last mentioned be reviewed.

The "proposition, in writing," above referred to, reads in part, as follows:

"Shreveport, La., June 7, 1906.

"Shreveport Traction Co.

"Gentlemen: If you will construct an electric railway along the following route, namely [giving the route], the undersigned, in consideration of the improved facilities for reaching the city of Shreveport, the Fair Grounds, and points intermediate, on, or near said line * * * hereby agree to pay, promptly, on the completion of the laying of said tracks, the amounts set opposite our names, below, the following conditions being those upon which the railway is to be built and operated.

"Conditions.

"(1) A bonus of \$15,000, in cash, or its equivalent, to be paid to the Traction Co. within 30 days after the completion of line and operation begun.

"(2) All costs of construction, both labor and material, bridges, etc., together with crossing of K. C. S. Ry., to be paid for by Traction Co.

"(3) No grade on said line to exceed 1% except at railroad crossings, where said grade shall not exceed 1½%.

"(4) The Traction Company to be held blameless and free from damages for any dirt or earth removed or disturbed for fills or cuts within 25 feet from either side of the center of the track.

"(5) A private right of way to be granted to the Traction Co., of 50 feet in width, for the purpose of side tracks, switches, or double tracks, as the company may select.

"(6) The franchise granted by the city of Shreveport and the parish of Caddo to run from the date of its issuance for a period of fifty years.

"(7) The Traction Co. to maintain a schedule, or headway, of not more than 20 minutes to its

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

line on Kenneth Avenue, and, beyond that point, of not more than 30 minutes. The fare to be 5 cts., each way, to any point between Texas street and Greenwood road, and 10 cts. each way, from the City of Shreveport to the Country Club. A sufficient number of cars to be operated for the fair and races."

The total amount subscribed appears to have been something less than \$15,000, and, after the signatures of the subscribers, there appears on the instrument the following form of acceptance, to wit:

"Messrs. Schumpert, Penick & Ford et als.

"Gentlemen: The undersigned Company, represented by W. F. Dillon, president, accepts the foregoing proposition and agrees to do the work and will comply on its part with the above stipulations, the work to be completed within 5 months of its acceptance. Accepted.

"Shreveport Traction Co.

"By _____,
President."

"(Date) 1906.

"President."

The form is unsigned, and the evidence adduced upon the trial of the case does not show by whom, or at what time, it was written. The Court of Appeal (naturally enough) assumed that it was written by the subscribers as part of their proposition, but plaintiff's counsel, in the brief filed by them, say that it was written on the document containing the proposition by one of plaintiff's officers, after the delivery of the document to plaintiff, and was not even suggested by the subscribers, and that they were ready to prove that fact if the Court of Appeal had remanded the case. However that may be, plaintiff sued upon a contract resulting, it is said, from the proposition accepted, not by the signing of the form, but by the doing the things called for thereby, to the knowledge of the defendant; the petition alleging, *inter alia*:

"That acting upon said proposal and agreement, it (plaintiff) proceeded to make the extension of its lines in accordance with the terms set out, * * * and has fully complied with the terms of said proposal and agreement in all respects," etc.

To which defendant answered, in substance: (1) That the proposition was never accepted, or, if accepted, he was never notified of its acceptance, or that he had withdrawn the proposition before receiving such notification; (2) that the alleged contract was *ultra vires* of plaintiff; (3) that plaintiff has not complied with the obligations purporting to have been assumed by it, in that it failed to furnish a sufficient number of cars to accommodate the public during the fair and races, and did not make the "headway" required; (4) that it did not furnish the new cars, as defendant was led to believe it would, but used cars from its other lines, "thus delaying people along the other lines in the city of Shreveport."

Upon the trial in the district court, it was shown, without attempt at contradiction, that, immediately on the receipt of the proposition, plaintiff telegraphed for rails and other materials, and proceeded to build the

road, which was completed and in operation within a few months—several weeks before the opening of the fair and races; that, up to the time of such opening, the cars were run within the schedule or "headway" called for by the proposition, and that the fares charged have always been in accordance with said proposition; that, after the opening of the fair and races, a larger number of cars were brought into the service than were called for by the ordinary schedule, and that, whilst, in consequence of the fact that great numbers of persons, constituting the crowds attending the fair, were at times moved by the same consideration to go and return at the same moment, there were, at such times, more or less of delay and complaint, the obligations assumed by plaintiff with regard to furnishing cars was, nevertheless, discharged with reasonable sufficiency, human ingenuity not having as yet devised any scheme by which, under such circumstances, delay and complaint can be altogether avoided. It was further shown that defendant lives (and, we infer, owns property) on the line of the road, and knew, or must have known, of its construction and operation, and it was not shown that he ever intimated any intention to withdraw his subscription until he filed his answer in this suit. The district court must have been of the opinion that plaintiff had accepted the offer made to it by acting on and suing to enforce compliance with it, since, as has been stated, it gave judgment for plaintiff as prayed for. The Court of Appeal, as we understand it, concedes that plaintiff has done all that defendant's offer calls on it to do, save to formally accept the offer and notify the defendant of such acceptance, the views of our learned Brethren upon the subject being, substantially, represented by the following excerpts from their carefully prepared opinion, to wit:

"The evidence shows that the railroad has been constructed and is in operation along the streets named in the proposition, but that no formal acceptance of the proposition was made and no notice thereof given to defendant. The most serious issue presented is, we think, the question as to whether or not a formal acceptance of the proposition and notice thereof to the defendant were necessary in order to bind him for the payment of the amount subscribed for by him."

The opinion quotes certain articles of the Civil Code, and says:

"These articles not only contemplate, but require, for the completion of the contract, in all cases to which they apply, that there shall be an express acceptance or one implied by law, and, in addition thereto, that notice of such acceptance must be expressly given, or, where the acceptance is implied by law, the circumstances which give rise to such implication must be known to the person making the proposal. But, in either case, notice or knowledge of the acceptance is essential; the person making the proposal having until * * * he receives such notice or knowledge [the right] to withdraw his consent, unless time has been expressly or impliedly given to the person to whom the proposal

has been made to communicate his determination."

After referring to the blank form of acceptance which appears upon the instrument sued on, the opinion continues:

"This acceptance was never signed by the plaintiff company nor was any other formal acceptance made and notice thereof given to defendant. Now, if the proposition had been to pay the amount of the respective subscriptions if the plaintiff company would extend the railway along the streets named, without any condition or without requiring on the part of the plaintiff company any reciprocal promise or obligations, and no intimation given, by the form of acceptance inclosed, that a formal acceptance and notice thereof were required, then it might be that the construction and completion of the railway along those streets named would have been a sufficient assent, and no notice of acceptance would have been necessary. But there is nothing in the form of the proposition nor in the terms thereof which evinced any design on the part of the subscribers to give the plaintiff company the right of concluding the contract by its mere assent, or to dispense with notification of its acceptance. On the contrary, it seems that formal acceptance and notification were clearly within the contemplation of the parties, as shown by the form of acceptance and notice accompanying the proposition, to all intents and purposes, as part of the communication. But, aside from this, that some notification, to say the least, whether by formal notice or implication, of the acceptance of the proposition, was essential, is beyond serious dispute. It was not only conditioned upon the granting of 50 years' franchise by the city of Shreveport and parish of Caddo, but required the promise and obligation on the part of plaintiff company to maintain certain fares to be charged for the service, and to operate sufficient cars to accommodate the crowds attending the fair and races, and that without limit of time. Notification or knowledge of its assent to the terms and stipulations being necessary, and no formal notice having been given, can the knowledge of its assent to all the terms be implied from the mere fact that defendant knew that the work of construction was thereafter begun, the railway completed, and cars operated thereon? We think not. The most that can be said is that those acts manifest an intention to perform the obligations required of it. But an intention to perform does not amount to an enforceable obligation to perform. * * * So, although the railroad has been constructed and is now in operation, and the plaintiff company may be observing the stipulations and conditions contained in the propositions, yet, if it should fail or refuse to continue to do so, the obligation could be legally enforced against it in that respect only upon the theory that, by the institution of this action or otherwise, it is estopped to deny its existence. If, upon the completion of its line, it had failed to observe the requirements stipulated in the proposition, and the subscribers, upon tender of the amounts of their respective subscriptions, had undertaken to enforce the stipulations, the plaintiff company could well have said that there were other considerations, such as the expectation of benefits and profits, which induced it to make the extension, and that it never assented to such requirements. * * *

"It may be that defendant has been benefited by the extension of the railway, and that, really, the work was undertaken and completed on the faith of the subscriptions. But those facts do not give rise to any legal obligation on the part of the defendant to pay anything. The plaintiff must recover, if at all, upon the alleged contract. And it cannot expect to enforce the obligations of a contract which, through its

own apparent laches, it failed to perfect. [Citing] Peet v. Meyer, 42 La. Ann. 1034, 8 South. 534; Menard v. Scudder, 7 La. Ann. 388, 56 Am. Dec. 610; Galt v. Swain, 9 Grat. (Va.) 633, 60 Am. Dec. 311."

Opinion.

It is suggested, in the brief filed on behalf of defendant, that the applicant herein did not, before making the application now under consideration, apply to the Court of Appeal for a rehearing and give notice of this application, as required by the rule of this court; but the suggestion seems to be founded in error of fact, as appears from the certificate of the clerk of the Court of Appeal.

The hypothesis, suggested in the opinion of the Court of Appeal, "that the defendant has been benefited by the extension of the railway, and that, really, the work was undertaken and completed on the faith of the subscriptions," being well founded in fact, and it being further established, as we think, that the work in question was undertaken and completed to the knowledge of defendant, and that, before defendant had intimated any desire to withdraw his offer (assuming that he would have had that right after plaintiff had acted on the offer), plaintiff had irrevocably committed itself, by the institution of this suit, to the performance of the other obligations imposed on it, there would seem to be nothing further for plaintiff to do in order to entitle it to recover the amount here claimed.

So far as the obligation to pay the amount of his subscription is concerned, defendant and his associates made the proposition:

"If you will construct an electric railway along the following route, * * * the undersigned, in consideration of the improved facilities for reaching the city of Shreveport, the Fair Grounds, and points intermediate, on, or near said line, * * * hereby agree to pay, promptly, on the completion of the laying of said tracks, the amounts set opposite our names; the following conditions being those under which the railway company is to be built and operated:

"Conditions.

"(1) A bonus of \$15,000, in cash, or its equivalent, to be paid to the Traction Company within 30 days after the completion of line and operation begun.

"(2) All costs of construction, both labor and material, bridges, &c., together with crossing of K. C. S. Ry., to be paid for by Traction Co.

"(3) No grade on proposed line to exceed 1%, except at railroad crossings, where grade shall not exceed 1½%."

The railway, as we have seen, has been constructed along the route selected by defendant and his associates, and it is not disputed that it was constructed, at the cost of the plaintiff, upon the grades designated in their proposition. Whether the subscriptions were payable promptly on the completion of the laying of said tracks, "or, as part of the bonus of \$15,000, within 30 days after the completion of line and after operation begun," is immaterial, since the delay in either case has expired, and the other conditions im-

posed have no bearing upon the obligation to pay. Thus, conditions 4 and 5 represent merely additional obligations assumed by the subscribers.

If condition 6 represents an obligation assumed by plaintiff, it, nevertheless, has no necessary connection with the immediate obligation of defendant to pay his subscription. The franchise, as we take it, was to be obtained, but, not as a condition precedent to the payment of the subscriptions. And so plaintiff is to maintain a certain schedule, charge certain fares, and operate sufficient cars for the fair and the races, but all that is to be done during the years to come, and not before defendant pays his subscription. If, in the future and after defendant has paid his subscription, in accordance with the terms of his proposition, plaintiff fails in the discharge of any obligation, which, according to the terms of said proposition, is to be discharged in the future, other questions will arise which may be then determined. The law which appears to us to control the case is to be found in title 4, c. 1, § 2, and section 1, arts. 1797 et seq., of the Revised Civil Code, and is to the following effect, to wit:

"Art. 1802. He [the party proposing] is bound by his proposition and the signification of dissent will be of no avail if the proposition be made in terms which evince a design to give the other party the right of concluding the contract by his assent; and, if that assent be given within such time as the situation of the parties and the nature of the contract shall prove that it was the intention of the proposer to allow."

It seems to us clear that the proposition, in this case, was made in terms which evinced a design to give the plaintiff the right of concluding the contract by its assent.

"Art. 1811. The proposition as well as the assent to a contract may be express or implied. Express when evinced by words, either written or spoken. Implied when it is manifested by actions, even by silence or by inaction in cases in which they can, from circumstances be supposed to mean, or by legal presumption are directed to be considered as, evidence of an assent."

"Art. 1816. Actions, without words, either written or spoken, are presumptive evidence of a contract, when they are done under circumstances that naturally imply a consent to such contract. To receive goods from a merchant, without any express promise, and to use them, implies a contract to pay the value," etc.

"Art. 1818. Where the law does not create a legal presumption of consent from certain facts, then, as in the case of other simple presumptions, it must be left to the discretion of the judge, whether assent is to be implied from them or not."

In the instant case, the proposition which defendant and his associates made to plaintiff was, in substance, "If you will build a railroad, along a certain route, on a certain grade, at your own expense, we will, each, pay you a certain sum when the rails are laid (or within 30 days after you begin operating the road)," and plaintiff at once built the road, in accordance with, and has proved on the trial that it was induced to do so by reason and did so, in acceptance of, the proposition so made.

As to the blank form of acceptance, which appears after the signatures upon the instrument containing the proposition, nothing more is known from the record than that it appears upon the instrument. There was no attempt at the trial, to connect it in any way with the action taken by either plaintiff or defendant, and it seems to us that, if defendant had placed any reliance upon the theory that he thereby intended to intimate that the acceptance of his offer must be in writing, he would have so testified.

It is said, however, that the mere building of the road was not necessarily an acceptance of those conditions of defendant's proposition whereby other obligations were to be assumed by plaintiff, and we acknowledge the force of the suggestion. But the time within which plaintiff could assent to the assumption of those other obligations had not elapsed when this suit was instituted, and the institution of the suit was itself an acceptance, by judicial admission, of all the conditions imposed by the proposition. Moreover, so far as it goes, the evidence shows that the particular conditions in question were complied with from the time that the road was completed, which was all that could be done by way of accepting these conditions by action. We are of opinion that the views here expressed are in accord with the text of the law, and with the jurisprudence, including that referred to by the learned judge of the Court of Appeal.

Seal v. Erwin et al., 2 Mart. (N. S.) 245; Ryder v. Frost, 3 La. Ann. 523; Menard v. Scudder, 7 La. Ann. 385, 56 Am. Dec. 610; McIlvalne & Spiegel v. Legaré & Godchaux, 36 La. Ann. 361; Gordon v. Stubbs, 36 La. Ann. 625; Bank v. Lemarie et al., 106 La. 429, 31 South. 138.

It is therefore ordered, adjudged, and decreed that the judgment of the Court of Appeal, here made the subject of review, be annulled, avoided, and reversed, and that the judgment rendered in this case by the district court be affirmed. All costs to be paid by the defendant.

(122 La. 677)

No. 17,230.

**STATE ex rel. BANK OF FRANKLINTON
v. LOUISIANA STATE BOARD OF
AGRICULTURE & IMMIGRATION.**

(Supreme Court of Louisiana. Jan. 4, 1909.)

**1. DEPOSITARIES (§ 6*) — FUNDS OF STATE
BOARDS—DEPOSIT—SELECTION OF BANKS—
"SAFETY."**

Under Acts Extra Sess. 1907, p. 25, No. 23, requiring public boards of the state to deposit their funds in one of the chartered banks within their jurisdiction offering the highest rate of interest consistent with the safety of the funds, and requiring the board to advertise and let the deposits, a distant bank cannot be excluded solely by reason of any supposed or real danger resulting from its distance, provided it is otherwise entitled to the contract, "safety," as used in the statute, meaning nothing more or less than that the funds should be safely kept and faithfully and punctually accounted for.

[Ed. Note.—For other cases, see Depositaries, Dec. Dig. § 6.*]

For other definitions, see Words and Phrases, vol. 7, p. 6284.]

2. DEPOSITARIES (§ 6*)—STATE FUNDS—DEPOSIT—BANKS—SELECTION—DUTY OF BOARD.

Under Acts Extra Sess. 1907, p. 25, No. 23, requiring state boards to advertise and let the deposits on open bids to the bank offering the highest rate of interest consistent with the safety of the funds, a board's function in ascertaining which bank has offered the highest rate of interest is confined to comparing the face of the bids, the only discretion granted to the board being to determine whether the bids are regular, and whether the bank whose bid is highest on the face of the papers would be a safe depository in the sense of safely keeping and restoring the funds.

[Ed. Note.—For other cases, see Depositaries, Dec. Dig. § 6.*]

**3. MANDAMUS (§ 72*) — DUTY OF OFFICERS —
DISCRETION.**

If, by a mistake of law or otherwise, there has been no actual or bona fide exercise of discretion by public officers, mandamus will lie.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 134; Dec. Dig. § 72.*]

4. DEPOSITARIES (§ 6*)—FUNDS—DEPOSIT—SELECTION OF BANKS.

Under Acts Extra Sess. 1907, p. 25, No. 23, requiring state boards to advertise and let deposits of public funds to the bank offering the highest rate of interest consistent with safety of the funds, a state board is without authority to proceed to let such a contract until it has pronounced on the bids in the manner prescribed by the statute.

[Ed. Note.—For other cases, see Depositaries, Dec. Dig. § 6.*]

**5. DEPOSITARIES (§ 6*)—DEPOSIT OF FUNDS—
BIDS.**

Acts Extra Sess. 1907, p. 25, No. 23, authorizes state boards to advertise for bids for state deposits and to let the deposits to the bank offering the highest rate of interest consistent with safety of the funds. *Held*, that an advertisement under such act constituted an offer to let the contract to the highest responsible bidder, which ripened into a contract on acceptance by the filing of such bid, so that the bidder had sufficient interest to sue to restrain the board from letting the contract to any one ex-

cept the highest bidder found to be a safe depository.

[Ed. Note.—For other cases, see Depositaries, Dec. Dig. § 6.*]

Breaux, C. J., dissenting.

Appeal from Twenty-Second Judicial District Court, Parish of East Baton Rouge; Harney Félix Brunot, Judge.

Application for mandamus by the State, on relation of the Bank of Franklinton, against the Louisiana State Board of Agriculture and Immigration. Judgment for respondent, and relator appeals. Affirmed in part, and reversed in part.

Thomas Jones Cross, for appellant. Laycock & Beale, for appellee.

PROVOSTY, J. Act No. 23, p. 25, Extra Sess. 1907, the interpretation of which is involved in this case, being very long, we abstain from transcribing it here, and content ourselves with giving its substance, in so far as bearing upon this case; which can be done in a few words, and will answer just as well. It requires the public boards of this state to deposit the funds which come under their control in one of the chartered banks within their jurisdiction; and provides that the bank "offering the highest rate of interest, consistent with safety of the funds," shall be selected as such depository; and that the selection of the depository shall be made by advertisement for bids. The language of the act is that the board shall "advertise and let the deposits." The act provides the manner and the time of the advertisements, and adds:

"As soon as possible after the terms of advertisement herein fixed shall have expired, said board shall meet at the capital and publicly open bids and make awards of said deposits as herein required."

The depository is required to give bond.

The defendant board advertised for bids in pursuance of said statute, and, although plaintiff's bid was the highest, selected one of plaintiff's competitors. And the plaintiff bank at once, before the contract could be let, or any further steps taken, filed the present suit asking for a mandamus to compel the letting of the contract to it and for an injunction against letting to any one else.

The defenses are:

First. That statutes like the foregoing, which require public contracts to be let to the lowest bidder, or to the highest, as the case may be, are not enacted for the benefit of the bidders, but solely of the public; and, in consequence, confer upon the bidder no interest or standing to enforce compliance with them judicially.

Second. That the defendant board has a discretion in the selection of its depository, and that this discretion cannot be controlled by mandamus.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Third. That the bidder which defendant selected was the highest, "consistent with the safety of the funds."

For convenience, we will invert the logical order, and consider first the latter two defenses. They can be dealt with together, as they constitute in reality but one.

Franklinton, where the plaintiff bank is located, is some distance from the capital. In passing on the bids, the defendant board took into consideration the expense and danger of transmitting the funds to and from plaintiff, and concluded that, by reason of this expense and danger, plaintiff was not the bank "offering the highest rate of interest," and the selection of plaintiff would not be "consistent with the safety of the funds." The reliability of plaintiff was not impugned, nor has it been impugned in this case by any evidence, although plaintiff tendered the issue, and produced what appears to be conclusive evidence upon it. On the face of the papers, plaintiff's bid was the highest.

A distant bank cannot be excluded by defendant by reason of any supposed or real danger resulting from its distance. Thereby competition would be confined to local banks, or local banks would be given an advantage, although the statute, in terms and in manifest spirit, extends competition to all the chartered banks within the jurisdiction of defendant, and places them all on a footing of perfect equality. By safety of the funds the statute means nothing more, or else, than their safe-keeping and faithful and punctual accounting for.

And we are equally clear that defendant's function in ascertaining which bank has "offered the highest rate of interest" is confined to comparing the face of the bids. Defendant is not asked, or required, to dispose of the funds to the best advantage, or in such a way as to bring the largest return; but simply to invite bids by published advertisements, and to open the bids as soon as possible and publicly, and let the funds to the highest bidder.

The only discretion defendant is invested with is to determine whether the bids are regular, and whether the bank whose bid is highest on the face of the papers would be a safe depository in the sense of safely keeping and restoring the funds. The defendant has thus far, as a matter of fact, not yet exercised that discretion; but has gone out of its way to determine a question it had nothing to do with, namely, whether there would be expense or danger to the funds in transmission to and from a distant bank. The law applicable to such a case is stated in 19 A. & E. E. 739, as follows:

"If, by reason of a mistaken view of the law, or otherwise, there has been in fact no actual and bona fide exercise of discretion, as, for instance, where the direction is made to turn upon the matters which under the law should not be exercised, mandamus will lie."

The only mandamus that would fit the case would be to compel defendant to pass upon the bids, on the face of the papers, and upon the reliability of the highest bidder, in the sense of safely keeping and restoring the funds. Such a mandamus is not asked for, and, doubtless, would not be needed.

In the meantime, however, the defendant board, until it has pronounced upon the bids in the manner required by the statute, is without authority to proceed to let the contract; and the question arises whether plaintiff has any interest, or standing for enjoining it from doing so, which is the question raised by the first of the hereinabove stated defenses.

If all the bids are safe, or any of them is, the defendant is not allowed to reject them all and readvertise. The obligation imposed by the statute upon defendant to let the contract to the highest safe bidder is, therefore, absolute; and, this being so, the advertisement which is made in pursuance of the statute constitutes a flat offer on the part of the defendant to enter into a contract for the funds with the highest safe bidder, and the bid in response to the advertisement is an acceptance of that offer. Hence the advertisement and the bid together constitute an agreement to enter into a contract for the funds. This agreement is subject, it is true, to the condition that the defendant find the bidder safe; but that condition is not wholly protestative on the part of defendant, and, in consequence, does not have the effect of depriving the agreement of its binding effect upon defendant. The reason why it is not wholly protestative is that the discretion vested in defendant to pass upon the safety of the bidder is to be exercised in good faith and upon consideration of the facts, and not arbitrarily or capriciously. If exercised in good faith, the courts will doubtless not interfere to control it; but, in the contrary case, they will. *Gunning v. City*, 45 La. Ann. 915, 13 South. 182; *Galle, State ex rel., v. City of New Orleans*, 113 La. 371, 36 South. 999, 67 L. R. A. 70; *City of New Orleans v. Smythe*, 116 La. 687, 41 South. 33, 6 L. R. A. (N. S.) 722, 114 Am. St. Rep. 566. There being a binding agreement, the highest bidder has a right of action.

Generally, in cases of this kind, a bid does not give rise to contractual relations. Page on Contracts, vol. 1, p. 40. But that is because the advertisement is generally a mere invitation to bid, with right reserved, expressly or impliedly, to reject at pleasure any or all of the bids. Such a right does not exist under the statute governing the instant case, which, as already stated, imposes upon the defendant the unqualified obligation to let the contract to the bank which is highest bidder, in response to the advertisement, and which at the same time is safe.

The reasoning that the bidder has no right

of action because the statute is enacted in the interest of the public solely, and not at all in his, does not cover a case like the present, where the right of action is not sought to be derived from the statute, but from the agreement resulting from the bidder's acceptance of the offer contained in the advertisement. The statute does not, *proprio vigore*, confer a right of action upon the bidder; but its necessary operation is to bring about an agreement or contract which does create a right of action. For cases denying a right of action to the bidder, see *Colorado Paving Co. v. Murphy*, 78 Fed. 28, 23 C. C. A. 631, 37 L. R. A. 630, and cases there cited; contra, note to *Anderson v. Board*, 26 L. R. A. 707.

It is ordered, adjudged, and decreed that the judgment appealed from be affirmed in so far as it has denied a mandamus, and has denied an injunction against the letting of the contract in question to any one but plaintiff; and that it be set aside in so far as it has denied an injunction against the letting of the contract in question to any one except the highest bidder found to be a safe depository in the sense indicated in this opinion; and, to the extent the said judgment is here set aside, the injunction herein is perpetuated. Defendant to pay all costs.

BREAUX, C. J. (dissenting). Defendant awarded the contract of deposit, under Act No. 23, p. 25, of the Extra Session of 1907, to two other banks at $3\frac{1}{2}$ per cent., and declined to accept plaintiff's bid at 4 per cent. on daily balances.

Under the terms of the statute, the state owes no duty to plaintiff, and is under no obligation to accept its bid, unless it is satisfactory and comes within the policy of those in charge for the state, and the system which doubtless her officers must have adopted in order to properly conduct the finances of the state while deposits are in the keeping of the different banks.

The deposit being for account of the state, the banks should have no authority to stand in judgment to obtain a decree to compel the board to accept a bid.

This question has been considered in another jurisdiction, and it has been held that boards representing the state are intrusted with large discretion in the premises, which cannot be controlled by mandamus unless there is flagrant abuse. The *Colorado Paving Co. v. Murphy*, 78 Fed. 28, 23 C. C. A. 631, 37 L. R. A. 630.

The state has some rights to select her depositories. The words of the statute are susceptible of very broad and far-reaching meaning.

The delicate and sometimes impossible task regarding the solvency or insolvency of a financial institution has not been imposed upon these boards beyond reasonable extent.

A bank may be entirely solvent and safe

and yet not offer all the required facilities; it may be more economical, and there may be very good reasons why another bank than the highest bidder should be selected. The state through her boards may prefer that there should be no delay; that checks be cashed at once or within a few hours after they are drawn, and this without charge. (The complaint here is delay and costs of checks.)

In that case, if the department is one in which for its maintenance a large number of checks are issued, it strikes me that the board may take that into consideration.

In any event, boards will be generally slow in passing judgment upon banks and expressing opinions that may affect their credit, as would follow if they pronounced a bank as undesirable as a bidder; there is nothing of the kind here, no such question presented, but there is another question equally within the cognizance of the board: That is, the right to select (all things considered) the most reliable and safest depository.

There should be no discrimination of any kind in making the selections, and, if unreasonable discrimination were made, there would be a wrong arise which should be remedied.

The court's jurisdiction should not be extended to interfere with the fiscal affairs of the government where there is no abuse of any kind.

I take it that in this case the defendant board has acted in good faith, and, after considering everything, has concluded to accept the bid of the two banks, although the amount is not as large.

I dissent.

(122 La. 683)

No. 17,349.

In re **LINDNER**.

In re **RINGE**.

(Supreme Court of Louisiana. Nov. 30, 1908. Rehearing Denied Jan. 18, 1909.)

COURTS (§ 224*) — **SUPREME COURT** — **SUPERVISORY JURISDICTION**.

Though the proviso, in article 101 of the Constitution, to the effect that the Supreme Court shall in no case exercise the power to review a judgment of the Court of Appeal, unless application be made not later than 30 days after such judgment has been rendered and entered, does not establish a rule for the action of the court in the exercise of the supervisory jurisdiction conferred by article 94, it serves at least as a guide by which the court may well be governed in cases arising under the article last mentioned, where no sufficient reason appears for unusual delay in applying for relief.

[Ed. Note.—For other cases, see *Courts*, Dec. Dig. § 224.*]

(Syllabus by the Court.)

Action by **J. F. Lindner** against **Joseph Pompei** and wife. Judgment for plaintiff. Rule to show cause against **Della Pompei** and **Alfred Ringe** for violation of injunc-

tion obtained in the original suit. Judgment for plaintiff, and, on execution against Ringe for costs in the contempt proceedings, he applies for certiorari and prohibition. Application dismissed.

Albert Voorhies and Richard Horace Browne, for relator. Respondent judge, pro se. Theodore Cotonio, for respondent Lindner.

MONROE, J. It appears, from the application and return in this case, that in September, 1905, J. F. Lindner brought suit in the civil district court, claiming ownership, by virtue of, a tax title and of the prescription of three years, of two lots of ground on Grant street, in this city, alleging that the property, at the date of his purchase, was assessed to Mrs. Della B. Dooling, wife of Joseph Pompei, and praying that she and her husband be cited, and that his title be confirmed. According to the return of the sheriff, the parties named were cited (by service at their domicile, in the hands of Miss E. Ringe), and they excepted to the petition for "vagueness," and as disclosing "no cause or right of action," which exceptions were overruled, after which there was judgment by default, confirmed November 16, 1905, quieting plaintiff in his title, recognizing him as the owner, in possession, of the property, enjoining defendants from setting up any title thereto, and condemning them to pay the costs. Shortly afterwards plaintiff ruled defendants to show cause why the costs should not be taxed, and the rule was made absolute December 15, 1905, taxing the costs against Mrs. Pompei at \$14.50. In May, 1907, plaintiff again proceeded by rule, setting up the judgment of November 16, 1905, and the injunction included therein, alleging that Mrs. Pompei and one Alfred Ringe, in violation thereof, were claiming to be in possession of the property; that said two parties, quoad said property, were one and the same, "the said Ringe conveying, at times, property in the name of Mrs. Pompei;" that Ringe had filed proceedings claiming possession of said property, but, on the mover's setting up his judgment by way of estoppel and res judicata, had discontinued the same; that Mrs. Pompei was a party to said proceeding, and that her acts and those of said Ringe were in contempt of mover's judgment and injunction—and praying that they be ordered to show cause why they should not be held guilty of contempt and punished accordingly. Both parties appeared, and, after several hearings, there was judgment (January 22, 1908) making the rule absolute as to Ringe, condemning him to pay \$10 by way of fine for the contempt of which he was adjudged guilty, with costs, and dismissing the rule as to Mrs. Pompei. From the judgment so rendered, Ringe appealed to the Court of Appeal, where it was held that the remedy was not by appeal, but

by certiorari and prohibition; and, a rehearing having been refused (June 29th), he applied to this court to review the ruling of the Court of Appeal, which relief was denied (judgment, in chambers, placed on record August 17th). On September 4th, following, Lindner ruled Ringe to show cause why he should not pay the fine imposed, and why execution should not issue for the costs for which he had been condemned in the contempt proceeding; and, after hearing, there was judgment (rendered October 16th, signed October 22d) ordering execution to issue against Ringe for \$29.95 costs, "the right of the sheriff being reserved for the sum of \$10, under judgment for contempt." On October 30th the present application was presented to this court by Ringe, who, after reciting the various proceedings above mentioned, alleges and prays as follows:

"This relator, being ruled to pay said fine of \$10 and \$29 of costs, moved for a new trial upon the grounds stated at full length in his answer to the rule, but the same was denied. Whereupon this relator notified in writing both the honorable trial judge and the plaintiff, J. F. Lindner, through his counsel, of his purpose to apply to this honorable court for a writ of revision, with certiorari and prohibition. Wherefore, considering the above showing, sworn to, and the annexed proceedings, relator respectfully prays for writs of certiorari, revision, and prohibition, directed to the honorable trial judge of division D of the civil district court for the parish of Orleans, and for a decree annulling the aforesaid proceedings in the premises."

To this the judge of the district court, made respondent, answers that, quoad the judgment on the rule for contempt, relator has had his day in court and the application comes too late; that the only matter now before the court is whether plaintiff, Lindner, has the right to have his costs taxed in a proceeding that has been disposed of by final judgment—a right which, respondent alleges, cannot be denied him.

We are of opinion that the return so made is sufficient, since the judgment on the rule for contempt was finally disposed of by the Court of Appeal on June 29th, and the application for the review of the judgment of that court was denied by this court on August 17th, after which no steps were taken by relator to obtain a review of the judgment on the rule for contempt until October 30th, some eight days after the judgment on the rule for costs had been signed.

It is true that, in conferring supervisory power on this court, the Constitution (article 94) does not limit the time within which that power may be exercised; but we think it should be invoked within a reasonable time, and to exercise it in cases where the party complaining has allowed months, perhaps years, to elapse before making his complaint, would be to violate the spirit of the liberal provision of the Constitution under which such action is authorized.

Article 101 of the Constitution, authorizing

the review of judgments rendered by the Courts of Appeal, contains the proviso:

"That the Supreme Court shall, in no case, exercise the power conferred on it by this article, unless application be made to the court, or to one of the justices thereof, not later than thirty days after the decision of the Court of Appeal has been rendered and entered."

And, though this does not establish a rule for the action of the court under article 94, it serves at least as a guide by which the court may well be governed in cases where no sufficient reason appears for unusual delay in applying for relief. It may be remarked, in addition, that it is not clear that relator prays for a review of the judgment on the rule for contempt, and it is clear that, without a review of that judgment (which, for the reasons stated, could not have been accorded, even if applied for), there is no basis upon which the judgment on the rule for execution and for costs can be disturbed.

It is therefore adjudged and decreed that this application be dismissed, at the cost of the relator.

(122 La. 687)

No. 16,996.

RONALDSON & PUCKETT CO., Limited,
v. **BYNUM.**

(Supreme Court of Louisiana. Nov. 16, 1908.
Rehearing Denied Jan. 18, 1909.)

1. CORPORATIONS (§ 434*)—POWERS—POWER TO BUY AND SELL LAND.

In the course of its business, a corporation is not prohibited from owning lands.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1765, 1766; Dec. Dig. § 434.*]

2. CORPORATIONS (§ 434*)—POWERS—POWER TO BUY AND SELL LAND.

To the end of securing a claim, it may buy land.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1766; Dec. Dig. § 434.*]

3. CORPORATIONS (§ 435*)—POWERS—POWER TO BUY AND SELL LAND.

The "powers clause" of the charter in part reads, "And to these ends it may acquire and dispose of any and all real estate necessary for its purposes." The power is not violative of Const. art. 265.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1766; Dec. Dig. § 435.*]

4. TENDER (§ 16*)—EXCUSES FOR INSUFFICIENCY—REFUSAL TO ACCEPT.

Defendant's refusal to carry out the contract had a waiving effect as relates to tender. There was no necessity of going further in attempting to tender the price. The defendant positively refused to receive it, and stated that there was no necessity of counting the amount tendered.

[Ed. Note.—For other cases, see Tender, Cent. Dig. § 52; Dec. Dig. § 16.*]

5. VENDOR AND PURCHASER (§§ 350, 351*)—REFUSAL TO CONVEY—DAMAGES.

In matter of determining lesion, the value of the property at the date that the option was accepted (and not the date of the offer to sell) is to be ascertained; and, as to value, its dif-

ferent elements should be proven with reasonable certainty.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1050, 1043; Dec. Dig. §§ 350, 351.*]

6. VARIANCE IN EVIDENCE.

There is some variance in the testimony, in order to establish beyond question the value of the land upon which the title depends.

(Syllabus by the Court.)

Appeal from Twenty-Second Judicial District Court, Parish of East Baton Rouge; Harney Félix Brunot, Judge.

Action by the Ronaldson & Puckett Company, Limited, against Margaret C. Bynum. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Hall & Monroe, for appellant. Thomas Jones Cross, for appellee.

BREAUX, C. J. This is an action on the part of plaintiff to compel the defendant, Mrs. Margaret C. Bynum, and her husband, Walter W. Bynum, to aid and authorize his wife to sign an act of sale.

She signed a contract of lease of her plantation, known as the "Istrouma," on August 1, 1900. In the lease there was a clause inserted which gave to her lessee the right or privilege of buying the Istrouma plantation for \$9,500.

In the year 1898 she sold the place to D. N. Barrow for the sum of \$9,500.

Some time afterward Barrow and she canceled the sale and Barrow retransferred it to her.

After the retransfer Mrs. Bynum leased the place to Ronaldson & Puckett for five years from the 1st day of January, 1899, for \$500 per year and the taxes.

To go a little back in time and take up acts preceding in date the retransfer to Mrs. Bynum: Barrow, David, Puckett, and Ronaldson formed a partnership under the name of "Istrouma." They cultivated the place as the lessees of Mrs. Bynum. This partnership was not successful, and became indebted to plaintiffs to an amount of about \$12,000. Barrow, as the owner of one-half of the place, was indebted for one-half of the amount of \$12,000, and desired to obtain his release, and surrender all of his interests, which were very little, if anything, for he was heavily indebted.

Plaintiff consented to release him if he would transfer to them the lease, with its option; but they made it a condition that Mrs. Bynum enter into a contract with them. This Mrs. Bynum did.

The old lease was canceled, and a new contract signed, giving to Ronaldson, Puckett & Co., Limited, the same right as Barrow had, including the option.

It appears by the testimony that the motive of the plaintiff was to try to get back their money; i. e., collect the debt which the part-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

nership owed to them, or at any rate Barrow's debt of the firm.

The property was afterward leased by plaintiff to J. T. Howell for two years, beginning January 12, 1902, and terminating January 12, 1904. A promise of sale was included in the act of lease by plaintiff to Howell, to remain open for the two years of the lease. The price fixed in case lessees concluded to buy was \$15,500.

Howell accepted the promise of sale, and sued to compel plaintiff to transfer to him title to the property.

That matter seems to have remained in statu quo.

The profit plaintiffs state they desired to apply to the payment of the amount due them by the partnership before named. According to their statement the amount due them was \$12,000.

The plaintiffs and a few others organized a company. The charter provides that the purpose and the nature of the business was general merchandising and plantation supplying business, and "to these ends it may acquire and dispose of any and all real estate for those purposes."

This is the extent of the "powers clause."

There are three grounds of defense:

Ultra vires.

Want of tender.

Lesion.

In support of the first ground, the defense quoted article 265 of the Constitution, to wit:

"No corporation shall engage in any business other than that expressly authorized in its charter or incidental thereto; nor shall it take nor hold any real estate for a longer period than ten years except such as may be necessary and proper for its legitimate business and purpose"

—as applying in the present case, and as prohibiting the defendant from buying land to be cultivated by them as incidental to their business.

The first proposition we will consider is the extent of the right of the incorporators under the charter as relates to real estate. The corporation had the right to buy and sell land for the purpose of carrying on its business. If in carrying on its business the situation became such as to render it to its interest to buy or sell land for the purpose of securing or collecting a debt, it has needful power. Otherwise, the corporation would have no right of foreclosure of a mortgage, or to execute a judgment and become a purchaser at the foreclosure sale, or at a sale made under a *f. fa.* for the payment of a debt due it.

That is a power which can scarcely be denied to any corporation. It is not denied to them when exercised by them in the ordinary course of their business.

Even the United States banks have that power, although the policy of the government, as made evident by the charters of the banks, is against their purchasing and owning real estate.

The condition here is about the same. This is about all that has been accomplished in the present transaction between plaintiff and defendant.

We readily concede that a corporation organized to carry on a general merchandise and plantation business would have no right to turn aside from the purpose of its real obligation to speculate in real estate or to engage in planting.

Here there was no turning aside from the purpose of the corporation. It sought primarily to collect a debt. The promise of sale was an asset. It was susceptible of transfer and sale, and as such it could be acquired by the plaintiffs and transferred, to the end of realizing something upon the claim they held.

From that point of view the transaction was proper enough for the legitimate business or purpose of the corporation. It was a permissible act. Besides, the weight of the testimony shows that the acquiring of the property was an incident of the business.

Furthermore the business was to advance the plantation and control the cotton. They advanced to the hands on their own plantation and controlled the cotton. This falls within the powers clause of the charter, whether the persons advanced to were laborers on their plantations or on the plantations of others. The advances are made to the workmen.

The act attacked by defendant is not annulable as ultra vires.

We will consider article 265 of the Constitution, cited by defendant.

It is not prohibitive to the extent, at any rate, for which the defendant contends.

It is true that by that article a corporation should not engage in any business than that expressly authorized by its charter or incidental thereto.

Here the act complained of was at least incident to its business, and not ultra the charter.

The last clause of the article cited *supra* limits the time that a corporation may hold real estate:

"If not necessary and proper to its legitimate business or purpose, it shall be ten years."

But, if it is necessary and proper to the business or purposes, it does not appear to us that there is any time limit at all.

The word "except" of the article of the Constitution cited *supra* takes it out of the time limit. If the purchase of real estate be a necessary incident of the business, then the time mentioned (10 years) does not apply. If it is authorized by the charter, but not incidental to the business, then it does apply.

But, be this as it may, we conclude that the charter contains the authority which plaintiffs claim for the purposes in question, and that the article of the Constitution is not here prohibitive.

Want of Tender.

Defendant denied that there was any binding contract. That of itself has been held by this court in several cases as relieving from the necessity of making formal tender.

But the plaintiffs did all within the bounds of reason to make a tender. One of the plaintiffs, representing his firm, in company of witnesses and a notary, called upon the defendant and offered the amount. Defendant declined to receive it, and added that it would be useless to count the price to her. She positively refused to accept it. There was no necessity of going any further in matter of this default. *Soula Cotton-Oil Co. v. The Red River*, 106 La. 46, 30 South. 303, 87 Am. St. Rep. 293; *Ware v. Berlin*, 43 La. Ann. 537, 9 South. 490; *Louisiana Molasses Co. v. Le Sassier*, 52 La. Ann. 2081, 28 South. 217.

Lesion.

Now as to this plea: If the date from which the prescriptive period begins is to be taken as of the date of the contract, there was no lesion. If it is to be taken from and after the date that this property advanced in value (and all property in fact increased in value), then there may be lesion.

To give dates: The contention of defendant is that the value of the land is to be estimated, not from the date of the contract in 1900, but from the date that the plaintiffs made their offer to buy. That was in May, 1903.

It stands to reason that the time of the prescriptive period should begin from the date of the contract, for, were it otherwise, the one accepting would not be inclined to accept if the property decreased very much in value; but, if it increased, he would be anxious to consummate the transaction and take the property. The obligor, or the party offering to sell, would be at considerable disadvantage. The advantage would be all on one side. That would be scarcely fair. Our Code must be followed. We have no decision in point, but the article is plain (article 2590); besides the French authorities and text-writers are persuasive and direct. These we will refer to later.

We are not concerned with an agreement between the possessor and promisee. There is here only a solicitation or option, which only becomes a binding contract from the date of acceptance, not before acceptance.

The lessee acquires no right as an owner before the date of acceptance.

The French text-writers are very positive on the subject. It cannot well be otherwise, for their Code on the subject is similar to ours.

Laurent, who has devoted close study to the subject of contracts, says a promise of sale before acceptance is an option—to use the original, “*pollicitation*.”

In the twenty-fourth volume of his work his text leaves no room for doubt as to his

opinion, which, as ours, is conclusive and unamenable.

We translate from the text:

Sec. 115. In fact there was lesion, and the action in re was well grounded, as the sale existed only by the acceptance of the vendee. It was at that date that the value of the immovable was to be calculated to fix its value.

Baudry de Lacantinerie is substantially of the same opinion. *De La Vente*, § 702.

Fuzier-Herman refers more particularly to French laws and jurisprudence. His Digest is direct.

Lesion must be fixed at the date that the act becomes complete by the acceptance of the promisee. Volume 4, p. 22, § 50.

This point of view eliminates from consideration the value of the property in 1900 as a direct basis of calculation; i. e., the value in 1900 may be proven, but it cannot serve as the basis of the judgment, but it may serve to prove something about its value in 1903, as may the proof of value in other years, but proof of value in 1903 must control. It is a fact conclusive.

The Value of the Place in 1903.

We have gathered all the material facts relating to values set forth in the record.

As relates to sales of the property:

In 1898 it was sold to D. N. Barrow for \$9,500 on credit.

In 1900 this vendee became plaintiff's vendor and retransferred the property to her.

She in August of that year leased the property to defendants for \$500 per annum. The contract contained the option before mentioned.

In the year 1902 defendants leased the place (known by the name of “*Istrouma*”) for the year for \$1,939 (rental). This was exceptional, it seems. There were stubbles on the place which gave it value for that year. For the year following (1903) they leased it to same lessee for \$1,000.

The lease contained an option by defendants to lessee, Harrell, to sell it to him at any time during the two years' lease for \$30 an acre. There are 531 acres in the place.

This as relates to sales.

Now as to the offer to buy the property: Mr. H. L. Favrot in 1902 was willing to give \$18,000 for the place, and expressed willingness to add a few hundred dollars, if necessary.

Ben Mayer offered \$15,000 for half of the place.

Mr. McCamland in 1904, early part, expressed some willingness to give over \$20,000. We are not impressed by these unexplained offers to buy. The witnesses who testified that offers had been made were doubtless sincere, but the would-be buyers were not heard as witnesses. The facts and circumstances of the offers were not proven to a sufficient extent to be conclusive of the value.

It was listed with a land agent, Mr. Hum-

mel, in 1904 or 1905, for over \$40,000. This was done by the lessee in possession. We have seen that it was a year after defendants sought to avail themselves of the option. This testimony also needs some explanation. Hummel, with whom it was listed, evidently did not believe it was worth any such amount in 1903.

One of the defendants testified that his firm thought that the option of which they could avail themselves within stipulated time would be enough to pay the indebtedness to their firm. It was said that this indebtedness amounted to \$12,000. On that basis the place was worth over \$20,000. This was said by the witness while testifying on another subject; but, when testifying as to the value of the property, his testimony is quite different. Besides, it does not appear whether he referred to the Barrow indebtedness of \$6,000, or the \$12,000 to the firm. They sold it for \$15,500, covering thereby the Barrow debt.

We have considered the amount of rental taken as a whole. It does not throw much light upon the subject.

As relates to value, the real estate agent for defendants placed it at \$30 per acre in 1903. He said that there was a great increase in value since 1902; but he testified positively that the place in 1903 was worth \$30 an acre—\$15,500.

Mr. Aldrich considered that the property was worth \$30 per acre in that year; that there had been a steady increase in real estate in East Baton Rouge since 1897, on account of the general prosperity and the high price of cotton.

Ronaldson, of the defense, said that \$15,500, for which they sold the place to Mr. Howell in 1902, was an adequate price.

The real value is not sufficiently shown. Reasonable certainty is necessary to sustain plea of lesion. *De Maret v. Hawkins*, 8 La. Ann. 484. In *Succession of Witting*, 121 La. 501, 46 South. 606, similar views were expressed. We are not sufficiently informed as to the value of the property in 1903. Witnesses who have offered to buy the place may perhaps illuminate the subject by testifying regarding their offers and why they were made. Experts may be heard, and other testimony going to show value (in 1903), with satisfactory results and some clearness.

Value has not been sufficiently shown to form the basis of a judgment with a degree of certainty. We are of the opinion that the case should be remanded, to prove the value of the place in May, 1903, and for no other purpose.

It is therefore ordered, adjudged, and decreed that the judgment appealed from is avoided, reversed, and annulled.

It is further ordered, adjudged, and decreed that plaintiff under its charter has the right to acquire real estate; that it has the

right to compel defendant to make good title to it of the property under the option, which the defendant has accepted, provided the plea of lesion pleaded by defendant is not well founded, and provided the property involved here was not worth over and above \$19,000 on the date the offer was made in form to plaintiff to accept title, viz., on May 15, 1903.

It is further ordered, adjudged, and decreed that this case be, and it is, remanded to the district court, in order that the issue of lesion may be tried and decided. If the price at said date was less than one-half of the value of the property, the sale (or promise of sale or option) will be decreed invalid, and a decree shall be accordingly rendered. If the price was not one-half less than the value of the property, then the same shall be valid, and the defendant shall make title as prayed for, and a decree accordingly rendered. And it is further ordered, adjudged, and decreed that judgment be rendered in favor of defendant for such rental as may be due her on the day that judgment will be rendered.

It is further ordered, adjudged, and decreed that the costs in the district court shall await the final decision in this case, and that the appellee shall pay the costs of appeal.

MONROE, J., concurs in the decree.

(122 La. 697)

No. 17,213.

TOWN OF WINNFIELD v. LONG.

(Supreme Court of Louisiana. Jan. 4, 1909.)

1. MUNICIPAL CORPORATIONS (§ 672*)—POWERS—WORK ON STREETS.

Statute 136 of 1893 (Acts 1893, p. 224), relating to the government of municipalities, contains no delegation of power authorizing those municipalities falling within its provisions to compel persons under their ordinances to work on the public streets.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 672.*]

2. VOID ORDINANCES.

Such ordinances are null.

3. MUNICIPAL CORPORATIONS (§ 672*) — IMPLIED POWERS—WORK ON STREETS.

No implied power authorizes the adoption of such ordinances. They must be adopted under an expressed grant of power.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1452; Dec. Dig. § 672.*]

4. MUNICIPAL CORPORATIONS (§ 672*)—POWERS—WORK ON STREETS.

The laws relating to parishes and work on public roads have no application.

Municipalities and parishes are governed under their respective delegated powers.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 672.*]

5. MUNICIPAL CORPORATIONS (§ 672*)—POWERS—WORK ON STREETS.

The municipality collects taxes, part of which (instead of requiring persons to work on

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the streets) is to be applied to the repair and maintenance of streets.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 672.*]

(Syllabus by the Court.)

Appeal from Mayor's Court of Winnfield; J. D. Pace, Judge.

Julius T. Long was convicted of violating an ordinance of the town of Winnfield, compelling every able-bodied man to work on the streets for not over three days during each quarter of the year or pay \$1 for each quarter, and he appeals. Reversed, and defendant discharged.

Kidd & Long, for appellant. Mathews & Gamble, for appellee.

BREAUX, C. J. As relates to the facts: It appears that the defendant was charged with having violated an ordinance of the town requiring him to work on the public streets.

The ordinance seeks to compel every able-bodied man between the ages of 18 and 50 years, who has resided in the town 15 days, to work on the streets for a period not over 3 days during each quarter of the year he may reside in the town, or to pay the marshal of the town \$1 for every quarter each year. The ordinance also provides that any person violating the ordinance, either by failing to work on the streets or failing to pay the assessment, shall be guilty of a misdemeanor, and on conviction shall be fined \$5 and costs, and in default of payment shall be imprisoned for not less than 10 days, or both, at the discretion of the mayor.

Both parties to the suit agreed that the town is governed in accordance with the authority delegated in the Lawrason Act, No. 136 of 1898 (Acts 1898, p. 224).

Plaintiff by order of the municipality invoked in the first place the general power under the law conferred on cities, towns, and villages, to care for, manage, and control cities, towns, and villages; also to maintain streets and roads within the limits of the town. Under this act, the town has the authority, plaintiff contends, to impose a fine not exceeding \$100 or imprisonment not exceeding 30 days. Section 15 of the act.

The defendant challenged the right of the town to adopt the ordinance of which he complains and compel him to work on the streets.

He filed a motion to quash and set aside the prosecution against him on the ground that the ordinance is unconstitutional, null, and void, as the town had no such power.

The mayor before whom the case was tried overruled the motion to quash. He heard the case, and found that the defendant had violated Ordinance 28 of the town, and rendered judgment imposing a fine of \$5 and

costs, and, in default of payment, imprisonment.

Defendant appealed.

There are grants of power delegated to towns under the provisions of the act in question. But not one of these grants authorizes the town to adopt ordinances to compel any of the inhabitants to work upon the streets. Subdivision 14 of section 15, of the act cited supra, provides that the streets shall be maintained and the roads within the limits of the town, but nothing further. Without an expressed delegation of power, no one can be compelled to work.

If it be the contention that plaintiff has the right under its implied power, we cannot agree with that view, for under no circumstances can it be held that compulsory labor on road or street falls within the incidental powers of the corporation.

Plaintiff invokes the law under which the police jury may require persons to work on the public roads, and specially refers to those laws.

The town stands upon the power that is delegated to it by superior authority, and the parish also stands upon its own delegated powers. They are distinct corporations, each governed by its own laws.

A similar question was considered in the case of *Town of Farmersville v. Mathews*, 120 La. 102, 44 South. 999.

The court in the last-cited case, having found no delegated power, decided that the ordinance under which the municipality was seeking to compel the person indicated to work on the streets was illegal and void.

Plaintiff will have to devise some other ways and means to maintain its streets.

It is true, as stated by plaintiff's counsel, that no law prohibits or prevents the town from requiring its inhabitants to perform labor on the streets; none the less, in order to exercise the power of compelling such work, it will not do to depend upon the silence of the law. It must be shown affirmatively that it is authorized by the Legislature.

The plaintiff corporation has authority to collect a license tax and other taxes to carry out the purposes of the corporation. The implied power springs from necessity. When a corporation collects taxes as just mentioned, the presumption is that it realizes sufficient to maintain its streets, and that no necessity arises for compelling men to work on the streets. Article 291 of the Constitution.

There is no necessity of multiplying reasons. It was incumbent upon plaintiff to point to the delegation of power. This it has not done, as it has neither expressed nor implied power to deal with the subject in the manner proposed.

The law and the evidence, and the reasons assigned according therewith, being in favor of defendant, it is ordered, adjudged,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and decreed that Ordinance No. 28, approved May 2, 1905, is illegal and void. It is further ordered, adjudged, and decreed that the judgment is reversed, sentence set aside, and defendant discharged.

(22 La. 701)

No. 17,381.

FILHIOL v. SCHMIDT.

In re LAMKIN.

(Supreme Court of Louisiana. Jan. 4, 1909.)

MANDAMUS (§ 57*)—PROHIBITION (§ 5*)—SUSPENSIVE APPEAL—DISMISSAL OF INTERVENTION.

Where, in a proceeding in which no conservatory writs have issued, an intervention is dismissed on exception, and an appeal allowed, such appeal can suspend nothing save the running of the delay within which the judgment appealed from would otherwise become unappealable; and, as an intervention is not allowed to retard the principal suit, mandamus will not lie to compel the granting of an appeal which will operate to suspend proceedings in such suit, nor will prohibition lie to prohibit such proceedings pending an appeal from a judgment dismissing an intervention.

[Ed. Note.—For other cases, see *Mandamus*, Dec. Dig. § 57; * *Prohibition*, Dec. Dig. § 5.*]

(Syllabus by the Court.)

Action by H. H. Filhiol against Inez Schmidt. E. T. Lamkin, tutor, intervened. Judgment dismissing the intervention, and intervener applies for writ of mandamus to compel the granting of suspensive appeals and for a writ of prohibition. Application denied.

Lamkin, Millsaps & Dawkins, for relator. Respondent judge, pro se. Stubbs, Russell & Theus, for respondent Filhiol.

Statement of the Case.

MONROE, J. It appears, from the petition, exhibits, and return herein, that Roland M. Filhiol, at his death, left an olographic will by which, after certain special legacies, he bequeathed the residue of a large estate to Inez Schmidt and appointed her his executrix. This will was attacked by H. H. Filhiol, a brother of the testator, and beneficiary of his bounty, and there was a judgment confirming Inez Schmidt as executrix, but reducing the bequest in her favor to one-tenth of the estate, payable from the movables. Thereafter, in May, 1908, E. T. Lamkin, tutor ad hoc of the minors, Aloysius Roland and Nancy Ruth Filhiol, brought suit against the executrix and against H. H. Filhiol, in which he alleges that, though the testator was never married, said minors are his children and only descendants, were registered and baptized as such by his direction, and have been so judicially admitted by H. H. Filhiol, and that the testator on several occasions and in writing declared his intention formally to

adopt them; that H. H. Filhiol has taken possession of a plantation which the testator had frequently declared, verbally and in writing, should become the property of the minor Aloysius; and that, in view of the facts stated, said minors are the forced heirs of the testator and are entitled to his estate. Petitioner further alleges that, should the court hold that said minors are not entitled to the rights of adopted children, they are entitled to alimony in proportion to the value of their father's estate, and, after some further allegations, there is a prayer for judgment. The suit was dismissed on exception, and plaintiff obtained an order for a suspensive appeal, and perfected the same (as he alleges) by lodging the transcript in this court.

In August, 1908, H. H. Filhiol instituted suit, alleging that Inez Schmidt had been confirmed as executrix, and as such put in possession of the estate; that petitioner has become the owner by inheritance of said estate, "subject to the payment of the debts and special legacies and costs of administration," and is entitled to be put in possession "on his giving bond for the payment of the debts and contested legacies, which bond" he is ready to give.

Wherefore he prays for judgment ordering the executrix to deliver to him, as the sole heir of the decedent, all the property of the succession, on his giving bond, etc.

To this the executrix excepted and answered, and thereupon Lamkin, tutor, intervened, alleging the bringing by him of the suit already mentioned, and reiterating substantially the allegations of his petition therein.

He further avers that H. H. Filhiol, "alleging himself to be the owner by inheritance of all the property consisting, of realty, money, stocks, * * * now in the custody of the executrix, * * * is seeking to obtain possession thereof, in utter disregard of petitioner's said suit, * * * in which he is a party defendant with the said * * * executrix; that, should said property pass into the possession of said * * * Filhiol as demanded, * * * and * * * be disposed of, * * * as is feared and believed would be done, the interests and the rights of the said minors would be seriously jeopardized, if not defeated." And he prays for judgment rejecting Filhiol's demand "and ordering * * * the retention of the property * * * by the testamentary executrix until a final decision has been rendered by the Supreme Court * * * in the suit in which petitioner is plaintiff and the succession of R. M. Filhiol and Hardy H. Filhiol defendants." This intervention having been dismissed on exception, intervener applied for and was granted an appeal, "with specific statement by the court that this appeal shall not suspend or delay the proceedings between the plaintiff and defendant," and thereupon intervener made to this court the application

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

now under consideration for a writ of mandamus to compel the granting of a suspensive appeal, and for a writ of prohibition forbidding the judge, made respondent, to proceed further in the original cause between H. H. Filhiol and the executrix of R. M. Filhiol.

The judge a quo, for answer and return, says, in substance, that relator, as tutor ad hoc, has no capacity to interfere in the suit between H. H. Filhiol and the executrix of R. M. Filhiol for the purpose stated in the intervention; that as an intervener he cannot delay the trial of said cause, and that his right to a suspensive appeal, if any he have, should be asserted when the final judgment shall have been rendered therein; that the order of appeal, as made and limited, was granted at relator's earnest solicitation and in the belief that no injury could result therefrom, but that it would greatly embarrass the administration of justice to permit a party who has no right to intervene to come into a case, and upon the dismissal of his intervention suspend proceedings between plaintiff and defendant by an appeal.

Opinion.

Whether relator had the capacity to intervene as he did, and whether he had the right to appeal before final judgment in the cause in which he intervened, are questions which are properly determinable on the hearing of his appeal, or on motion to dismiss. We are satisfied, however, that he has no right to an appeal that will operate to control the disposition of the property which is the subject of the litigation, or to suspend or retard proceedings in the cause in which the intervention was filed. If the plaintiff in a suit for the recovery of property, real or personal, desires that action be taken for the conservation of the property pending such suit, he has his remedies; and whether those remedies are available to an intervener or not, it is quite certain that the property cannot be tied up by an intervener unless they are available to him and unless he invokes them; and as an appeal from a judgment dismissing the main action, where no conservatory writ is thereby dissolved, can suspend nothing save the running of the delay within which the judgment appealed from would otherwise become unappealable, an appeal from a judgment dismissing an intervention can have no greater effect. Moreover, "the theory governing the admission of interventions and their trial is that the intervener has an independent remedy, which is in no manner affected by the action of the court in the pending contest" (Cross on Pleading, 425, 426; Code Prac. art. 391)—a theory which is very well illustrated here, since the relator is pursuing his independent remedy concurrently with the present attempt. That being the case, there is no reason why he should be permitted to interfere to the extent of obstructing or de-

laying the litigation of others, and he is not so permitted.

An intervention will not be allowed to retard the decision of the principal action. *Walker v. Dunbar*, 7 (Mart.) N. S. 587, 18 Am. Dec. 248; *Devall v. Boatner*, 2 La. Ann. 271; *Colvin v. Nelson*, 4 La. Ann. 544.

The intervener must be always ready to exhibit his evidence. *Gaines v. Page*, 15 La. Ann. 110. The trial between the original parties can properly be gone into without him or waiting for him. *McMillen v. Gibson et al.*, 10 La. 518. It is clear that to issue the writs here prayed for would be to retard the principal action for the accommodation of the intervener, which is not permissible.

Relator's application is therefore denied, and this proceeding dismissed, at his cost.

(122 La. 706)

No. 17,365.

STATE v. CHANCE.

(Supreme Court of Louisiana. Jan. 4, 1909.)

1. OFFENSE CHARGED.

The crime for which the accused was brought to trial was assault with intent to commit rape.

2. CRIMINAL LAW (§ 1169*)—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Evidence admitted as part of the *res gestæ*, if erroneously admitted, affords no ground of defense if it be not prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3137; Dec. Dig. § 1169.*]

3. CRIMINAL LAW (§ 1169*)—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Evidence not pertinent, which does not in any way tend to prejudice the defense, which is meaningless as stated, is not reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3137; Dec. Dig. § 1169.*]

Provosty, J., dissenting.

(Syllabus by the Court.)

Appeal from Twenty-Second Judicial District Court, Parish of East Baton Rouge; Harney Félix Brunot, Judge.

Sam Chance was convicted of an assault with an intent to commit rape, and he appeals. Affirmed.

Edward Elliott Wall, for appellant. Walter Gulon, Atty. Gen., and Hubert Nicholls Wax, Dist. Atty. (Ruffin Golsen Pleasant, of counsel), for the State.

BREAUX, C. J. The defendant, charged with the offense of assault with intent to commit rape on the 5th day of August, 1908, was arraigned on the 25th day of October, 1908, and tried on the 5th day of November of that year.

The jury returned a verdict of guilty, and recommended him to the mercy of the court.

The court sentenced him to hard labor in the penitentiary for a term of five years.

The little girl defendant was charged with having attempted to rape was 11 years of age.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The point at issue is before us as brought up in a bill of exceptions, setting forth that the testimony of the sister of the little girl was admitted by the trial judge as part of the *res gestæ* although it was not part of the *res gestæ*.

The complaint principally is that it was irrelevant, and that it was intended to and did prejudice the jury against the defendant.

The district judge in the *per curiam* stated that the testimony was that the defendant, Chance, and the prosecuting witness, Ione, were alone at the former's home, and that immediately after the offense had been committed the defendant accompanied her to her home; that on arriving she stated to her mother what had taken place. The prosecuting attorney asked the witness:

"When the accused, Sam Chance, came over to her mother's house from his house, and was told by her mother, 'Oh! Sam, what did you do that for?' what did he have in his hand?"

The question was objected to, on the ground before stated.

The testimony does prove that the incident to which the question was directed was (when Chance arrived at the home of the mother) a half hour after he is said to have committed the offense, and for that reason the contention was that it was not part of the *res gestæ* and irrelevant; that half an hour's time having intervened, it was not inseparably connected with the case—not a part of it.

In ruling on this point, we will first state that, in accordance with the court's order that she should answer, the witness stated that defendant had nothing in his hand at the moment, but afterward he took a knife from his pocket. She did not know what kind of knife it was. This point has no merit.

Granted that it was not part of the *res gestæ*, the testimony could not possibly prejudice the case of the defendant. Besides, the objection on the ground that the evidence admitted was intended to and did prejudice the jury is too general of itself and without any other statement of fact or reason to sustain the objection, it does not commend itself to extended notice. There was nothing incriminating in the fact that the accused took a knife from his pocket, particularly as it was not stated whether it was a common pocketknife or a formidable knife in the hands of a man bent upon a crime or drawn for the purpose of intimidating some one.

It is not stated by the defense whether it was evidence of his behavior when he was mildly upbraided by the mother of the prosecuting witness.

The appellate court considers the ground stated by the trial judge. It is proper to assume that there was no other ground than that stated by him. Upon the ground stated,

there is no possible room for complaint. *Marr's Digest*, p. 859, § 493.

It is contended in the second place that the evidence was irrelevant.

The testimony is equally as unprejudicial if it be considered from the point of view of irrelevancy. It adds nothing to the issues, and takes nothing from the point in dispute. It did not have the least tendency of proving that it was the purpose of proving that the accused was guilty of another crime, nor does it appear in any way to add to the gravity of the crime for which he was prosecuted. It was useless to admit the evidence, but having been admitted, it affords no ground to set aside the verdict.

The error not being prejudicial, the defendant is not entitled to a new trial. 3 Jones, § 890.

The text of Bishop on Criminal Law and Criminal Jurisprudence is to the same effect as that in the text of Jones cited *supra*.

After having considered the issues, and after having arrived at the conclusion to affirm the judgment, we found that the information fails to show that an assault had been committed on the prosecuting witness. We infer that it is a clerical error in the copy before us. Neither the state nor the defense has called the court's attention to this error.

We affirm the judgment. If it be not a clerical error, a rehearing will have to be granted.

By reason of the law and the evidence being in favor of the state and against the defendant, the judgment is affirmed.

PROVOSTY, J., dissents.

No. 17,181.

CHAUVIN v. CALDWELL.

(Supreme Court of Louisiana. Jan. 4, 1909.)

ASSAULT AND BATTERY (§ 40*)—CIVIL ACTIONS—DAMAGES.

Where defendant sought out plaintiff with the deliberate intention of assaulting him, and did brutally assault him, and as a result thereof plaintiff limped for some 30 days, and his ear, which was permanently displaced, remained black and blue a long time, he was entitled to \$500 damages, notwithstanding the mitigating circumstance that plaintiff during the difficulty called defendant a liar.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 55; Dec. Dig. § 40.*]

Appeal from Seventeenth Judicial District Court, Parish of Vermillion; William Pierrepoint Edwards, Judge.

Action by Oscar J. Chauvin against Vernon L. Caldwell. From the judgment, plaintiff appeals. Judgment amended, and, as amended, affirmed.

Gordy & Gordy, for appellant. Greene & Greene, for appellee.

PROVOSTY, J. This suit is in damages for assault and battery. The jury allowed \$25, and the plaintiff has appealed. Defendant has answered the appeal, and prayed that the suit be dismissed.

Defendant is a general contractor. His firm had built a house for plaintiff, and his brother, acting for the firm, had made a settlement with plaintiff. In this settlement, plaintiff had deducted \$40 from the contract price for a debt which he said the defendant's firm owed him.

A few days later plaintiff was on the street with a friend, when defendant accosted him, and asked him to step aside, as he wanted to have a few words with him. They walked across the street. Defendant was carrying under his arm a pane of glass 28x34 inches. He laid this glass down, and began the conversation; and soon there occurred between them what defendant characterizes as an altercation and street fight, and plaintiff, as an assault and battery.

Defendant's age is not given. His weight is said by himself to be 230 pounds. He is described as a strong, robust, muscular man.

Plaintiff is 46 years old, weighs 135 to 136 pounds, is a storekeeper, has been in bad health, suffering from asthma for 25 years, and is a frail man.

Plaintiff testifies that after a few words on the subject of the \$40—defendant saying he did not owe it, and he, plaintiff, saying that if defendant would come to his store he would show him that he did—defendant called him a rascal, and seized him by the collar with one hand and with the fist of the other pounded him on the side of the face and knocked him down, and then kicked him repeatedly; that he, plaintiff, made no movement to strike defendant, but merely caught hold of his hand with both of his in trying to get loose.

Defendant testifies that as soon as he mentioned the \$40, and said he did not owe it, plaintiff became very angry and called him a damned liar and that thereupon he struck plaintiff; does not know whether he struck him with his open hand or with his fist; does not know whether he kicked him or not; does not know whether he called him a rascal or not.

A witness whose attention was attracted by the loud talking heard the words "rascal" and "liar," but could not say from which one of the parties.

As the result of the encounter, plaintiff limped for some 30 days, and his ear remained black and blue a long time, and is permanently displaced, or, as the witnesses express it, "flops" more than the other.

Whether there is or not in the case the mitigating circumstance of plaintiff having called defendant a liar, we think the amount allowed by the jury is insufficient. We think defendant sought out plaintiff with the de-

liberate intention of assaulting him in case he did not consent to pay the \$40. The precautionary care with which he laid down the pane of glass before beginning the conversation shows this. The assault was brutal. We fix the damages at \$500, and would allow much more were we certain that the word "liar" had not been used by plaintiff, or had been used by him only when called a rascal.

It is ordered, adjudged, and decreed that the judgment therein be increased to \$500, and that as thus amended it be affirmed; defendant to pay all costs. Interest at the rate of 5 per cent. per annum to run on \$50 from the date of judgment in the lower court, and on the balance of this judgment from this date.

(122 La. 711)

No. 17,364.

STATE v. HILL.

(Supreme Court of Louisiana. Jan. 4, 1909.)

1. CRIMINAL LAW (§§ 180, 200*) — FORMER JEOPARDY—DISTINCT OFFENSES.

The offense of "wilfully shooting at," denounced by section 792 of the Revised Statutes of 1870, and the offense of shooting with a dangerous weapon with intent to murder, denounced by section 791, are separate and distinct, subject to different possible penalties, and triable before different tribunals, and cannot serve as the basis of a plea of former jeopardy, where on the former trial the jury was discharged from giving a verdict. Rev. St. § 1055.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 328, 392; Dec. Dig. §§ 180, 200.*]

2. CRIMINAL LAW (§ 1090*) — APPEAL — BILL OF EXCEPTIONS—NECESSITY.

A motion for a new trial cannot be made to serve the purpose of a bill of exception to the charge of the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2804; Dec. Dig. § 1090.*]

(Syllabus by the Court.)

Appeal from Tenth Judicial District Court, Parish of Concordia; John Stirling Boatner, Judge.

Charley Hill was convicted of shooting with intent to kill, and he appeals. Affirmed.

John Stirling Boatner, Jr., for appellant. Walter Gulon, Atty. Gen., and Hugh Tullis, Dist. Atty. (Ruffin Golsen Pleasant, of counsel), for the State.

LAND, J. The defendant, charged with shooting with intent to murder, was convicted of shooting with intent to kill, and was sentenced to imprisonment at hard labor for one year. Defendant has appealed, and relies for reversal on the alleged error of the court below in overruling his plea of former jeopardy.

It appears from the record that the defendant was first charged with the crime of felonious assault on one Ed. Reynolds by will-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

fully shooting at him. The defendant pleaded not guilty, and the trial proceeded before a jury of 12. After the evidence had been adduced and argument concluded, the district attorney, with leave of the court, entered a nolle prosequi, and the jury was discharged. On the same day the district attorney, with leave of the court, filed an information charging that the defendant did, with a dangerous weapon, to wit, a pistol, and with the felonious intent to murder, shoot one Ed. Reynolds.

Defendant filed a plea of former jeopardy based on his prosecution under the first bill of information and the discharge of the jury, as already has been stated. This plea was overruled, and the defendant excepted to the ruling of the court.

The first information is under section 792, and the second information is under section 791, of the Revised Statutes of 1870.

Section 792 was enacted to punish assaults with intent to commit murder, rape, or robbery, or "by wilfully shooting at" with no particular felonious intent. The penalty was imprisonment at hard labor not exceeding 2 years. By Act No. 59, p. 93, of 1896, the section was amended so as to substitute 20 years.

Section 791 of the Revised Statutes of 1870 was enacted to punish perfected assaults by shooting, stabbing, thrusting with a dangerous weapon, with intent to commit murder, and the penalty was and is imprisonment at hard labor or otherwise, for not less than 1, nor more than 21, years. Under this section the punishment may be imprisonment in the parish jail, and the accused may be tried by a jury of five under article 116, Const. 1898. *State v. Sinegal*, 51 La. Ann. 932, 25 South. 957.

Under section 792 the penalty is necessarily imprisonment at hard labor, and the accused must be tried before a jury of 12 under article 116, Const. 1898. Under this section the accused can neither be tried nor convicted of shooting with intent to murder. *State v. Matthews*, 111 La. 962, 38 South. 48.

The two offenses, being separate and distinct, founded upon different laws, subject to different possible penalties, and triable before different tribunals, afford no basis for the plea of former jeopardy.

Assuming that the two prosecutions were based on the same evidence, the discharge of the jury from giving any verdict upon the former trial preserved the right of the state to prosecute for the offense shown to have been committed. Section 1055, Rev. St. 1870.

There was no exception taken at the time of the charge of the court to the jury as far as the record shows. A motion for a new trial cannot be made to serve the purpose of a bill of exception seasonably taken.

Judgment affirmed.

No. 17,251.

(122 La. 714)

MCLEOD v. NORLE

(Supreme Court of Louisiana. Jan. 4, 1909.)

EXEMPTIONS (§ 148*)—EVIDENCE—BURDEN OF PROOF.

The laws of the state in respect to homestead rights and things exempt from seizure are exceptional in character. Parties who claim under them, in their pleadings, and in their proof, must bring themselves within their provisions, expressly and not by implication.

[Ed. Note.—For other cases, see *Exemptions*, Dec. Dig. § 148.*]

(Syllabus by the Court.)

Appeal from Seventh Judicial District Court, Parish of Richland; John Robert McIntosh, Judge.

Action by Dave McLeod against C. M. Noble. Judgment for defendant, and plaintiff appeals. Affirmed.

George Wesley Smith, for appellant. Ellis & McGregor, for appellee.

Statement of the Case.

NICHOLLS, J. This case has been submitted to the court on the record, neither party appearing or filing briefs.

Plaintiff appeals from a judgment, dissolving an injunction he had caused to issue, enjoining the sale of two horses which had been seized under a *f. fa.* in execution of a judgment against him.

In his petition, after alleging that he was the head of a family, having a wife dependent upon him for support, that his wife owned in her own right less than \$2,000, and after reciting the seizure of two horses, he averred that he was entitled, under the Constitution and laws of the state, to certain homestead exemptions, and "that the property so seized was exempt from seizure and sale under the homestead laws of the state."

Defendant, in his answer, admits that he had made a seizure of the horses, as alleged, but denied that plaintiff was entitled to the exemption claimed, for the reasons:

First. That he was trying to dispose of his property for the purpose of defeating his creditors, instead of keeping it for the purposes to which exempted property should be applied.

Second. Because plaintiff, at the date of the seizure, owned three or more horses, and since the filing of the existing suit he had sold all but those then claimed to be exempt for the sole purpose of claiming these particular horses from seizure and sale as being exempt under the homestead exemption.

He denied that any of the horses seized were work horses, and denied generally all of plaintiff's allegations.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes 48 SO.—11

Very little testimony was taken on the trial. Defendant offered none whatever. Plaintiff testified that he lived on his father's place; he was a married man; his wife was living with him, he owned one horse; it was the horse which had been seized; it was then, and had been for about two months, in charge of Mr. McConnel, who was book-keeper for Mr. Noble; he had no other horses, nor any mules. His wife owned separate property worth about \$200.

Plaintiff offered in evidence his petition and the affidavit. The district court rendered judgment rejecting plaintiff's demand. After the trial, but before judgment, plaintiff filed an application to the court to reopen the case for the purpose of permitting him "to prove specifically and categorically that the animal in dispute was a work horse, and that he had no other property."

In this application he stated that while he had put in evidence, the petition filed in the case which alleged that the property in dispute was exempt from seizure under the homestead and exemption laws of Louisiana, which necessarily implied that the horse in dispute was a work horse, which allegations were by him sworn to in the affidavit introduced in evidence, he had, through a mere oversight in giving his testimony, neglected to state that the original horse in dispute was a work horse. He then averred that the horse seized was the only animal of any kind or property that he owned; that it was necessary that he have same in order to make a living for himself and family; that the ends of substantial justice required that the case be reopened, as it was not the policy of the law to take advantage of technicalities to deprive debtors of the homestead rights and exemptions, but rather where there was a doubt to resolve it in favor of the debtor.

The court refused to reopen the case, and rendered judgment as stated.

Opinion.

The laws of the state in respect to homestead rights and to things exempt from seizure are exceptional in character. Parties who claim under them must, in their pleadings and in their proof, bring themselves within these provisions expressly and not by implication. The plaintiff did not do so in either. Plaintiff failed on the trial to establish that the horses seized were work horses, though that fact was directly put at issue.

The allegation of his petition to which he refers in his application to reopen the case, in reference to the horse which was seized, was a conclusion of law, and his testimony on the trial did not better the situation. We find no ground for reversing the judgment. It is hereby affirmed.

(122 La. 717)

No. 16,983.

VILLERE v. NEW ORLEANS PURE MILK CO., Limited.

(Supreme Court of Louisiana. Nov. 4, 1906.
Rehearing Denied Jan. 18, 1909.)

1. RECEIVERS (§ 105*)—CONTINUING BUSINESS WITHOUT AUTHORITY—LIABILITY OF RECEIVER.

When a receiver continues temporarily, without the court's order and authority, the operations of a company placed in its charge, as a going concern, and thereby sustains a loss of \$704, that loss cannot be made to be borne by the mass of creditors. It must be borne by the receiver, and the amount of the same deducted from the commission otherwise falling to him.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 105.*]

2. RECEIVERS (§ 96*)—EMPLOYMENT OF AN ATTORNEY.

It is not the practice in Louisiana for a receiver to apply for authority to employ an attorney, or for the receiver to consult the court as to what attorney he should employ. The fact that a particular attorney may have individual interests involved in the matters embraced in the receivership does not, ipso facto, cut him off from being employed as the attorney to conduct the receivership proceedings. That fact, however, affects the fee which he will be entitled to receive for his services.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 180; Dec. Dig. § 96.*]

3. RECEIVERS (§ 92*)—CONTINUING BUSINESS—ORDER.

An order of court appointing a receiver to a corporation, "with power to administer its affairs for the best interest of all parties," does not confer upon the receiver the authority and power to continue the operations of the company and incur liabilities as a going concern. Authority for such purpose must be given in express and precise language.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 169; Dec. Dig. § 92.*]

4. CORPORATIONS (§ 186*)—STOCKHOLDERS—DEALINGS WITH CORPORATION.

A stockholder of a corporation may advance money to it, may become its creditor, may take from it a mortgage or other security, or may indorse same like any other creditor, but always subject to severe scrutiny under the obligation of acting in the utmost good faith. *Cotton Seed Oil Co. v. Refining Co.*, 108 La. 74, 32 South, 221.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 700; Dec. Dig. § 186.*]

5. CORPORATIONS (§ 565*)—RECEIVERSHIP—CREDITORS—WHO ARE.

Parties who contract to take stock in a corporation for and in consideration of personal services to be rendered by them, who render such services and become entitled to the stock, do not become creditors of the corporation by reason of the fact that the company is placed in the hands of a receiver before the stock is in fact issued.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 565.*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; George Henry Théard, Judge.
Action by Octave J. Villere against the

New Orleans Pure Milk Company, Limited. Judgment for defendant, and plaintiff appeals. Amended, and, as amended, affirmed.

Omer Villere, for appellants the receiver and the mortgage creditors. Morgan & Milner, for appellants W. T. Carey & Bro. and Charles J. Babst. Richardson & Soule, for appellants William E. Hall and sundry creditors. Harry Hinckley Hall, for appellants German-American Savings Bank & Trust Co. and Omer Villere. Guy Morville Hornor, for appellee M. D. Lagan, Ltd., in liquidation. Asahel Walker Cooper, for appellee the Walsh & Weldner Boiler Co. Gustave Joseph Ricau, for appellee Andry & Bendoragel. Charles Rosen, for appellee Alfred Raymond. Denegre & Blair, Victor Leovy, Bernard Bruenn, John Wagner, and Rouse, Grant & Grant, for appellees interveners.

NICHOLLS, J. On the 10th of September, 1906, the plaintiff, Octave J. Villere, filed a petition in the civil district court (verified by his oath) in which he averred that he was the holder and owner of 150 shares of stock in the New Orleans Pure Milk Company, Limited, a corporation organized under the laws of this state, and domiciled in this parish; that he was also an indorser, with others, for the sum of \$25,000 on a certain demand note of said corporation; that said corporation was hopelessly insolvent and unable to pay its debts, and that the present condition of affairs did not justify a continuation under the present management; that it was to the interest of the stockholders and creditors that a receiver be appointed to said corporation, and that the German-American Savings Bank & Trust Company, be appointed receiver; that said corporation is mismanaged.

In view of the premises, petitioner prays for citation of the New Orleans Pure Milk Company, Limited, through its president, George A. Villere; that after due proceedings a receiver be appointed to said corporation for the purposes of administering its affairs, under the order of this honorable court; and petitioner prays that after due time the said corporation be fully and finally liquidated and dissolved; that the German-American Savings Bank & Trust Company be appointed receiver, and that petitioner be recognized as a creditor aforesaid.

And he prayed for all general and equitable relief.

On the 11th of September the defendant company, through its president, George A. Villere, filed an answer to this petition, in which it averred that at a meeting of its directors held the 11th of September, 1906, it was unanimously resolved that said corporation was unable to meet its obligations as they matured, or to carry out existing contracts, and that a receiver was necessary to preserve and administer its assets for the

benefit of all concerned, recommending, in the event the court deemed such receiver necessary, the German-American Savings Bank & Trust Company as such receiver, the whole as is more fully set forth in the annexed certified copy of the minutes of said meeting of the board held as aforesaid.

In view of the premises, respondent submitted the matter to the court for such action as it deemed proper, and prayed for all general and equitable relief.

The copy of the meeting of the directors of the company annexed to this answer was as follows:

"New Orleans, Sept. 11, 1906.

"Office of the New Orleans Pure Milk Company, Ltd.

"A special meeting of the board of directors of the New Orleans Pure Milk Company Limited, was held this day, President Villere presiding, with a quorum present. Whereupon it was moved by Wm. F. Voorhies, and duly seconded, and unanimously

"Resolved, that owing to the financial condition and situation of this corporation, its inability to meet its obligations as they mature, or to carry out its existing contracts, and in view of the further fact that suit had been instituted against it by Octave Villere, it was the sense of this board that a receiver was necessary to preserve and administer its assets for the benefit of all concerned, and that this board recommends to the court for appointment the German-American Savings Bank & Trust Company, as receiver.

"(Signed) Geo. A. Villere.
"Certified L. L. Lamothe, Secty. [Seal.]"

Accompanying this answer was the following statement:

Balance Sheet.

New Orleans Pure Milk Company, Limited.
New Orleans, La.

At close of business August 31st, 1906.

Assets.

Cash	\$327 43
Accounts receivable, sundry debts...	9,070 65
New Orleans Plant (real estate, building, property, machinery, etc.)	85,637 58
Hammond Plant (real estate, farm buildings, property, etc.)	27,672 10
Supplies, butter and feed	825 78
Unexpired insurance and taxes	606 55
Office furniture and fixtures	466 35
Deposits and guarantees	17 50
Good will, etc., and establishing business	9,708 00
Stock in Hammond Planting & Mfg. Company	300 00
Total assets	\$135,332 49

Liabilities.

Account payable sundry creditors, estimated	\$7,411 93
Account payable, sundry creditors, for contracts on building, machinery, estimated	29,954 55
Notes payable—mortgage	1,440 49
Notes payable—mortgage	25,000 00
	\$63,806 97
Capital stock	97,000 00
Total liabilities	\$160,806 97
Aug. 31, 1906, excess of liabilities over assets, or loss	\$25,474 48

On the same day, the judge of division E of the civil district court signed the following order:

"Let the German-American Savings Bank & Trust Company be appointed receiver to the New Orleans Pure Milk Company, Limited, with power to administer and manage its affairs for the best interest of all parties upon giving bond for fifteen thousand dollars, and until further orders of this court, let all proceedings by other persons against said New Orleans Pure Milk Company, Limited, be stayed."

The German-American Savings Bank & Trust Company qualified as receiver, under the order and letters of receivership issued to it, on the 21st of September, 1906.

On the 17th of September, 1906, the court ordered, upon the petition of the receiver, that an inventory be made of the property of the milk company in the parish of Orleans, and on the 19th of September the court ordered that an inventory be taken of the property in Tangipahoa parish.

These inventories were made on the 26th of September in both parishes. The property inventoried in the parish of Orleans was appraised at the sum of \$36,998. Of that amount there appeared to be then on hand in cash the sum of \$1,856.46. The property in Tangipahoa parish was valued at \$8,241.

On the 26th of September the receiver filed a petition in which it alleged that there was no prospect of working the company out of the debt, and that the interest of all parties concerned would be best subserved by selling all the assets and business of said company in block as a going concern at public auction for one-half cash and the balance at one year's credit. It prayed accordingly.

The court on the same day granted the order prayed for. On October 4th, W. T. Carey & Bro. filed a petition of intervention and opposition, in which it averred that it was a privileged creditor of the pure milk company in the sum of \$13,320 for the causes therein stated. After setting out what it claimed to be its rights as a creditor, it averred that on September 10, 1906, Octave J. Villere, representing himself to be a stockholder of the New Orleans Pure Milk Company, Limited, filed a petition in which he alleged that that company was hopelessly insolvent, and that it was to the interest of the stockholders and creditors that a receiver be appointed. That on September 11th the company filed a copy of a resolution said to have been passed at a special meeting that day, to the effect that the corporation was unable to meet its obligations, and submitting the matter to the court for adjudication. That it also filed a balance sheet of the company of August 31, 1906, showing \$135,132 of assets, and only \$68,806 of liabilities; but in order to make it appear insolvent, it put down the amount of capital stock alleged to have been issued at \$97,000.

That upon this showing the court appointed the German Bank & Trust Company receiver.

That said entire proceedings were irregular, null, and void, and showed on their face that said corporation was not insolvent.

That the court was not authorized by law, and particularly Act No. 159, p. 312, of 1898, to appoint a receiver at the instance of a stockholder upon the allegations contained in the petition, but was only authorized to appoint a receiver at the instance of a creditor when the board of directors shall declare by resolution that the corporation is unable to meet its obligations as they mature, and that a receiver is necessary. That the order appointing a receiver was improvidently granted, and should be vacated. That said O. J. Villere does not appear by charter to have been a subscriber to the stock of said corporation; and they generally denied that the outstanding alleged issue of stock was issued legally, or that the corporation received a valid and legal consideration for same, as required by the Constitution of the state.

That on September 26, 1906, before the inventory of the property rights and credits of the corporation had been filed, a petition to sell all the assets of the corporation was filed, and said petition was still pending upon the receivership order book. They opposed the granting of such order on the ground that examination into the affairs of the corporation will show that there is reason to believe that an aggressive administration of the corporation will enable it to pay its debts; that no price was put upon the property; that the petition was ill advised and hasty, and the only effect of a sale under it will be to allow the property to be sold for an insignificant price, and permit interested parties and speculators to acquire it at a price that will not pay the bona fide obligations of the corporation or petitioners' debt; that the inventory filed did not appraise the property at its true value. They denied that the alleged mortgage of \$25,000 was a legal and bona fide indebtedness of the corporation, or that there was any necessity to sell all the assets of the corporation.

They prayed that Octave J. Villere, the New Orleans Pure Milk Company, and the German-American Bank & Trust Company, receiver, be cited; that the order appointing a receiver be rescinded, and the appointment vacated; that the petition to sell all the property of the corporation be denied; that intervenor be declared a creditor of and have judgment against the New Orleans Pure Milk Company, Limited, for the sum of \$13,322, with legal interest from judicial demand, and recognizing interveners' first lien and privilege upon the building and lot of ground described in their petition; that after due proceedings the property be sold to pay their debt.

About the same time a number of other parties (among others, Charles J. Babst), alleging themselves to be privileged creditors of the pure milk company, filed interventions

setting up their respective claims, and praying recognition and enforcement of the same, accompanying the same with oppositions of like character as that of Carey & Bro. The claims set up in these various petitions of intervention and oppositions will be hereafter returned to, as well as the answers thereto and the issues raised thereby.

On October 12, 1906, on motion of counsel representing Carey & Bro. and Charles J. Babst, suggesting that the receiver had not filed a statement of the debts and liabilities of the corporation in spite of amicable demand, and that there was then pending a suit to vacate the receivership and the order of sale of the assets of the defendant corporation, and that it was proper that monthly statements should be filed by the receiver, and that the receiver had administered the property of the defendant for a month, the court ordered that the receiver show cause on October 19th why it should not furnish a statement of the debts and liabilities of the defendant, and why it should not file an account of administration up to date.

On the 15th of October the receiver answered the intervention and opposition of Carey & Bro. Among other allegations of this answer, the receiver denied that the pure milk company could possibly be administered so as to enable it to pay its debts within a reasonable time. It declared that he filed that day, as an exhibit in its answer to the petition and opposition of Charles J. Babst, a detailed statement of the liabilities of the corporation which it verily believed to be correct, which statement showed liabilities to the amount of \$58,375.98.

It denied that the appraisal made by the sworn officers of the court was too low, and doubted that said property would sell for its appraised value, whether sold by an auctioneer or by the civil sheriff at public auction.

It averred that it firmly believed that if said property was sold in block as a going concern it would sell for more than if it was dismantled. It declared, however, that it submitted the whole matter to the court, and prayed for such orders and decrees as the nature of the case and equity would permit, and for general relief. The receiver made similar allegations in its answer to the intervention and opposition of Charles J. Babst. On the 22d of October, 1906, the receiver filed a petition in which it declared that, in compliance with the decree of the court of the 19th of October, it filed a statement of its gestion of the defendant corporation showing:

First. Statement of receipts and disbursements from September 11th to September 30th.

Second. Statement of receipts and disbursements from October 1st to October 30th.

Third. Trial balance September 30, 1906.

Fourth. Statement of revenues and expen-

ses from September 11th to September 30th. It prayed for such orders and decrees as the nature of the case might require, and which the law and equity would permit, and for general relief.

On December 6, 1906, the court declared that, considering the petition of the receiver for the sale, and the consent expressed by the opponents in open court, the sale be ordered in separate lots, ordered that the property described in its order be sold at public auction by an auctioneer to be designated by the receiver, the sale to be made in lots after being separately appraised and divided.

In the meantime, on October 25, 1906, W. T. Carey & Bro. and Charles J. Babst had filed a petition to the court in which they averred that they were large creditors of the pure milk company. After reciting the fact that the German-American Savings Bank & Trust Company had been appointed receiver of that company, it averred that the said receiver should be removed for the following causes:

First. Because, although the balance sheet of the New Orleans Pure Milk Company, Limited, at close of business August 3, 1906, filed by defendant corporation, showed assets of \$135,332, with only \$63,806 of liabilities, said receiver within 15 days after its appointment, averring that the interest of all parties concerned "would be best subserved," petitioned the court for an order to sell "all the assets and business of said company as a going concern." Petitioners and nearly all the large creditors of the corporation, with the exception of those claiming to be mortgage creditors, opposed the granting of such an order, and that it was an act of mismanagement of the affairs of the corporation and against the interest of all parties, save those claimed to be mortgage creditors, to ask for such an order.

Second. That said receiver had undertaken, without applying to the court for special authority, to disburse since its appointment over \$8,000 of the money of the corporation; that this disbursement has been made practically in 30 days; that by a sworn statement of its gestion, and as shown by testimony of its trust officer on the rule requiring the filing of said account, it is seen that it is expending about \$250 a week on pay rolls, without special authority of the court or showing the necessity therefor, or to whom this money is being paid. That generally, by failing to make application to the court for authority to conduct its administration, it deprived the court, petitioners, and other creditors of knowledge of what was being done with such large sums of money as the expenditures of \$8,000 in 30 days.

Third. Because, despite the fact of the charge under oath of mismanagement made by Octave J. Villere in his allegations that the old management should not be allowed to conduct the business of the corporation,

the receivership had retained Mr. George A. Villere, president of the corporation, as its manager, at a salary of \$150 a month, and had practically retained the old management, so that the affairs of the corporation are practically turned back into the hands of the parties who are charged with so grossly mismanaging its affairs as to necessitate a receiver. That such a receivership is one in name only, and is not being conducted for the best interests of the real parties in interest. Petitioners averred that on the trial of the rule they would show other acts of mismanagement by the receiver. They prayed that the German-American Savings Bank & Trust Company be cited to show cause on November 2d why the court should not remove the receiver. The receiver answered the petition. After pleading the general issue, it averred that, while it was true that the balance sheet taken from the books of the pure milk company showed assets to an amount far in excess of the debt, said assets consisted of the plant and other property of the corporation necessary to carry on its business; that, when respondent asked for the sale of the property of said corporation in bulk as a going concern, it was because it ascertained after a thorough examination that the corporation owed upward of \$50,000 as shown by the detailed statement of liabilities; that there were no means of paying said debts except by selling the assets; furthermore, after a careful examination of the business, it was of the opinion (which opinion it still retained) that at a forced sale of the assets the same would certainly not sell at their book value, whatever such value might have been to the corporation; that it was then, and was still, of the opinion that there was no reasonable ground to believe that the property of the corporation could be so administered as to pay its debts, and the possession thereof restored to the corporation; that, whatever may have been the cost or the value to the corporation of its assets, it felt satisfied that unless the corporation could raise the money to pay its debts, either by selling additional stock or borrowing more money, neither of which it could do, its assets would have to be sold, and under the circumstances it was its duty under the statute to apply for an order of sale.

It reiterated the averments it had already made that the interest of all parties concerned would be best subserved by selling all the assets and business of said company in block as a going concern, as it was, after familiarizing itself with the business of the company of the opinion that said assets would sell for more in block as a going concern than they would sell for if the same were dismantled and sold piecemeal. It is of the opinion that the only way of saving the good will and established business is to sell the property as a going concern. It denied the truth of all the allegations made that the petition for the sale

was presented by it against the interest of all parties save those claiming to be mortgage creditors. It alleged: That it had disbursed the sums mentioned in the statement of its gestion, and that the same was properly and necessarily made under the general powers of administration given to it in the order appointing it. That it was true that in order to properly administer the affairs and business of the corporation under the order of the court under the sanction of its oath, and under the obligation of its bond of \$15,000 in such time as the court should issue under different order in expending in weekly payments and for the purchase the sums mentioned in the sworn statement of its gestion, and that the said sums are being expended as the necessary consequence of its administration of the affairs of the company, and were being expended in the interest of every and all parties concerned, with the view of keeping the good will and business connections, which are an asset that would otherwise be lost. That it had cut down the expenses of the management of the business to the extent of about \$731 per month, as shown by the comparative statement of the pay rolls of the milk company, limited, and those of the receiver, which it embodied in its answer showing the monthly pay roll of the company to have been \$2,009, and that of the receiver \$1,277, saving \$731 under the administration of the receiver. That at the time it was appointed receiver the milk company was under large contracts to furnish milk at 18½, 19, and 20 cents per gallon, and, realizing that such contracts were losing contracts, it notified all parties that it would no longer furnish milk at less than 23 cents per gallon.

That the charges which were made by the complainants which were reported in the daily press and discussed in the clubs had considerably injured the business of the company, which, from time to time, showed increased loss.

That it was not true that by failing to make application to the court for authority to conduct its administration it deprived the court or any creditor of knowledge of what was being done, inasmuch as all moneys expended were fully set forth in the sworn statement of its gestion which it filed. It averred that neither the complainants nor their lawyers ever applied to it for information, which would have been cheerfully given to all parties interested.

That before the application had been made for a receiver the bank's officer had examined into the affairs of the milk company and had caused its books to be examined by a public accountant. That, when the receiver employed Mr. George A. Villere to attend to certain details of its business under the direction and management of the court, it knew that on account of his integrity and thorough knowledge of this particular business he was a proper and fit person to be employed in

such a capacity, and it had besides employed at its own expense, as its representative at the plant, an experienced man to act in conjunction with him who had never been connected with the milk company.

That the allegations that it had practically retained the old management and turned back from the 11th of September, 1908, the administration of the affairs of the company into the hands of those who had been charged with "so grossly mismanaging" them, was unfounded in point of fact, as the management during that time was under the direct charge and supervision of the receiver. That there was no charge that said property had been "so grossly mismanaged" until the same were made by insinuations in the petition of the complainants. That said insinuations were made by parties who had never tried to ascertain the true facts. That when the receiver employed George Villere it knew the management of the milk company had made mistakes, but not that it was guilty of gross mismanagement. It averred that it was absolutely untrue that the receivership was one only in name, and that it was not conducted for the best interest of the real parties in interest.

This application for the removal of the receiver was never brought to trial. There is in the transcript no procès verbal of the sale made under the order of the court which has been referred to. That such sale was made under that order appears to be conceded by all parties, and, as there is no complaint as to the manner, form, and time of sale, it is assumed that the sale followed in its execution the order of the court.

The property seems to have been purchased by Mr. Ratcliffe Irby, whose claim as a mortgage creditor was recognized by the district court, and whose rights as such are contested on this appeal.

On the 19th of April, 1907, the receiver filed a provisional account and tableau of distribution. From the account it appears that the receiver had received the sum of \$78,666.26; that it had disbursed at different times \$26,276.99; that the receiver proposed to pay to privileged and mortgage creditors \$47,039.43—leaving \$3,299.84 to be disbursed among the ordinary creditors.

Prior to the order of the court to sell the property of the defendant corporation, O. J. Villere, W. R. Irby, and Omer Villere filed a petition in the district court in which they alleged that they were creditors of the pure milk company in the sum of \$8,333 each, or in the aggregate in the sum of \$25,000, with 7 per cent. interest from 2d June, 1906, and that as security for said amount they held a certain promissory note of \$25,000 drawn by said company and secured by mortgage per two notarial acts dated June 2d, 1906, and recorded respectively in the parish of Orleans on the same date, and in the parish of Tangipahoa on the 5th of June, 1906.

That they had always been of the opinion,

and so expressed themselves freely, that the property of said company would have to be sold at public auction, and that by maintaining the property as a going concern more bidders would attend the sale. That, when the receiver applied for an order to sell the property in block as "a going concern," petitioners made no objection thereto, because in their opinion such a sale would be to the evident advantage of all parties concerned, and principally to the advantage of the creditors whose claims were not secured by privilege and mortgage.

That, if they had intended to acquire said property for a song, they would have desired that the business would be stopped and the property dismantled so as to reduce the number of bidders. That they were of the opinion that the privileged debts which prime their mortgage claim barely amount to \$13,000, and that the claim of petitioners was fully secured. They recognized that there was a possibility that the said property, which had cost in the neighborhood of \$100,000, would sell for more than the combined claims of the privilege and mortgage creditors, and that it was the duty of the receiver to use every effort to obtain the best price for same. That they were of the opinion that a further delay in advertising said property would work injury to the ordinary creditors, and possibly to the mortgage creditors, but certainly not to the privileged creditors, as there was no doubt that the property will sell for more than enough to pay the privileges in full. That said property should be advertised at as early a date as possible, subject to the right of privileged creditors to ask for a separate appraisal and sale of the property on which they may have privilege. That said property will sell better, if sold for one-third or more cash, and the rest at one and two years' credit for notes of the —, bearing 7 per cent. interest, secured by vendor's privilege and all customary clauses, as petitioners would be willing that the privileged creditors be paid from the cash payment. They prayed that all the real and personal property of the company in New Orleans and Tangipahoa be sold at public auction, and for such orders and decrees as the nature of the case might require and equity will permit.

The following, among others, were placed on the account as preference claims due by the company, and payment of the same was proposed by the receiver to be paid by it as stated therein:

Geo. A. Villere, balance due on his salary (as president) to September 10, 1906	\$236 84
Germania Savings Bank & Trust Company for receiver, 5 per cent. on \$75,400.....	\$3,770 00
Omer Villere, attorney for receiver	\$3,000 00

The receiver proposed to make the following distribution among the preference creditors:

Creamery Package Company.

W. T. Carey & Bro., \$26,000, proceeds of sale of five lots and buildings.	
Their privilege claims, \$7,822.58, less 93 days' liquidated damages as per contract, \$930	\$6,912 58
Of which amount \$1,254.38 are claimed by R. P. Le Sassier, W. R. Irby, Omer Villere, and Octave J. Villere on account of their \$25,000 mortgage note, which bears 7 per cent. interest from 30th May, 1906.	
(1) Balance proceeds of sale of five lots and buildings	18,087 42
(2) Proceeds two vacant lots.	2,000 00
(3) Proceeds of Hammond real estate	3,500 00
(4) Proceeds of sale of agricultural implements and live stock on Hammond farm which was immovable by determination.	1,722 50
Total privilege and mortgage claims	47,039 43
Total disbursements and liabilities.	73,316 84
Leaving a balance on hand.	3,299 84

Which balance of \$3,299.84, or such balance as may be left after trial plus future collections, will be distributed pro rata among the following named ordinary creditors:

W. T. Carey & Bro.	\$5,464 87
C. H. Babst, less \$1,000 to be deducted for defective work	3,100 00
Alfred Raymond	60 00
Sundry creditors (Hammond furnishers of milk as per statement C) annexed to answer of receiver filed November 12, 1906	5,661 60
Sundry creditors as per statement C	1,688 19

On May 1, 1907, the district court rendered the following judgment:

"In this case submitted for adjudication by the receiver, account of date April 19, 1907, for the reasons this day orally assigned by the court, the law and the evidence justifying the judgment. It is ordered, adjudged, and decreed that the account aforesaid be amended as follows:

"First. By striking from the privileged creditors the item George A. Villere, balance due on his salary \$286, and by recognizing said Villere as an ordinary creditor for said sum, to be paid only after all other debts of the New Orleans Pure Milk Company have been satisfied.

"Second. By reducing the item German-American Savings Bank & Trust Company, receiver, from \$3,770 to \$2,613.63.

"Third. By reducing the item J. L. Onorato for sale of real estate from \$823.50 to \$643.50.

"Fourth. By reducing the item Walsh & Weldner Boiler Company, \$1,440.49, so as to allow interest thereon at the rate of 6 per cent. per annum from August 6, 1906, to April 19, 1907.

"Fifth. By recognizing W. T. Carey & Bro. as entitled to the payment of their privileged claim of \$7,842.58 in full, without deduction for demurrage or liquidated damages, but subject to R. P. Le Sassier's claim of \$1,254.58.

"Sixth. By increasing the item balance of proceeds of sale of five lots and buildings out of which it is proposed to pay W. R. Irby, Omer Villere, and O. J. Villere, mortgage creditors, from \$18,087.42 to \$18,157.42.

"Seventh. By increasing the item W. T. Carey & Bro. (ordinary creditors) from \$5,464.87 to \$5,480.12.

"Eighth. By recognizing C. H. Babst as an

ordinary creditor for \$3,100, without deduction for defective work.

"Ninth. By increasing the item Alfred Raymond from \$60 to \$1,350.60.

"Tenth. By placing Andry & Bendernagel on said account as ordinary creditors for the sum of \$2,061.70.

"Eleventh. By placing Antoine & Armstrong on said account as ordinary creditors for the sum of \$158, with 5 per cent. per annum interest from August 9, 1906, to April 19, 1907.

"Twelfth. By striking out the item, 'Sundry Creditors, Hammond furnishers, etc., \$5661.30,' as in case of nonsuit.

"Thirteenth. By striking out the item, 'Sundry Creditors, as per statement C, \$1,688.19,' as in case of nonsuit.

"It is further ordered, adjudged, and decreed that except as hereinabove mentioned all oppositions to the receiver's account be dismissed, costs to be paid by the receivership, and that as amended said account be approved and homologated, and the funds distributed accordingly."

A motion having been made to homologate the account so far as not opposed, the court on the same day, May 1, 1907, approved and homologated the same so far as not opposed.

Application having been made for a new trial, the same was refused. In so refusing, the court assigned the following reasons for so doing:

"First. The appointment of the receiver herein at the request of a stockholder is maintainable under article 2 of section 1 of Act No. 159, p. 312, of 1898.

"The allegation in the petition that the corporation is hopelessly insolvent and unable to pay its debts, that the present condition of affairs does not justify a continuation under the present management, is, in effect, an allegation that the defendant corporation is being mismanaged. The resolution of the board of directors subsequent to the institution of the receivership proceedings, advertising the corporation's insolvency, does not necessarily bring those proceedings within the purview of article 8 of the said section. Besides, it is specially averred that the corporation is mismanaged. The averment need not be in the exact wording of the statute.

"(2) The power to 'manage and administer for the best interests of all parties' does not confer upon a receiver the power to 'conduct the business of the corporation as a going concern.' Such power, under Act 159 of 1898, should be specifically granted by the court. But where a receiver with power only to manage and administer, shortly after his appointment, applies for an order of sale of all the assets in block, under the honest belief and upon informing the court that it is necessary to sell, and that a sale of a going concern would be to the greater advantage of the creditors, and the order of sale is opposed by some creditors, who seek to annul the receiver's appointment and put an end to the receivership, and the receiver, until an order of sale is secured, with the qualified consent of the opponents, runs the corporation as a going concern at a comparatively small loss, keeping the court advised of his gestion by statements filed monthly, and it is not apparent to the court that the receiver's conduct was extravagant, unwise, or in defiance of law, the court will so far ratify his acts as not to charge him with the loss sustained in keeping the corporation going. Am. & Eng. Ency. of Law (2d Ed.) vol. 23, p. 1064, Nos. 3, 5, 7; Atwood v. Knowlson, 91 Ill. App. 265.

"(3) In fixing the receiver's commission, however, the court will not take into account the sums of money handled by him during assumed gestion, but will consider only such sums of

money proposed for distribution as came into his hands under the power of administration and liquidation conferred upon him. Section 6, Act No. 159, p. 314, of 1898, Rev. St. § 1818.

"(4) The act of 1898 assimilates receivers of corporations to syndics of insolvent individuals, so far from there being any inhibition against the selection of a creditor. Rev. St. § 1810. As syndic, the insolvency statutes favors such a selection. A creditor being eligible as syndic or receiver, there can be no objection to the employing as attorney of the insolvency or receivership an attorney who is himself a creditor.

"(5) Counsel's fees will be allowed though the employment of counsel was not authorized by an order of court when such employment was necessary. There is nothing in the act of 1898 requiring an authorization of the receiver to retain an attorney.

"(6) In fixing the fee of such attorney, both the amount to be distributed and the extent of the services rendered must be considered.

"(7) Cows, live stock, and agricultural implements used in the cultivation (exploitation in French) of a dairy farm are immovables by destination. Civ. Code, art. 468; Fuzier-Herman, art. 524, Nos. 1, 2, 3, 4 and 5; Id. Supplement, art. 524, No. 16; Aubry and Rau, vol. 1, No. 2219; Demolombe, vol. 9, No. 238.

"(8) The auctioneer's charges in a receivership sale are regulated by the tariff provided by section 160 of the Revised Statutes. Succession of Rabasse, 51 La. Ann. 590, 25 South. 326.

"(9) The mortgage creditors are entitled to show by parol the true consideration for and the circumstances under which the mortgage is executed.

"(10) The \$25,000 mortgage note was pledged by defendant to the indorser on its demand note for a like amount, and was by them in turn pledged to the German-American Bank to secure the loan made by it to them for account of the defendant company on the aforesaid demand note. Upon paying the demand note the indorsers became subrogated to the bank's rights in the mortgage note, or rather resumed their rights as original pledgees thereof. Rev. Civ. Code, arts. 3291, 3293; Collins v. Creditors, 18 La. Ann. 235; Brander v. Bowmar, 16 La. 370; Pickersgill & Co. v. Brown, 7 La. Ann. 297; Rev. Civ. Code, art. 2161; Millaudon v. Colla, 15 La. 214; Duchamp v. Dantilly, 9 La. Ann. 247; Seixas v. Gonsoulin, 40 La. Ann. 351, 4 South. 453; Woodward v. R. Co., 39 La. Ann. 566, 2 South. 413.

"(11) At the time that the mortgage note was executed, the mortgage creditors were not directors of the defendant corporation, but if they had been, inasmuch as there was no fraud or collusion in securing the mortgage, and its proceeds, together with the price of the additional stock subscribed by them at the time of its execution, were used in paying the contractors and other creditors, their rights would not have been impaired. Standard Cotton Seed Oil Co. v. Excelsior Refining Co., 108 La. 74, 32 South. 221.

"(12) By agreeing to accept stock in payment of their services, the creditors impliedly waived the privilege accorded to them by law, but they did not waive their right to payment, and, the stock not having been tendered, they are entitled to recognition as ordinary creditors in the sums claimed.

"(13) The registry of the contract between Carey & Bro. and the corporation preserved the former's privilege as against third persons to the extent only of the amount contracted for. Extra items thereafter stipulated for constituted new contracts requiring special registry. They were recorded too late. Rev. Civ. Code, arts. 3272, 3274.

"(14) The evidence does not justify the deduction of demurrage under the Carey & Bro. contract.

"(15) No evidence other than that already made by the supervising architects for defective work can be allowed on the Babst claim, but it is not privileged because it was not recorded in time. The duly attested detailed statement of the amount due, dated August 2d, was not recorded until October 1, 1906.

"(16) The salary of officers cannot be paid until all other debts of the corporation have been satisfied. Cotton Seed Oil Company v. Refining Company, 108 La. 78, 32 South. 221.

"(17) Interest when claimed is due on all debts of the corporation up to the date of the filing of the account and tableaux of the distribution. Zeigler v. Creditors, 49 La. Ann. 158, 21 South. 666; Oil Co. v. Refining Co., 108 La. 78, 32 South. 221.

"(18) There is no proof of the items 'Hammond milk furnishers' and 'sundry creditors' as per statement G. The receiver's affidavit to the account is only to the best of his knowledge and belief, and was not offered in evidence.

"I adhere to those conclusions, and decline to reopen this matter at the instance of the Hammond milk furnishers. The account had been filed and published since April 19, 1907. They had ample time to prepare for trial and meet the opposition.

"The new trial prayed for is refused."

Carey & Bro.'s opposition was based upon their claim that they were privileged creditors of the pure milk company for the sum of \$13,323.70, based upon two contracts dated January 6 and January 10, 1906, by which they agreed to furnish all the material and complete a building on certain property of the company, described in the contracts, situated in the city of New Orleans, under specifications and plans and addenda specifications, for the price of \$23,350, which were recorded in the parish of Orleans on January 6 and February 10, 1906.

They allege that said contracts contemplated additions, changes, and modifications, and a great amount of work was done by them under said contracts, said work amounting to \$3,581, as appearing by itemized statements, duly approved by the architect, which were duly recorded in the mortgage office on the — day of —, after being duly sworn to.

That they received their completion or final certificate as provided for in the contracts on September 20, 1906, and same showed a balance of \$7,842.58, which final certificate was sworn to and recorded in the mortgage office of Orleans parish on the — day of —.

That they did further work as aforesaid, under the direct order of the president, to an amount of \$1,577.44, as appeared by a detailed statement annexed to their petition, which was duly recorded in the parish of Orleans on the — day of —. They averred that they had a lien on the buildings and on the lots upon which the buildings were erected. They alleged that the receiver of the pure milk company had recognized them as a privileged creditor for the sum of \$7,842.50, less a deduction of \$980 for alleged liquidated damages, and as ordinary creditors for \$5,654.87. They opposed the receiver's account, and denied any

liability to the milk company for the liquidated damages attempted to be deducted.

They alleged that extra work was given to opponents under the terms and conditions of the contract; that the same exceeded \$9,000, increasing the original contract by 33½ per cent.; that under one of the clauses of the contract it was stipulated that the owner reserved the right to make any modification to the plans and specifications that it might deem necessary; that under this clause in the original contract they did all the work specified in detail in statements dated September 21st annexed to their original petition amounting to \$7,284.75.

That they received by way of payments and credits on said extra bill \$3,695, leaving due and imposed \$3,559.75.

That all said extra work was done under the original contract, was recorded in the mortgage office of the parish of Orleans within one week from its date, to wit, on January 9, 1906, before the work was started; that opponent had a lien and privilege on the building erected by it, and on the lot on which it was erected, and on the proceeds of sale of same then in the hands of the receiver to the full amount of the balance due it under the original contract, \$7,842, plus the balance due it for charges under the original contract, to wit, \$3,581.71, or a total of \$11,452.29.

That the recording of opponent's contract within one week of its date, and before any work was started, gave opponent a lien and privilege on the building and lot, not only for the amount of the contract, but for all extra work done under the provisions of the contract, and that said lien and privilege primes and takes preference over all other creditors. That under the terms of the original contract they did further work for the amount of \$377.44 and \$1,512.97. Therefore opponents should be put down upon said account as a privileged creditor for the amount of \$13,322.70.

They averred that the separate statement referred to by them had also been recorded for greater security on the mortgage book on October 1, 1906.

Opponents further opposed the placing of W. R. Irby, Omer Villere, and Octave J. Villere on the account as mortgage creditors in the sum of \$75,000. They denied that the mortgage note was ever issued, or, if issued, that the mortgage granted with it gave them any priority or preference over opponents' claim; opponents alleging that said parties did not become creditors of the pure milk company until subsequent to the recording of opponents' lien and privilege in the mortgage office.

They specially opposed said item as a privileged claim against the proceeds of the sale of the property therein described, and particularly in the interest of Octave J. Villere as a mortgage creditor, he being the peti-

tioning creditor for a receiver for the defendant company upon the ground that a stockholder cannot secure a privilege within three months of the insolvency of a corporation, superior to contractors, material furnishers, etc., furnishing materials and labor in the erection of the building.

Opponents further opposed the account of George A. Villere, \$284.84; A. J. Villere, notary, \$100; German-American Savings Bank & Trust Company, \$3,770; Omer Villere, attorney for receiver, \$3,000—on the ground that said amounts are not due, or, if due, they were excessive.

They averred that there was no prayer asking that the milk company be run as a going concern, and there was no order of court authorizing such extraordinary procedure; but nevertheless the receiver did undertake to run said corporation as a going concern at a loss, and he should not be allowed a credit for such disbursements made by him or for the loss sustained in the operation of the business.

They opposed specially the allowance of \$3,770 upon the ground that, if the receiver was authorized to run said corporation as a going concern, his compensation should not exceed \$100 a month, as the corporation is charged with all the expenses of management, and the receivership was merely supervisory, and under the statute (section 6 of Act 159 of 1898) his compensation is not a fixed percentage, but must be "such reasonable sum as the nature of the case justifies." They prayed that they be placed on the account as privileged creditors for \$13,320.70, and that the various items opposed by them be stricken from the account.

Charles J. Babst opposed the account, claiming to be a privileged creditor of the pure milk company for the sum of \$3,100 upon the building erected for the company, upon its property, and upon the lots on which said building was erected, for materials furnished and delivered, as the whole appeared by a detailed statement of account, which it annexed duly approved by the architect, which had been duly sworn to and recorded in the mortgage book of the parish of Orleans.

It opposed any deduction being made from the amount of the same, asserting that such deduction was neither just nor well founded. He opposed each and every disbursement of the receiver, and opposed its taking credit for the amount lost in operating the business. He opposed the same items on the account which Carey & Bro. opposed, and on the same ground.

Octave J. Villere, alleging that he was an ordinary creditor of the milk company for the surplus of interest due on the \$25,000 mortgage note, of which he was a one-third owner, opposed the account as to the following items placed thereon:

Creamery Package Manufacturing Com-

pany, for \$1,500; Creamery Package Manufacturing Company, \$2,400; W. T. Carey & Bro., \$6,912—on the ground that the same are not due, and that they have no privilege.

Octave J. Villere, Omer Villere, and W. R. Irby, claiming that through an error of calculation they had been placed on the account as preference creditors for \$18,087.42, instead of \$19,087.42, as they should have been, prayed that the account be amended by correcting the error.

Carey & Bro., Charles J. Babst, Omer Villere, Octave J. Villere, W. R. Irby, the German-American Savings Bank & Trust Company (receiver), and the creditors appearing on the account as sundry creditors, Hammond furnishers of milk, whose claims were by the court disallowed, as of nonsuit, appealed.

The question as to whether the district judge should have acted upon the application of O. J. Villere to have the pure milk company placed under receivership, for the assigned reasons that O. J. Villere was not a creditor of the company at that time, and the application should have been rejected as not having been presented under the conditions and circumstances required by law, is not, we think, properly before us, nor is that for the removal of the German-American Savings Bank & Trust Company as receiver. The property of the company has been sold with the consent of all parties; the receiver has filed a provisional account; and the case is before us on opposition to the account and contest over the distribution of the proceeds of the sale.

Were that question before us—and the fact was that at the time of his application O. J. Villere was simply an indorser who had not as yet paid the note upon which he was an indorser—we are not prepared to say that he would not have been authorized, under article 2042 of the Revised Civil Code, to take all steps conservatory of his interests.

Appellants urge that the receiver is entitled to no commissions, for the reason that no order of court was asked or granted to him to run the business of the company as a going concern; that its management of the receivership was arbitrary in the extreme, and disregarded and ignored in every way the protests of the largest creditors in interest; that the receiver ran the business as a going concern, without specific order of court, at a loss, and in its accounts now attempts to shoulder the loss on the creditors; that the receiver was notified by direct suit and action of the creditors immediately after its appointment of the illegality of that appointment.

The German-American Savings Bank & Trust Company did not institute the proceedings asking for the placing of the company under a receiver, nor seek the appointment as such. It was appointed by the court without solicitation from it. Having ac-

cepted the appointment and qualified, it was its right and duty to continue to act as such until relieved from the trust. It was justified in believing that the action of the court was legal and proper unless and until that action was set aside. In making the appointment, the court did not specifically authorize the receiver to carry on the company as a running concern, but it "authorized it to administer and manage its affairs for the best interest of all parties."

The receiver, very shortly after its appointment, recognized the fact that the company could not continue operations under the conditions in which it was placed, and that it was necessary as soon as practicable to sell all of its property, and it accordingly made application for an order of sale. It was of opinion that when that sale was made the company should have retained its customers, so that the purchaser at the sale could at once commence business with an established clientele.

Construing the order appointing it as authorizing it so to do, the receiver continued the operations of the company, though on a reduced scale, until the sale asked for. The business as so carried on resulted in a loss of \$704. The court declared in its opinion, subsequently rendered, that its order did not warrant this temporary carrying on of the operation of the company as had been done; that for such purpose the order should have granted that authority in precise and exact words. So holding, it refused to allow the receiver commissions upon the moneys which went into its hands through such administration, which was dehors the functions of the receiver in this particular case. It refused, however, to accede to the demand of the opposing creditors to forfeit the entire commissions as asked.

We think the judge's action was legal and correct in both respects. The court refused to charge up to the receiver itself the loss of \$704 incurred by the receiver in its temporary carrying on of the operations of the company, and made the mass of creditors bear that loss.

We think the court erred in that respect. The administration, so far as that portion of the same is concerned, being dehors the legal functions of the receiver, the loss in question should not be made to be borne by the mass of creditors, but should be made to be borne by the receiver, and that amount deducted from the commissions awarded in the judgment appealed from.

Opponents insist that their attorney who conducted these proceedings is entitled to no fee whatever for his services, as in the proceedings he acted in his own behalf and also in behalf of O. J. Villere and W. R. Irby. It has never been the practice in this state in insolvency proceedings or proceedings under receiverships for the receiver to ask leave of the court to employ an attor-

ney or to give its sanction to the employment of any particular person. The right to obtain the services of counsel and to select the counsel has always been recognized as matters of right. Should there be objections on the part of creditors for legal reasons, those objections should be made at once on the grounds stated. The fact that the attorney selected or others who employ him may have personal interests in the administration is not good ground for his exclusion by the receiver from employing him as his counsel. That fact, however, affects the amount of his fee. To the extent that his services inured to the benefit of the mass of creditors, they should be paid. We think the attorney in this instance is entitled to a fee of \$1,000.

Carey & Bro. claimed that:

"They are entitled to be classed in the account as privileged creditors for the full amount of their recorded contract."

In their brief on their behalf, counsel say:

"W. T. Carey & Bro. contracted with the New Orleans Pure Milk Company by notarial act on the 6th of January, 1906, to erect a building in this city according to plans and specifications of Andry & Bendernagel, architects. The contract price was \$28,350. The contract provided in its third article that while the work is being done if it should be deemed necessary, advantageous, or convenient to make any modifications in said plans and specifications, or both, the value of such modifications shall be added to or deducted from (as the case may be) the original amount of this contract as herein specified, provided that both contracting parties shall agree beforehand and in writing upon the modifications to be made, and upon the time necessary to make such modifications, and upon the value of the same. The evidence establishes that extra work was done to an amount upon which they have received payments, leaving a balance of \$5,489.12 which is covered by privilege in their favor. The building contract was recorded on January 9, 1906, three days after. Omer Villere, Octave J. Villere, and W. R. Irby claim preference over Carey & Bro. and also over Charles Babst by reason of a special mortgage granted by act executed on June 2, 1906, by the pure milk company. The district judge held that Carey & Bro. had a privilege which ranked this mortgage for the balance due them under the contract, but had no privilege for what it termed the amount of extra work performed by them. The court erred in that respect. The building contract was to erect the building for \$28,350, but it was distinctly provided that the value of any modifications should be added to the original amount of the contract.

"Carey & Bro. by the immediate registry of their agreement obtained a lien or privilege not only for the \$28,350 stipulated as the contract price, but as well for any increased sum due to modifications in the design of the building between the parties. Carey & Bro. recorded their sworn detailed statements for the balance due them under this contract on October 1, 1906. The court erred when it held that the modifications in this building were contracts which had to be recorded within a given time, otherwise the contractor loses his lien or privilege against a subsequent mortgage. The modifications contemplated in the contract do not form new contracts, but as expressed in the body of the original contract, the value of such contracts should be added to the original amount of the contract. The court lost sight of the fact that there is a clear distinction between the contract of the par-

ties, the recording of which gives a privilege, and the recordation of a sworn claim; both give privilege. Carey & Bro.'s claim for extras was apparently approved September 21, 1906, and affidavit not recorded until October 1, 1906. The original contract, however, specifically authorized change and modifications, and the contract recorded in the mortgage book on January, 1906, prior to the mortgage of June 2, 1906, preserved a lien and privilege on that building and the lot of ground for all extra work done thereunder without the necessity of any further recordation of claims for extra work."

Carey & Bro. urge, independently of the question of the registry:

"That the holders of the note cannot compete with them, for the reason that they are not third parties."

They say that:

"Omer Villere and Octave J. Villere were directors of the pure milk company, and became such directors 10 days after the act of mortgage under which they are claiming superior rights, and are not 'third parties in contemplation of law.'

"The fact that they became directors after the date of the mortgage does not affect the case. As directors, the proceeds of the mortgage were under their control."

Carey & Bro. finally take the position that Omer Villere, Octave J. Villere, and W. R. Irby are not mortgage creditors at all. Counsel say:

"The evidence in the record shows that a resolution of May 19th authorized the president to negotiate a loan of \$25,000, and to secure the lender by a mortgage on the property of the corporation. On June 19th we see by reference to the minute book that Mr. George A. Villere made a written report, reading:

"As per authority conferred on me by the board of directors at its meeting of May 19th, 1906, I have signed a mortgage note for \$25,000 secured by two acts of mortgage on all the company's real estate here and in Hammond, and with said mortgage as security and the endorsement of W. R. Irby, Omer Villere, O. J. Villere and W. Voorhies, I have borrowed \$25,000 from the German-American National Bank."

"The testimony of Mr. Omer Villere and Mr. George Villere is irreconcilably in conflict with the minutes of the corporation and with Mr. George A. Villere's report of his transaction concerning the loan. The evidence of Mr. Omer Villere and Mr. George A. Villere shows that this was not the transaction. Mr. Omer Villere admits that the act of mortgage was made before him as notary public on the 2d of June, 1906, and that he immediately took possession of same, and that he pledged it to the German-American National Bank to secure the indorsement of himself, W. R. Irby, O. J. Villere, and others.

"Mr. Le Breton testifies that he loaned the money upon the indorsement of these gentlemen, and that the mortgage note was not pledged to him for the money.

"The evidence shows that these indorsers did not pay the demand note of the pure milk company until November 8, 1906, more than 33 days after the recording of the detailed statements by Carey & Bro. and Charles J. Babst.

"They have no greater rights than the German-American Bank. The German-American Bank never at any time held this mortgage note in pledge to secure the demand note of the pure milk company, but only to secure the indorsements; in other words, the note was never pledged to the bank by Mr. Villere (George) as

president nor by the pure milk company; in other words, there never was any lawful issue or pledge of this note.

"In a contest, therefore, between the holders of such a note and material furnishers who have recorded their liens and privileges prior to the acquisition of this note by said holders, the lien and privilege of the material furnishers must prevail."

On May 19, 1906, at a meeting of the board of directors of the pure milk company, the following resolution was adopted:

"That Mr. George A. Villere, president of the company, be authorized and empowered to negotiate a loan of twenty-five thousand dollars (\$25,000) to the company with such person as he should see fit, said loan to be secured by such security on the property of the company as the lender might desire."

On June 19th, George A. Villere, president of the company, made his report to the company as to what he had done under the resolution, as has been stated, and on the same day the board passed the following resolution:

"The president having reported that he had negotiated a loan to this company of twenty-five thousand dollars, and had executed, to secure the same, two acts of mortgage, one on the real estate of this company situated in this city, and the other on the real estate situated in Tangipahoa parish, said mortgage having been required by the lender—on motion, duly seconded, the action of the president in executing said two acts of mortgages is hereby confirmed and ratified."

Mr. Le Breton was the officer of the German-American National Bank who made the loan of the \$25,000 to the pure milk company. He testified that the president wanted the bank to loan the money secured by a first mortgage on the building; that he declined to lend on those terms, but said the bank would be willing to advance the money provided that the bank was covered by the indorsement or guaranty of the most important stockholders.

"We had in view Mr. Omer Villere, Mr. George A. Villere, Mr. Irby, and Mr. O. J. Villere. After consulting between them, they said they would negotiate it, and asked me to fix the matter. They drew the mortgage for \$25,000, with a mortgage note issued, and made a demand or pledge note, secured by a mortgage of \$25,000, on which they indorsed their names on the back, which means according to the act of 1904, that they were responsible for the mortgage and we looked to them for the money; not taking into consideration the mortgage when the company went into the hands of a receiver. Mr. Irby, Mr. Omer Villere, and Mr. Octave Villere paid that note in full, and we turned it over with the collateral note with the mortgage note."

Octave J. Villere testified that, on the same day the receiver was appointed, the bank made a demand on the pure milk company to pay the note.

"They acknowledged they could not pay it, and then demand was made on me to pay it, and I said we would pay it, and the bank held it until we paid it for our account. About the

time the mortgage note was given the bank needed money—\$40,000—the bank would not lend it, and agreed to lend \$25,000 provided we would indorse the notes if we would subscribe—five of us—\$15,000 more of stock, which was made up by Mr. Irby, Omer Villere, Mr. Voorhies, and myself (O. J. Villere), of which amount he (O. J. Villere) took \$5,000, Mr. Irby \$3,500, Omer Villere \$3,500, and Mr. Voorhies \$3,000. He was not a director when he indorsed that note. I always understood that the money was loaned on account of our indorsement. They insisted on our indorsing the note. He understood from that the bank would not lend the money unless we indorsed the note. He was not deriving any benefit from indorsing the note; he was only creditor of the pure milk company as indorser on the note."

Omer Villere testified that he was the person who negotiated the \$25,000 loan; that he tried to get the German-American Bank to take the bonds of the pure milk company secured by mortgage on its property.

"Mr. Le Breton, acting for the bank, said: 'Well, I can arrange it for you. We are not going to loan to the New Orleans Pure Milk Co.; the bank will loan you (the parties who indorsed the note), and we are going to look to you.' We (the indorsers) were the three persons financially responsible. Le Breton said, 'You will have to take a mortgage from the pure milk company, and we will make a note then in order to facilitate matters, and rather than have you all put out your personal note borrowing the money from the bank, we will make a note of twenty-five thousand dollars signed by the pure milk company; you will indorse it, and you will take the mortgage and give the bank the mortgage in pledge.' The mortgage was ours (Irby's, Octave Villere's, and myself). That mortgage we deposited with the bank. We always considered and recognized that we owed that money to the bank. (Mr. Irby, Mr. Octave Villere, and himself.) When the demand for payment of the note was made, he (Omer Villere) was not in New Orleans; he got there the next day, and took charge of the receivership; he told Mr. Le Breton and Mr. Irby of course he was responsible; he had always been responsible; and he told Mr. Le Breton to hold the note for a few days and he would give him his check. He recognized his obligation as dating from the date of the note on the 2d of June, and he had paid his share of the note. He had taken originally \$5,000 of stock in the company, and at the time the note was negotiated he took \$3,500 more. Mr. Irby took \$3,500. The distinct understanding at the time with Mr. Irby and Mr. Le Breton was that we were to be personally responsible for that money; that the money was being advanced, and that the bank would look to Octave Villere, Irby, and himself (Omer Villere). Mr. George A. Villere and Mr. Voorhies were also made to sign the note, but it was well understood that Irby, Octave J. Villere, and Omer Villere were each responsible for one-third of the note. When it was found that the milk company could not pay, and demand of payment was made, Irby, Octave J. Villere, and himself (Omer Villere) each paid one-third of the note. The pure milk company did not deliver the mortgage note to the bank. He (Omer Villere) took possession of the mortgage as the representative of the mortgagees; he gave it to the bank to secure their indorsement. That mortgage was not given by the pure milk company to the bank; it was given to Irby, Octave J. Villere, and himself (Omer Villere). They were the owners of the mortgage note from the time it was issued, and they gave it to the bank to secure the conditional

obligation they had assumed to pay for that note. The mortgage note was delivered to the bank, because it had been agreed with the bank that that money was virtually loaned to them, and they were to take the mortgage from the company and were to give the mortgage note to secure their indorsement. The mortgage note was given under that resolution authorizing Mr. Villere, Octave J. Villere, Mr. Irby, and himself (Omer Villere), who virtually made that loan. The bank agreed to lend that money to Irby, Octave J. Villere and himself (Omer Villere). The latter took this mortgage to guarantee themselves under the resolution of the company, and then they gave the mortgage note to the bank to secure their obligations to the bank—their unconditional obligations, but they owed the money from the beginning. They understood the note was pledged (given) by the company to them, and they gave it to the bank to secure their obligations. Mr. George Villere, as president of the company, issued that note to Irby, Octave J. Villere to retain as security for the money which the bank had agreed to lend them and which they had agreed to lend to the company. The understanding was that the bank should advance the money to Octave J. Villere, Omer Villere, and Irby, and they were to turn it over to the pure milk company with the understanding on the part of the bank that the mortgage note would go to it to secure the indebtedness. The bank, though virtually making a transaction with Octave J. Villere, Omer Villere, and Irby, wanted some security from them."

The German-American Bank, just before the pure milk company went into the hands of the receiver, was a creditor of that company for \$25,000. It was then the holder and owner of a note for that amount executed by that company, which note the bank held under the indorsement thereof of Ratliff Irby, Octave J. Villere, and Omer Villere, and which note was secured as to payment not only by the personal indebtedness of the maker and indorsers, but through the collateral suretyship of a special mortgage executed by the pure milk company on its real property to secure the payment of \$25,000, with interest, which mortgage was executed to secure payment of a loan of money to that amount which the company was seeking to obtain. The company obtained that amount of money by a loan made to it, and became obligated for repayment of the same by mortgage. The company not paying the loan at maturity, it was paid by the indorsers. The effect of that payment was to leave the company indebted to them for the amount of the note secured as to payment by a special mortgage dated back to the date of the note.

That result followed whether the indorsers be considered as the direct original lenders of the money loaned to the company out of their own moneys, or whether they obtained the money for the company through their personal responsibility as indorsers, supported by the mortgage executed to secure the repayment of the money borrowed. The proposition that Omer Villere, O. J. Villere, and Ratliff Irby acquired no mortgage rights whatever by reason of the loan made to the pure milk company is not tenable.

The contention of appellants that stockholders of a corporation cannot be granted a mortgage to secure an indebtedness due to them to the prejudice of creditors of the corporation—that stockholders must, so far as debts due to them are concerned, stand in the background until all the creditors not stockholders are paid—is not correct as a general proposition. It may be true under some circumstances, and not so under others. We do not think the facts of this case would justify its application here. It is not claimed that the board of directors were without power or authority to have borrowed from the German-American Bank \$25,000, at the time of the execution of the special mortgage referred to, and to have secured to the bank through that mortgage the sum borrowed. Had the bank not been paid by Omer Villere, Octave J. Villere, and R. W. Irby the amount due to it by the pure milk company, we have no reason to suppose that its claims as a creditor would have been attacked; matters (so far as other creditors are concerned) would, under such circumstances, stand precisely as they do now. What seems to draw upon it the censure and attack of the opponents is that the claim is presented, not as one due to the bank, but as one due to these particular stockholders.

We do not think they occupy any worse position than the German-American Bank would occupy were it before the court claiming the benefit resulting from its position as a mortgaged creditor.

In the case of the Cotton Seed Oil Co. v. Refining Co., 108 La. 74, 32 South. 221, this court quoted approvingly an extract from Clark & Marshall, Private Corporations, vol. 2, § 534, to the effect that stockholders may lend money to a corporation and take a mortgage to secure the loan, and in the absence of fraud he has the same right under such a contract as a stranger would. It also quoted as follows from Thompson's Commentaries on the Law of Corporations, vol. 3, p. 2968, § 4068:

"The strict rule that directors cannot enter into contracts with the corporation does not seem practicable. It would operate to disable those who have already embarked their funds in a corporate enterprise, and given to it their personal attention, from assisting it in time of difficulty, except at the risk of doing so without security. A corporation might be in a sorry plight, indeed, if one who had already embarked his funds in it, and who, from the fact of his being one of its managers, is best acquainted with its needs and difficulties, should not be able to make a present advance of money to help it out of those difficulties. That it is necessary for the law to throw around such transactions the strongest safeguards in order to prevent fraud need not be argued. Nor shall it be forgotten that the right of directors of an insolvent corporation to take security for past advances, thereby preferring themselves over other creditors, stands on quite a different footing. We therefore find the prevailing doctrine to be that the director of a corporation may advance money to it, may become its creditor, may take from

it a mortgage or other security, and may enforce same like any other creditor, but always subject to severe scrutiny, and under the obligation of acting in the utmost good faith."

The decision copies numerous extracts on the same subject-matter.

The particular parties whose claims to a mortgage are contested did not cause to be executed a special mortgage in favor of themselves to secure a past-due debt; the mortgage was granted to secure the payment of a loan of money which the company was seeking to obtain. The parties now holding the mortgage went to the assistance of the company in obtaining that loan, and simultaneously, or just before doing so, sought still further to assist it by taking additional stock to the amount of \$15,000. Carey & Bro., in throwing blame upon the special mortgagees for not holding a privilege for their extra work, ignore the fact that they would and could have secured that privilege had they themselves complied with the law.

We think the judgment of the district court refusing to recognize a privilege as ever existing in favor of Carey & Bro. for the extra work done by them is correct. It is true that there were stipulations made in the building contract in respect to extra work to be done, but the amount or value of the extra work to be done was not fixed and stated therein. We think the issue as to the existence of a privilege for extra work is governed by the decision in *First Municipality v. Hall*, 2 La. Ann. 549. See, also, *Murray v. Sweeney*, 48 La. Ann. 763, 19 South. 753.

We think the judgment of the court as to the right of Charles J. Babst to a privilege is correct—proper steps were not taken by him to sustain the privilege claimed.

Andry & Bendernagel not being placed on the provisional account, an opposition was filed in which they claimed to be creditors of the pure milk company for \$2,061.70 for services as architects of the building erected by the company, and to have a privilege on the building and lot.

They averred that by their contract they were to be paid for their services, during the life of the company as a going concern, in stock at its market value, as said services were performed; that although such services were rendered the stock was never issued nor delivered; that the company by its acts of maladministration had gone into the hands of a receiver, and was unable to comply with its obligations and make payment in stock, while the company was a going concern.

It was admitted on the trial that the bill for services was correct, and that the situation was such that it could be computed and presented prior to the time it was—September 28, 1906. The president of the company

testified that the understanding was that the stock was to be taken at its par value of \$100 a share.

On the trial, the court placed them on the account, but without a privilege. It is objected that they are not entitled to a judgment for the reason that the company having virtually failed—they never received the stock—that had such stock been received it would be worthless, as was all the stock of all stockholders who had paid cash for their stock.

Alfred Raymond occupies the same position as Andry & Bendernagel. He was the consulting engineer in the construction of the building of the company, and had consented to take stock in payment of his services. This stock was never issued nor delivered to him. We think the court erred in ordering Alfred Raymond to be placed on the account as an ordinary creditor for \$1,850.50, and by ordering Andry & Bendernagel to be placed as ordinary creditors for \$2,060.70.

We think that neither Raymond nor Andry & Bendernagel have claims against the pure milk company as creditors. Whatever legal rights they may have in the premises are such as will belong to them as holders of the stock which they consented to take, and which the company contracted and consented to issue to them for and in consideration of their services.

It is not claimed that they made any demand for stock. Had the placing of the company in the hands of a receiver been delayed for a few days and the stock been issued to them, it would to-day be worthless in their hands; they occupy no better position now than they would have occupied had this been the case. The placing of the company in the hands of a receiver did not have as its result the placing of those parties before the court as creditors. *Wehre v. Beltran*, 47 La. Ann. 201, 16 South. 860.

We see no reason for disturbing the action of the court in rendering a judgment of nonsuit upon the item of the account headed "Sundry Creditors (Hammond furnishers of milk)."

The Walsh & Weldner Boiler Company, which obtained a judgment in its favor, and the partnership of Antoine & Armstrong, which obtained a judgment in its favor of the district court alleging that the court did not accord them the full relief to which they were entitled, have asked in this court that the judgments in their favor be amended, but they have not appealed. They should have done so. We can afford them no relief.

For the reasons herein assigned, it is hereby ordered, adjudged, and decreed that the judgment appealed from, in so far as it made the mass of creditors bear the loss of \$704, incurred by the receiver in carrying on the operations of the New Orleans Pure Milk

Company from the time it went into the hands of the receiver up to the date of the sale of the real estate belonging to the company, be, and the same is, annulled, avoided, and reversed; and it is hereby ordered, adjudged, and decreed that said loss be borne by the receiver, and that said amount be deducted from the amount of the commissions awarded to the receiver by the judgment appealed from. It is further ordered, adjudged, and decreed that the sum of \$3,000 awarded to Omer Villere for his fee as attorney herein be, and the same is hereby, reduced to \$1,000. It is further ordered, adjudged, and decreed that the decree recognizing Alfred Raymond as an ordinary creditor of the New Orleans Pure Milk Company, Limited, for the sum of \$1,350.50, and ordering him to be placed on the receiver's account for said amount as such, be, and the same is, set aside, annulled, avoided, and reversed.

It is further ordered, adjudged, and decreed that the decree recognizing Andry & Bendernagel as ordinary creditors of the New Orleans Pure Milk Company, Limited, for the sum of \$2,060.70, and ordering them placed on the receiver's account as such for said amount, be set aside, annulled, avoided, and reversed. It is further ordered, adjudg-

ed, and decreed that the application of the Walsh & Weldner Boiler Company and the partnership of Antoine & Armstrong for relief under their prayer for an amendment of judgment are not properly before the court for consideration. It is further ordered, adjudged, and decreed that the judgment appealed from, as so altered and amended, be, and the same is hereby, affirmed.

(122 La. 755)

No. 17,206.

BASS v. KULLMAN.

(Supreme Court of Louisiana. Jan. 4, 1909.)

Appeal from Tenth Judicial District Court, Parish of Tensas; John Stirling Boatner, Judge.

Action by Jennie K. Bass against Michael Kullman. Judgment for defendant, and plaintiff appeals. Affirmed.

Edgar Howard Farrar and Samuel Lucius Elam, for appellant. Young & Young, for appellee.

LAND, J. Pursuant to the joint motion of counsel, filed herein on the 30th day of December, 1908:

It is ordered, adjudged, and decreed that the judgment of the lower court, confirming the title of the defendants and their warrantors to the W. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 24, township 10, range 10, be affirmed, and that plaintiff pay the costs of this appeal.

(94 Miss. 566)

HOWELL et al. v. HILL et al. (No. 13,684.)
(Supreme Court of Mississippi. Jan. 18, 1909.)

1. HOMESTEAD (§ 118*)—CONVEYANCES—SUFFICIENCY.

A deed to a homestead is not void because the wife signed it eight months after the husband did, where both signed in furtherance of an intention to which there was a common and contemporaneous assent.

[Ed. Note.—For other cases, see Homestead, Dec. Dig. § 118.*]

2. VENDOR AND PURCHASER (§ 261*) — VENDOR'S LIEN—RIGHTS OF JUNIOR GRANTEE—"RIGHT OR ESTATE IN THE LANDS."

The right of a vendor to subject the land to the payment of the purchase money is not a "right or estate in the lands," within Ann. Code 1892, § 2444, providing that conveyances purporting to convey a greater estate than the grantor has shall convey as much of the right and estate as he could lawfully convey, etc., the vendor's interest passing to the personal representatives of a deceased, and the statute did not make a conveyance to defendants after their grantors had conveyed to another pass the grantors' claim against such prior grantee for unpaid purchase money.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 675; Dec. Dig. § 261.*]

Appeal from Chancery Court, Yalobusha County; I. T. Blount, Chancellor.

Action by W. W. Hill and others against W. B. Howell and another. From a judgment for complainants, defendants appeal. Affirmed.

This was a suit for possession of land and cancellation of the claim of appellants as a cloud on the title of appellees. The land in controversy had been the homestead of E. Bardwell and wife. They executed a deed to their son, W. W. Bardwell, through whom appellees claim title. This deed was signed in September, 1904, by E. Bardwell, and properly acknowledged. Mrs. Elizabeth Bardwell, his wife, signed and acknowledged the deed in May, 1905. Each signed and acknowledged with the consent of the other, and the deed was properly recorded. In the fall of 1905 W. W. Bardwell, not having paid any part of the purchase money, gave back this deed to E. Bardwell; appellants contending that it was done in the belief that this amounted to a reconveyance to E. Bardwell. W. W. Bardwell, however, denies that this was his intention, but that he gave the deed into the keeping of his parents with the understanding that the property would revert to him. In February, 1906, E. Bardwell and wife executed a deed to appellants, Howell and wife, the consideration being for love and affection, and under this deed they assert claim of title to the land in controversy. In 1907 W. W. Bardwell executed a deed to appellees, Hill and others, for a consideration of \$400. Thereafter they brought this suit. The defense set up by the appellants is that the deed from E. Bardwell and wife to W. W. Bardwell was void, because it lacked contemporaneous assent of hus-

band and wife in its execution; next, that, even if the above deed was valid, appellees were estopped to assert title against appellants because of full knowledge and notice of the true facts of the case. They further contend that under their deed from E. Bardwell and wife they took at least the interest of their grantors in the land—that is, a claim for \$400 purchase money—and therefore retained a claim for this unpaid purchase price, since all parties to the suit were fully acquainted with the fact that the purchase money had never been paid. They base their contention upon section 2444 of the Code of 1892, which is as follows: "All alienations and warranties of lands purporting to convey or pass a greater estate than the grantor may lawfully convey or pass, shall operate as alienations or warranties of so much of the right and estate in such lands as the grantor could lawfully convey, but shall not pass or bar the right to the residue of the estate purporting to be conveyed; nor shall the alienation of any particular estate on which a remainder may depend, whether such alienation be by will or other writing, nor the union of such particular estate with the inheritance, by purchase or by descent, so operate, by merger or otherwise, as to defeat, impair, or in any way affect such remainder." From a judgment for complainants, defendants appeal.

Creekmore & Stone, for appellants. A. T. Smith, for appellees.

FLETCHER, J. While it is true that the husband signed and acknowledged the deed conveying the homestead in September, and the wife's signature and acknowledgment bear date of the May following, yet both signed the same instrument in furtherance of an intention to which there was manifestly a common and contemporaneous assent. This case is totally unlike *Duncan v. Moore*, 67 Miss. 136, 7 South. 221, in which case the alleged assent of the wife was evidenced by a separate deed of conveyance, executed by the wife subsequent to the husband's deed, and made without the husband's consent. In the case before us the wife signed with the full knowledge and consent of the husband, and this is surely sufficient.

Upon the point made as to the conveyance from Bardwell to Howell operating as an assignment to Howell of Bardwell's lien for the unpaid purchase money, we think it is clear that section 2444 of the Annotated Code of 1892 is without application. That statute deals with an estate in lands, and the right which a vendor has to subject the land sold to the payment of the purchase money is not such a "right or estate in the lands" as this statute contemplates. This debt goes to the personal representative of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the deceased vendor, and not to the junior grantee of the lands.

There being no satisfactory evidence of estoppel, the legal title must prevail, and that is clearly shown to be in the appellees.

Affirmed.

(95 Miss. 639)

STATE FIRE INS. CO. et al. v. MORRISON.
(No. 13,795.)

(Supreme Court of Mississippi. Jan. 18, 1909.)

APPEAL AND ERROR (§ 359*)—RIGHT TO APPEAL—DISCRETION.

Under Code 1906, § 34, providing that, when a demurrer is overruled, demurrant may appeal to the Supreme Court without being first compelled to answer, but that the appeal must be allowed by the court or chancellor, it is discretionary with the trial court or chancellor whether an appeal shall be allowed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1936; Dec. Dig. § 359.*]

Appeal from Chancery Court, Hinds County; G. G. Lyell, Chancellor.

"To be officially reported."

Bill by D. J. Morrison against the State Fire Insurance Company and others. Defendants apply for a review of the chancellor's action in denying an appeal from an order overruling a demurrer to the bill. Petition disallowed.

McLaurin, Armistead & Brien, for appellants. Green & Green, for appellee.

MAYES, J. D. J. Morrison filed a bill in the chancery court of Hinds county against the State Fire Insurance Company and others. For the purpose of deciding the question presented to the court by this application, it is unnecessary to recite the facts contained in the bill. A demurrer to the bill was filed by the defendants and overruled by the chancellor. The chancellor was applied to for an appeal, under section 34 of the Code of 1906, which was refused, whereupon an application is made to this court, under section 4908 of the Code of 1906, for the purpose of having the chancellor's action in denying the appeal reviewed.

It is urged that the appeal is a matter of right under section 34 of the Code of 1906. Unless the appeal is a matter of right, an examination of the record convinces us that the decree of the chancellor overruling the demurrer was not such an abuse of discretion as would warrant this court in granting an appeal over his refusal. Section 34 of the Code of 1906 provides that "when a demurrer shall be overruled in a chancery court, or by the chancellor in vacation, the party demurring may appeal to the Supreme Court, without being first compelled to answer; and, if the decree be affirmed, the cause shall be remanded, to be proceeded with according to the practice of the court; but such appeal must be applied for, and

bond given, within ten days after the demurrer is overruled, if in term time, and if decided in vacation within thirty days after the decree is filed in the proper office. Such appeal must be allowed by the court or the chancellor; but the appeal bond may be approved by the court or chancellor, or the clerk."

It is seen from this section that a different mode of appeal is prescribed where the appeal is sought to be taken from a decree arising under section 34 from that provided for where the appeal is a general appeal under section 41. Where the appeal is taken under section 41, the clerk of the court where the judgment or decree was rendered is authorized to grant the appeal, except in such cases as the law provides that the appeal shall be granted by the court or chancellor. There could be no reason for making it imperative that an appeal under section 34 shall be by the court or chancellor, unless it be that this was done in order that the chancellor might determine whether or not such appeal should be granted. It is our view of this statute that the very reason why it denies the clerk the power to grant an appeal in cases arising under it, and requires that such appeal shall only be granted by the court or chancellor, was because it was the intention of the Legislature to vest the court or chancellor with the discretion to say whether or not such appeal should be allowed.

The cases cited by counsel making the application for appeal have no application to the statute as it now exists. The decisions referred to were made before the change in the law to be found at the close of section 34.

The petition for appeal is disallowed.

(95 Miss. 643)

MURPHY v. HUTCHINSON. (No. 13,349.)
(Supreme Court of Mississippi. Jan. 25, 1909.)

ELECTION OF REMEDIES (§ 3*) — ACTION AGAINST PRINCIPAL.

A creditor who, having a right of action against either the principal or the agent, elects to sue the principal, with knowledge of the facts and the law, cannot, after proceeding to judgment, though unsuccessful, sue the agent.

[Ed. Note.—For other cases, see *Election of Remedies*, Cent. Dig. § 4; Dec. Dig. § 3.*]

Appeal from Circuit Court, Lowndes County; Robert F. Cocheran, Judge.

Action in a justice's court by R. J. Murphy against W. N. Hutchinson. Plaintiff had judgment; but, on appeal to the circuit court, judgment was rendered for defendant, and plaintiff appeals. **Affirmed.**

R. J. Murphy brought suit against W. N. Hutchinson in the court of a justice of the peace for medical services alleged to have been rendered tenants on the place belonging to defendant's mother and managed by

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

defendant. Plaintiff recovered in the justice's court, and on appeal to the circuit court a peremptory instruction was given for defendant; it being shown that Mrs. Eltonia Hutchinson, the mother of defendant, had already been sued by Murphy on the identical account, said suit having resulted in a judgment for defendant, Mrs. Hutchinson, and that Murphy, having elected to sue Mrs. Hutchinson, instead of her agent, was estopped to proceed against the agent, though unsuccessful in the first suit. The appeal in this case was dismissed by the court on its own motion. See 47 South. 666. Afterwards, on motion of appellant, it was reinstated on the docket and heard on its merits.

James T. Harrison and McWillie & Thompson, for appellant. Z. P. Landrum, for appellee.

FLETCHER, J. The peremptory instruction in this case was manifestly based upon the theory that Dr. Murphy, being free to sue either Mrs. Hutchinson, the principal, or W. N. Hutchinson, the agent, elected to hold the principal, and, having prosecuted a suit against Mrs. Hutchinson to final judgment, was estopped to proceed against the agent, though unsuccessful in the first action. This question involves the doctrine of election of remedies, a subject on which there is considerable conflict in the authorities.

It should be stated that in this case Dr. Murphy testifies that at the time the medical services were rendered he had no knowledge that W. N. Hutchinson was acting as his mother's agent, but that the credit was extended to Hutchinson as the principal debtor. This accounts for the admitted fact that the account was charged to Hutchinson, and, of course, since Dr. Murphy was dealing with the agent of an undisclosed principal, the agent could be held to personal liability if the creditor so desires. It is equally well settled that Dr. Murphy, after ascertaining that young Hutchinson was acting for his mother, could elect to hold the principal, even though, at the time the debt was made, there was no disclosure of the agency. Keeping these elementary principles in mind, we observe that Dr. Murphy made out his account against W. N. Hutchinson and turned the same over to his attorney for collection. The attorney advised Murphy that Mrs. Hutchinson was the owner of the plantation, and that W. N. Hutchinson was only her managing agent, and that Mrs. Hutchinson was in law responsible for the debt. The attorney states that, since he had his remedy against either party, he concluded to proceed against Mrs. Hutchinson as being the more solvent of the two, which was accordingly done. In this trial W. N. Hutchinson was subpoenaed as a witness for the plaintiff, and testified that he was acting as his mother's agent. It is therefore clear that Dr. Murphy was correctly informed as to the facts and properly advised as to the

law at the time he instituted his action against the principal, Mrs. Hutchinson.

Dr. Murphy was defeated in this suit, there being an adverse verdict of the jury in the justice's court. We have no possible way of knowing what considerations were influential with the jury; but, giving effect to all the presumptions that the law attaches to the action of every court, the plaintiff could not have been defeated because he had sued the wrong party, since the agency of W. N. Hutchinson was admitted, and there can be no dispute as to the principal's liability for the contracts of the agent, made in reference to the business which the agent was employed to perform. The presumption must therefore be indulged that Dr. Murphy was defeated in his suit because the jury was not satisfied as to the merit of plaintiff's demand, considered entirely apart from any question of which party was the responsible one. After this first suit was finally disposed of, Dr. Murphy brings a second suit upon the identical account litigated in the first action, but against W. N. Hutchinson, the agent, relying upon the fact that he had made the account without disclosing the agency. We are therefore confronted with the question whether a creditor, free to sue either principal or agent, who elects to proceed against the principal, with full and correct knowledge both of the facts and the law governing his case, can, after prosecuting his case to judgment, bring another suit against the agent upon the identical account first sued on.

We are fully aware of the fact that our own court has been slow to give effect to the doctrine, elsewhere widely accepted, that a person with an unredressed grievance, and with two inconsistent courses open to him, will be held to have finally abandoned one of these courses merely because he has entered upon another. The doctrine, so far as Mississippi is concerned, has been carefully limited and guarded. Perhaps the fullest consideration of the question to be found in our Reports is found in the opinion of Judge Campbell in response to the suggestion of error in *Madden v. Louisville, etc., R. R. Co.*, 66 Miss., 258, 6 South. 181. This opinion, while distinctly stating that while the doctrine of election is sound, and is to be recognized and applied by our courts in proper cases, yet it must not be applied when the party sought to be bound by the election acts without full knowledge of his legal rights as determined by the application of correct principles of law to a state of facts of which he has full knowledge. So in *Conn v. Bernheimer*, 67 Miss. 498, 7 South. 345, it was held that, because appellee had mistakenly instituted an action of replevin in a case where that form of action would not lie, he was not precluded from prosecuting a proper action in another forum. So in *Tucker v. Wilson*, 68 Miss. 693, 9 South. 898, the doctrine was not applied, for the manifest reason that com-

plainants in their first suit had no proper conception of the course best adapted to preserve their rights. These cases do not purport to deny the application of the doctrine to proper cases, but do so limit and restrict its application that it can prevail only when the electing party acts with full knowledge of his rights.

We cannot resist the conclusion that Dr. Murphy so acted when he brought his suit against Mrs. Hutchinson, the principal. We have shown that he was told of the agency and correctly advised as to the law governing such cases. Since our own cases do not deal with this precise state of case, let us look a little to the authorities elsewhere. Mr. Wharton thus states the rule: "In order to relieve the principal, there must be something equivalent to an election not to charge the principal; and whether there is such an election is a question of fact, which is not determined by charging the agent after knowledge of the principal. As will presently be seen, after the agent has been sued to judgment, the right to revert to the principal, by the technical rules of the English common law, is lost. But an affidavit of proof in bankruptcy, filed, but not further proceeded upon, and countermanded, is not an election, precluding recourse to the principal. And it is intimated, though not decided, that merely commencing suit against the agent does not operate as an election which discharges the principal. But if the third party accepts the individual obligation of the agent under circumstances indicating an intent, with full knowledge of all the facts, to give sole credit to the agent, and to abandon all claim against the principal, then his election will bind him, and he cannot subsequently resort to the principal. Unless this distinctly appears, however, he is not concluded by the form of the contract. There is much reason for the position that the mere taking of judgment against the agent, under such circumstances, should not, when the judgment is unsatisfied, extinguish the debt. Judge Story has given his opinion to this effect, and he cites Mr. Livermore as authority. But a subsequent English case has rejected this conclusion, maintaining that, if the agent be sued to judgment, this judgment, though unsatisfied, is a bar to proceedings against the principal. The case before the court was a suit against the master on a bill of lading; but the rule was declared to apply to all suits based on the relation of master and servant."

Turning, now, to the English case referred to in the text, which, indeed, may be said to be the leading case on the subject, since it is constantly cited in nearly all the well-considered cases on the subject, we find it stated: "If this were an ordinary case of principal and agent, where the agent, having made a contract in his own name, has been sued on it to judgment, there can be no doubt that no second action would be maintainable

against the principal. The very expression that where a contract is so made the contractee has an election to sue agent or principal supposes he can only sue one of them; that is to say, sue to judgment. For it may be that an action against one might be discontinued, and fresh proceedings be well taken against the other." *Priestly v. Fernie*, 3 Hurl. & C. 977. It may be here remarked in passing that this case utterly repudiates the statement from Story on Agency, 291, referred to above in the quotation from Wharton, and demonstrates that it was based on a misconception of the doctrine announced in *Livermore on Agency*, 267. We think there can be no doubt that the English rule is as just stated, and that it is there well established. *Paterson v. Gandasequi*, 15 East, 62; *Addison v. Gandasequi*, 4 Taunt. 574.

Coming to the American cases, we do not find that they are in such complete accord as in England. But we think most of the authorities, holding that there can be no final election in the case of principal and agent unless judgment has actually been obtained and satisfied, have their origin in the case of *Beymer v. Bonsall*, 79 Pa. 298. But the opinion in this case does not undertake to cite any authority or give any reason for the rule, contenting itself with the bare announcement that the agent can escape liability only by satisfying the demand. This case was referred to in *Cobb v. Knapp*, 71 N. Y. 348, 27 Am. Rep. 51, a case, however, where the only point actually decided was that the commencement of an action does not sufficiently show an election. To the same effect is *Nason v. Cockcroft*, 3 Duer (N. Y.) 368, 369. But the view of the New York court, upon full consideration, is thus expressed: "Now, according to the averments in the complaint, Poole, the agent, was liable originally, inasmuch as it is stated that he purchased the property and promised payment without disclosing his agency. So, too, a right of recovery existed against O'Donoghue, the principal, when discovered; but the plaintiff, while he might elect which of them he would hold responsible, could not have a recovery against both. *Meeker v. Claghorn*, 44 N. Y. 349. In the case in hand the plaintiff, the vendor, had, according to the statement in the complaint, an undoubted option as to which he would hold liable for the goods sold. Both principal and agent were equally responsible to him. The question, then, is whether it appears that he had made a binding selection of the principal, O'Donoghue, as his debtor. Had he proceeded to judgment against the latter on the claim, he would be held concluded by his election. *Curtis v. Williamson*, 11 Eng. Rep. (Moak's Notes) 149, and *Priestly v. Fernie*, there cited. But will a proceeding at law on the claim, short of judgment, be conclusive of an election? This question was considered in the cases last cited, and it was there decided that whilst a judgment against prin-

principal or agent, even without satisfaction, would constitute a conclusive election, yet that no legal proceeding short of judgment would have that effect. So Judge Oakley said in *Nason v. Cockroft*, 3 Duer (N. Y.) 368, 369, when speaking to this point, that it was clear that the mere commencement of a suit against the principal would not discharge the agent. The remark of the court in *Beymer v. Bonsall*, 79 Pa. 298, 300, is perhaps too strong. It is there said that the agent, being already liable on his contract, can be discharged only by satisfaction of it by himself or another. According to the authorities, then, the commencement of this action against O'Donoghue, the principal, no judgment having been entered against her, does not bar the plaintiff's action against Poole, the agent. The plaintiff may discontinue against O'Donoghue." *Mattlage v. Poole*, 15 Hun (N. Y.) 556.

In a somewhat earlier case the New York Court of Common Pleas followed the English rule in saying: "If an agent make a contract in his own name, the party with whom it is made may sue the agent as principal, or, if he elect to do so, may sue the real principal. He has his option to sue either, but he cannot sue both; for, when he sues the principal, he affirms the fact that the other was acting simply as an agent." *Borell v. Newell*, 3 Daly (N. Y.) 233. The Supreme Court of New York in a later case laid down the rule that, while the mere bringing of a suit does not evidence a conclusive election, yet that if the first case actually proceeded to judgment, though adverse to the plaintiff, he would be precluded from instituting a subsequent suit against the other party, and in support of this statement there is cited the great authority of Chancellor Kent in *Sanger v. Wood*, 3 Johns. Ch. (N. Y.) 416. *Equitable Foundry Co. v. Hersee*, 33 Hun (N. Y.) 169. To the same effect is the Connecticut court in *Jones v. Aetna Ins. Co.*, 14 Conn. 501, and the Massachusetts court in *Kingsley v. Davis*, 104 Mass. 178, where it is said that, if with full knowledge of all the facts the creditor elects to hold the agent, he cannot afterwards resort to the principal. The Georgia court is in line with these authorities, holding that if the "creditor elected to go on the principal, after the fact of agency is ascertained, the agent is no longer liable." *Garrard v. Moody*, 48 Ga. 96.

Not to multiply citations, we reach the conclusion that the correct rule is summed up in the note to *Fowler v. Bowery Savings Bank*, 10 Am. St. Rep., at page 494, where, after mentioning *Beymer v. Bonsall*, supra, and other cases in line therewith, it is stated: "In regard to this latter line of authorities, it may be observed that while the mere institution of an action should plainly not conclusively determine one's election, in the case of principal or agent, yet if the action is com-

menced with full knowledge of one's rights, or any other case against the agent, it should be a bar to a subsequent action against the principal, and vice versa; for by suing the agent the third person disaffirms the agency, while by suing the principal he affirms the fact that the other was acting simply as agent."

We have not undertaken to explore the entire field of cases dealing with the doctrine of election of remedies, but have confined our observations, though not our research, to authorities dealing with the application of the doctrine to the precise point under consideration, which has to do with the law of principal and agent. Nor have we taken notice of cases like *Maple v. Cincinnati, etc., Ry. Co.*, 40 Ohio St. 313, 48 Am. Rep. 685, which deals essentially with actions against principal and agent, and who are also joint tortfeasors; the action being in substance one of tort. Bearing in mind the undisputed fact that the first action against Mrs. Hutchinson was brought with full knowledge of all the material facts and after correct advice as to the law, we conclude that the appellant, having made his election and had his day in court, cannot retry the same facts in an independent suit against the agent upon the identical issues before litigated, and that the learned judge below correctly gave the peremptory charge for the defendant.

Affirmed.

(94 Miss. 860)

COLEMAN v. STATE. (No. 13,519.)

(Supreme Court of Mississippi. Jan. 18, 1909.)

1. WEAPONS (§ 17*) — STATUTES — "POINT" — "AIM."

Code 1906, § 1045, makes it an offense to "point or aim" a gun, etc. Defendant was indicted, for that he did "point and aim" a pistol at and toward prosecutor, etc., and was found guilty as charged. *Held*, that the words "point" and "aim," as used in such section, were synonymous, and defendant was therefore charged and convicted of but a single offense.

[Ed. Note.—For other cases, see *Weapons*, Cent. Dig. § 24; Dec. Dig. § 17.*]

For other definitions, see *Words and Phrases*, vol. 8, p. 7570.]

2. INDICTMENT AND INFORMATION (§ 125*) — OFFENSES IN THE ALTERNATIVE.

Where a statute makes punishable the doing of one thing "or" another, the person who in one transaction does all violates the statute but once, incurring but a single penalty, so that an indictment may properly allege in a single count that defendant did as many of the forbidden things as the pleader chooses, employing the conjunction "and" where the statute uses "or," without subjecting the indictment to the charge of duplicity.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. § 381; Dec. Dig. § 125.*]

Appeal from Circuit Court, Covington County; R. L. Bullard, Judge.

A. Coleman was convicted of pointing and aiming a pistol, and he appeals. Affirmed.

The indictment in this case alleges that the defendant "did unlawfully and intentionally point and aim a pistol at and towards one McQueen, not in necessary defense or in the lawful discharge of official duties, contrary," etc. On the trial the court instructed the jury, at the instance of the state, that if they believed "that the defendant willfully pointed or aimed a pistol at and towards McQueen, not in his necessary self-defense nor in the lawful discharge of official duties," etc., then they should find him guilty. On appeal it is contended that two offenses are charged in the indictment "pointing and aiming," and that appellant was convicted of pointing and aiming; that is, he was charged with both and convicted of one. The statute (section 1045 of the Code of 1906) makes it a criminal offense to "point or aim" a gun, etc. From a verdict of guilty as charged, this appeal is prosecuted.

Shannon & Street, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

FLETCHER, J. We do not think there is any substantial distinction between the terms "point" and "aim," as these words are employed in section 1045 of the Code of 1906. Both words are used in the statute to convey precisely the same meaning; the offense consisting in intentionally so directing a gun or pistol as that its discharge will endanger human life. There is an evident distinction between this statute and the statute on the subject of arson, considered in *Rist v. State* (Miss.) 47 South. 433.

Even if there were some real distinction between these practically synonymous expressions, no error was committed in the trial of this case, since it is settled: "A statute often makes punishable the doing of one thing, or another, sometimes thus specifying a considerable number of things. Then, by proper and ordinary construction, a person who in one transaction does all violates the statute but once, and incurs only one penalty. Yet he violates it equally by doing one of the things. Therefore the indictment on such a statute may allege, in a single count, that the defendant did as many of the forbidden things as the pleader chooses, employing the conjunction 'and' where the statute has 'or,' and it will not be double, and it will be established at the trial by proof of any one of them." 1 Bishop's Crim. Proc. § 436.

Affirmed.

HUMPHREYS v. McFARLAND. (No. 13,724.)

(Supreme Court of Mississippi. Jan. 18, 1909.)
APPEAL AND ERROR (§ 20*)—BOND—JUSTICE'S COURT.

Appeal from circuit court, in a case originating in a justice's court, will be dismissed

for want of jurisdiction; there being no bond in the record on the appeal from the justice to the circuit court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 20.*]

Appeal from Circuit Court, Yalobusha County; Sam C. Cook, Judge.

"To be officially reported."

Action between Ed. Humphreys and W. B. McFarland. From an adverse judgment, Humphreys appeals. Dismissed.

See, also, 48 South. 1027.

H. T. Blount, for appellant. Kimmons & Kimmons, for appellee.

WHITFIELD, O. J. This case originated in the court of the justice of the peace. There is no bond in the record on the appeal from the justice's court to the circuit court.

We are therefore without jurisdiction, and the appeal is dismissed.

JOHNSON v. MARSHALL. (No. 13,430.)
(Supreme Court of Mississippi. Jan. 18, 1909.)
APPEAL AND ERROR (§ 20*)—BOND—JUSTICE'S CASE.

An appeal from circuit court, in a case originating in a justice's court, will be dismissed for want of jurisdiction; there being no bond in the record on the appeal from the justice to the circuit court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 81; Dec. Dig. § 20.*]

Appeal from Circuit Court, Tallahatchie County; Sam C. Cook, Judge.

"To be officially reported."

Action between Albert J. Johnson and W. T. Marshall. From an adverse judgment, Johnson appeals. Dismissed.

See, also, 48 South. 975.

Beatner & May, for appellant. W. T. Marshall and Dinkins, Caldwell & Ward, for appellee.

WHITFIELD, O. J. This case originated in the court of the justice of the peace. There is no bond in the record on the appeal from the justice's court to the circuit court.

We are therefore without jurisdiction, and the appeal is dismissed.

GAINES v. STATE. (No. 13,425.)
(Supreme Court of Mississippi. Jan. 18, 1909.)
CRIMINAL LAW (§ 785*)—INSTRUCTIONS—CREDIBILITY OF WITNESSES.

In a criminal case it was fatal error to instruct that the jury could consider the interest of the witnesses and the fact that they had sworn falsely to some material fact, where accused was the only witness in his own behalf and testified to facts which, if believed, entitled him to acquittal.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 785.*]

Appeal from Circuit Court, Wayne County; W. H. Hardy, Judge.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Dave Gaines was convicted of an offense, and he appeals. Reversed and remanded.

D. M. Taylor and E. W. Stewart, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

FLETCHER, J. Appellant being the only witness in his own behalf and testifying to a state of facts which, if believed by the jury, would result in his acquittal, it was fatal error to give the second and third instructions for the state. These charges, authorizing the jury to consider the interest of the witnesses and the fact that they had sworn falsely to some material fact, were, of course, pointed straight at the defendant, and are plainly condemned in *Woods v. State*, 67 Miss. 573, 7 South. 495, and *Smith v. State*, 90 Miss. 111, 43 South. 465, 122 Am. St. Rep. 313.

Reversed and remanded.

(95 Miss. 163)

ROYAL INS. CO. v. BOARD OF LEVEE COM'RS. (No. 13,874.)

(Supreme Court of Mississippi. Jan. 18, 1909. Suggestion of Error Overruled Jan. 26, 1909.)

STATUTES (§ 38*)—ENACTMENT—PUBLICATION.

Acts 1908, p. 59, c. 73, § 7, imposing a privilege tax on fire insurance companies, and forbidding the levy of any further privilege tax by a county, levee board, or municipality, is not void because not published in accordance with Const. 1890, § 234, providing that no bill affecting the taxation or revenue of the Yazoo-Mississippi Delta levee district shall be considered by the Legislature unless published for four weeks in a newspaper in the county where the board of levee commissioners is domiciled, as that section of the Constitution extends only to such a bill as may affect the taxation or revenue of the levee district alone, and no other part of the state, and has no application to a general bill for general revenue purposes, which may in an indirect way affect taxation in the levee district, in common with the balance of the state.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 38.*]

Appeal from Circuit Court, Coahoma County; Sam O. Cook, Judge.

"To be officially reported."

Action by the Royal Insurance Company against the Board of Levee Commissioners. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

The appellant is a fire insurance corporation authorized to do business in the state of Mississippi, and prior to the institution of this suit had paid to the Insurance Commissioner, as required by section 3894 of the Code of 1906, the privilege tax required of it for the exercise of its business in the state as required by law—the sum of \$300. Under the provisions of the last-named act, counties, levee boards, and municipal corporations were prohibited from levying and collecting any further privilege tax on insurance companies, and on this ground appellant resisted

the payment of a privilege tax of \$100 which was levied by the Yazoo-Mississippi Delta levee board. The levee board, however, claims authority to levy and collect such tax under chapter 80, p. 132, of the Laws of 1902, authorizing it to levy taxes upon all privileges exercised within the levee district. Finally appellant paid the tax under protest, and filed suit for the recovery of the same.

John W. Cutrer, for appellant. F. A. Montgomery, for appellee.

MAYES, J. Acts 1908, p. 59, c. 73, § 7, provides that: "For each license issued to a fire insurance corporation or association, or to any company or association of companies operating a separate or distinct plant or agency in the state, \$300.00." It also provides that: "No county, levee board, or municipal authority shall levy a privilege tax on any insurance company or association." The effect of this act is to exempt from additional privilege taxation any insurance company or association at the hands of any county, levee board, or municipal authority. As the law existed under section 1, c. 80, p. 132, of the Acts of 1902, the levee commissioners for the Yazoo-Mississippi Delta were authorized to levy a tax upon all privileges exercised within the limits of the levee district in a sum not to exceed the taxes levied by the state on the same privilege.

It is contended that section 7, p. 59, of the Acts of 1908, prohibiting any county, levee board, or municipal authority from levying a privilege tax on an insurance corporation or association, is void because in conflict with section 234 of the state Constitution of 1890. The section of the Constitution just referred to provides that "no bill changing the boundaries of the district, or affecting the taxation or revenue of the Yazoo-Mississippi Delta levee district," etc., "shall be considered by the Legislature unless said bill shall have been published in some newspaper in the county in which is situated the domicile of the board of levee commissioners of the levee district to be affected thereby, for four weeks prior to the introduction into the Legislature," etc. The agreed facts show that the act of 1908, the act here challenged as unconstitutional, was never published in the district in accordance with section 234 of the Constitution of 1890. In the case of *Bobo v. Board of Levee Commissioners* (Miss.) 46 South. 819, the court said: "We think this provision of the Constitution had in mind alone a law which would increase or diminish the rate of taxation or amount of revenue to be derived from taxation for the protection of the people of this district by the construction of levees." In the quotation just given is to be found the key for a correct interpretation of this section of the Constitution. When

the Constitution says that "no bill changing the boundaries of the district, or affecting the taxation or revenue of the Yazoo-Mississippi Delta levee district," etc., "shall be considered," etc., it means only such bill as may affect taxation or revenue of the Yazoo-Mississippi Delta levee district alone, where the object and purpose of the bill is to affect this district, and no other part of the state. It has no application to a general bill passed by the Legislature for general revenue purposes, such as imposing privileges on occupations, or making any change in privilege taxes already imposed by lowering or raising same, or abolishing them altogether, the incidental effect of which may in an indirect way affect taxation in the levee district in common with all the balance of the state. If this were not the case, the state would be very much hampered in its governmental action, and, when once a privilege tax was fixed, it could be neither raised, lowered, nor abolished without publication under the section of the Constitution drawn in question. There could be no change in the general law exempting certain property from taxation. Such a result was never thought of. The section has no reference to general revenue bills, but its operation is confined exclusively to such taxation or revenue as the Legislature attempts to enact for the levee district alone, affecting the rate of taxation exclusively within the boundary of the levee district.

Reversed and remanded.

(95 Miss. 165)

ST. LOUIS & S. F. R. CO. v. RUFF.
(No. 13,677.)

(Supreme Court of Mississippi. Jan. 18, 1909.)

RAILROADS (§ 383*)—INJURIES TO PERSONS ON TRACK—CONTRIBUTORY NEGLIGENCE.

Where a person, struck by a train approaching from the opposite direction, did not look up for the train until he saw the light from the headlight upon the track, and was walking on the end of the cross-ties, and had nothing to do except step off to be safe, and two others near him stepped off in safety, and the track was straight for eight miles, and the engine had whistled for a station and two or three times afterwards, he was guilty of contributory negligence as a matter of law.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1305-1310; Dec. Dig. § 333.*]

Appeal from Circuit Court, Lee County; E. O. Sykes, Judge.

Action by Jim Ruff against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

This is an action for personal injuries, brought by appellee against appellant, based upon the alleged negligence of appellant in running one of its trains through an incorporated town at a rate of speed in excess of six miles an hour. The defense was con-

tributory negligence on the part of plaintiff below. The testimony shows that plaintiff, while walking south on the railroad track on a dark, rainy evening, was struck by a north-bound engine with an electric headlight burning brightly. It seems that plaintiff heard the train approaching, but did not look up, but stepped outside of the rail on to the cross-ties, or onto the dump beyond the ties, when he was struck by the approaching train and injured. He brought suit, and recovered a judgment for \$400, from which the railroad company appeals.

W. F. Evans, E. T. Miller, and J. W. Buchanan, for appellant. J. M. Thomas and Anderson & Long, for appellee.

WHITFIELD, C. J. On the testimony in this record we think it is clear that a peremptory instruction should have been given for the defendant railroad company. The result of the testimony makes it plain that the unfortunate plaintiff did not look up for the train, but that he simply looked up when he saw the light from the headlight on the track. He was walking on the end of the cross-ties, and had nothing on earth to do except step off and be safe. Two men had, just above where he was injured, stepped off in safety. The track was straight for eight miles. The train had whistled for Plantersville, and two or three times afterwards. The case is plainly one of contributory negligence, producing the injury as its proximate cause. It is just one of those rare cases of negligence which a court ought to take from the jury.

Reversed and remanded.

(93 Miss. 407)

WELLS, Tax Collector, v. McNEILL et al.
(No. 13,771.)

(Supreme Court of Mississippi. Jan. 28, 1909.)

1. COUNTIES (§ 192*) — TAXATION — LEVY — ERECTION OF COURTHOUSE—STATUTORY PROVISIONS.

Code 1906, § 313, providing that, if a new courthouse shall be required in a county, the board of supervisors shall determine the material, plans, etc., and make the necessary contracts and supervise the work, while it gives the board incidentally the power to fix the cost, which is not subject to review by the courts, makes no provision for ways and means of payment, nor for taxation therefor.

[Ed. Note.—For other cases, see *Counties*, Dec. Dig. § 192.*]

2. COUNTIES (§ 192*)—TAXATION—LEVY—RATE—STATUTORY LIMITATION.

Acts 1908, p. 56, c. 72, which makes 18 mills the maximum rate of taxes that counties can levy, including the state tax, for the years 1908 and 1909, is not alone applicable to current and annual expenses, but applies to special levies and those for extraordinary purposes; and hence limits the tax provided by Code 1906, § 324, empowering the board of supervisors of a county to levy a special tax for the erection

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of a courthouse, etc., which shall be applied to no other purpose.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 192.*]

3. COUNTIES (§ 192*)—TAXATION—LEVY—LAYING BURDEN OF FUTURE TAXES—STATUTORY PROVISIONS.

The only way in which a burden of future taxes can be laid on the people is that prescribed by Code 1906, § 331, providing for the issuance of bonds, and reserving to the people the right to express their will by an election; and hence a sum of money to pay for a courthouse could not be levied by installments, though the amount levied in a single year, taken with all other levies, does not exceed the statutory limit.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 192.*]

Appeal from Chancery Court, Newton County; Sam Whitman, Jr., Chancellor.

Bill by G. H. McNeill and others against C. M. Wells, Tax Collector. From an order overruling a demurrer to the bill, defendant appeals. Affirmed and remanded, with leave to answer within 60 days.

Witherspoon & Witherspoon, for appellant. J. D. Carr, J. D. Jones, G. H. Banks, W. I. Munn, Flowers & Whitfield, and McWille & Thompson, for appellees.

EDWARD MAYES, Special Judge. The bill in this cause shows that the board of supervisors had levied a tax of $4\frac{1}{2}$ mills for the purpose of erecting a new courthouse; that such levy, added to the other levies made, aggregated the full tax authorized by the act of 1908 (Acts 1908, p. 56, c. 72), being 18 mills; that the board had advertised for proposals to build the new courthouse, on the basis of a structure to cost not less than \$30,000 nor more than \$50,000, and were about to contract on that basis; that a proposal to issue bonds had been rejected by the people; that the $4\frac{1}{2}$ mills levy would yield only \$19,000; and that therefore the excess of cost over that sum would have to be paid out of levies made in future years. Wherefore the tax is unlawful, and an injunction was obtained against the tax collector. A demurrer to this bill was overruled, and from that order the tax collector prayed this appeal.

The effort on the part of the appellant is to distinguish this case from the decision in *Monroe Co. v. Strong*, 78 Miss. 565, 29 South, 530. It is said that sections 313 and 324 of the Code of 1906 control, and lead to a different result, since here the question is of a courthouse, while there it was a bridge. The sections so relied on are as follows:

"313. Shall Remodel, Repair and Erect Courthouse and Jail When Necessary.—If a new courthouse or jail shall be required in any county, or if the courthouse or jail shall need remodeling, enlarging, or repairing, the board of supervisors shall determine the material, the dimensions, and the plan thereof, and may make the necessary con-

tracts for the erection, remodeling, enlarging, or repairing thereof, and for furnishing the materials, and may appoint one or more commissioners to superintend the work as it progresses, who shall take care that the proper materials are furnished, and the work faithfully performed according to contract, and who, for their services, shall receive a reasonable compensation."

"324. May Levy Special Tax.—The board of supervisors of any county may levy a special tax for the erection, remodeling, enlarging or repairing of the courthouse, jail, or other county buildings, and the order making such special levy shall designate the objects for which the levy is made, and the fund shall be applied to no other purpose."

It is contended that section 313 by necessity gives the board incidentally the power to fix the cost of a courthouse, and that such power is beyond the reach of the courts by way of review. That is true; but the power to contract there conferred has reference only to the contract to build, with the secondary contracts auxiliary thereto. The section means exactly what it says, and no more than what is necessarily included. It has no aspect towards the ways and means for payment, nor to any matter of taxation. Section 324 does deal with the power to tax. But that power was not a vested right in the board, and was subject to legislation. We understand the restriction laid by the act of 1908 (Acts 1908, p. 56, c. 72) to be, just what its terms most simply express, mandatory and general that in no case shall the state and county levies exceed 18 mills in any one year. This prohibition includes those levies called special, and those for extraordinary purposes. It is not by construction to be limited to a prohibition of heavy current and annual expenses only. The courthouse tax authorized by section 324 is a special tax, because, when levied, the proceeds are applicable to that purpose alone; but, because it is special, it is not therefore freed from the limitation fixed by the salutary law of 1908.

But it is said that the levy made in this instance is lawful, because it, taken with all other levies, does not exceed 18 mills; that it is within that limit. This is true; but also it is true that the proceeds of such levy will not pay for the courthouse, even if the contract be placed at the minimum of \$30,000. There must, as an admitted fact, be a shortage of over \$10,000, which, if paid at all, must be met by some future levy. This course is not permissible under these statutes. The only way in which a burden of future taxes can be laid on the people is that prescribed by section 331, which provides for the issuance of courthouse (and similar) bonds, but reserves to the people the right to express their will by an election. It

might easily happen that the values of a county are so large and its current expenses so small by comparison that one year's special tax at a rate within the limit fixed by the act of 1908 would raise the amount needed for a new courthouse. In such case there would be no need of a bond issue or for an election. But, if it be proposed to raise an amount which will involve a need for future taxation, the bonding scheme of section 331 must be employed.

The order of the chancellor overruling the demurrer to the bill is therefore affirmed, and cause remanded, with leave to answer within 60 days.

(94 Miss. 598)

CARPER v. CARPER. (No. 13,663.)

(Supreme Court of Mississippi. Jan. 18, 1909.)

1. DIVORCE (§ 269*) — ALIMONY — ENFORCEMENT OF ORDER — CONTEMPT PROCEEDINGS.

Debtors of complainant's husband, who had been ordered to pay complainant certain money due her husband to satisfy an award of alimony pendente lite and for attorney's fees, could not be attached as in contempt for their failure to pay the money to complainant; such a proceeding being equivalent to imprisonment for debt.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 269.*]

2. DIVORCE (§ 269*) — ALIMONY — ENFORCEMENT — CONTEMPT PROCEEDINGS.

A husband can be punished for contempt for failure to pay alimony and attorney's fees awarded.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 756-763; Dec. Dig. § 269.*]

Appeal from Chancery Court, Alcorn County; J. Q. Robins, Chancellor.

Divorce action by Lucy Carper against Samson Carper, in which complainant was awarded alimony pendente lite, and the husband's debtors were ordered to pay to her certain sums due him to satisfy the award. From an order quashing a writ of attachment against them for failure to pay such sums, complainant appealed. Affirmed.

Appellant filed a bill in chancery for a divorce from appellee. Among other allegations of the bill she stated that E. H. and T. E. De Loach and R. L. Jones were indebted to appellee in various sums. She prayed for alimony pendente lite and attorney's fees. The De Loaches answered, admitting their indebtedness. At the trial the court sustained a motion for alimony pendente lite and attorney's fees, and ordered the De Loaches to pay whatever sum they owed into the hands of the clerk. At the following term the clerk reported that this money had not been paid into court in compliance with the prior order. Appellant moved for a writ of attachment for the De Loaches, which motion was sustained, and writs of attachment were issued. The De Loaches appeared and moved to quash the writs of attachment against them. This motion was sustained,

and appellants took an appeal on the ground that the action of the court in sustaining the motion was error, since the De Loaches were in contempt of court.

Lamb & Johnston, for appellant.

FLETCHER, J. We have no difficulty in reaching the conclusion that the chancellor very properly refused to permit the debtors of the defendant, against whom a decree for alimony pendente lite and counsel fees had been rendered, to be harassed with contempt proceedings. These persons were ordinary debtors of the respondent, and to punish as a contempt of court their failure to pay their obligations would be nothing more nor less than an imprisonment for debt. They occupy an attitude entirely different from the husband, who after proper inquiry was directed to pay alimony and suit money. Because, upon well-settled principles, he can be required to defray these charges or suffer the penalty imposed for contempt of court, it does not follow that the court may extend this authority over third persons who are so unfortunate as to be indebted to the husband. Authorities dealing with trustees in charge of specific funds, or persons having the control of specific property, have no application to a mere indebtedness, which can never be treated as a fund under the control of the court.

Affirmed.

(94 Miss. 868)

ALLEN et al. v. LUCKETT. (No. 13,593.)

(Supreme Court of Mississippi. Dec. 21, 1908.
On Motion, Jan. 18, 1909.)

1. DEEDS (§ 70*)—VALIDITY—MISTAKE AS TO ACREAGE.

Where the vendee was more familiar with the boundaries of the vendor's land than the latter, and pointed them out to him, and the vendor, relying on such representations, sold a tract by the acre, which he supposed contained 50 acres, when it in fact contained 200 acres, equity will cancel the conveyance, though there was no actual fraud.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 70.*]

2. EQUITY (§ 8*)—JURISDICTION — MISTAKE — FACTS.

Though the terms of an instrument are according to the intent of the parties, if one or both parties are mistaken as to the identity, situation, boundaries, title, amount, value, etc., of the subject-matter, equity will grant appropriate relief, if the mistake is material.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 14, 17; Dec. Dig. § 8.*]

Appeal from Chancery Court, Leake County; J. F. McCool, Chancellor.

Bill by O. A. Luckett against N. R. Allen and others to cancel a deed. From a decree for complainant, respondents appeal. Affirmed.

Appellee was the owner of 480 acres of timber land, all in section 29, township 10, range

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

7 E., in Leake county. The land was wild, and situated in a river bottom a considerable distance—in fact, in another county—from the residence of the appellee. In January, 1900, he made a trade with appellants to sell them "that part of the east half and the east half of the west half of said section lying north of Pearl river" for the sum of \$50. He gave appellant a deed describing the property as above, and received part payment at the time, and the balance in March, 1901, on which date another deed was executed; the former deed having been lost before being put of record. In this latter deed, the land was described as "that part of the east half, and the east half of the west half, north of Pearl river, 50 acres, more or less." Afterwards—that is, in 1905—Luckett filed a bill in chancery, setting out the above facts and alleging, further, that it was the intention of the grantor to convey 50 acres of land; that is, it was understood that Allen was to purchase land at the rate of \$1 per acre; that complainant was not familiar with the boundaries of the property, but relied upon the representations of the purchaser that there was about 50 acres lying north of Pearl river, and executed the deed accordingly. He afterwards learned that there was about 200 acres in the tract north of Pearl river, and demanded of Allen that he correct the mistake, which Allen refused to do, on the ground that he had purchased the entire tract lying north of Pearl river, regardless of the number of acres. The bill prayed for the cancellation of the deed and for a writ of possession upon complainant's refunding the purchase price, with interest. From a decree granting the prayer of the complainant, this appeal is prosecuted.

McMillon & Howard, for appellants. W. A. Ellis and May, Flowers & Whitfield, for appellee.

FLETCHER, J. On this record the chancellor must have concluded that Allen was more familiar with the boundaries of the land than was Luckett, that Allen pointed out these boundaries, that the sale was made upon the faith of these representations, that the sale was by the acre, and that appellee did not intend to convey more than 50 acres; whereas, in truth, nearly 200 acres were conveyed. We are not warranted in overthrowing this finding of fact.

Upon this state of facts the jurisdiction of a court of equity to decree rescission of the contract and cancellation of the conveyance is well established. It is immaterial whether actual fraud be imputed to appellant. The result is the same, if the transaction was the result of a mutual mistake. If the terms are stated according to the intent of the parties, but there is an error of one or both in respect of the thing to which these terms

apply—its identity, situation, boundaries, title, amount, value, and the like—then it is elementary that a court of equity may grant appropriate relief, provided the fact about which the mistake occurs was a material element in the transaction. 2 Pomeroy's Equity Jurisprudence, §§ 852-853; Bigham v. Madison, 103 Tenn. 358, 52 S. W. 1074, 47 L. R. A. 267.

The court having required appellee to refund the purchase money, with interest, the case must be, and is hereby, affirmed.

PER CURIAM. Motion to allow 5 per cent. damages sustained.

(94 Miss. 572)

MORELAND v. NEWBERGER COTTON CO. (No. 13,875.)

(Supreme Court of Mississippi. Jan. 25, 1909.)

1. FRAUDS, STATUTE OF (§ 95*)—SALES OF PERSONALTY—PART ACCEPTANCE.

Where, under an oral contract of sale of cotton, the purchaser actually received and paid for a part thereof, the statute of frauds was satisfied.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 183; Dec. Dig. § 95.*]

2. SALES (§ 192*)—DELIVERY—DEFERRED PAYMENT.

Where a cotton planter, at the beginning of the ginning season, sold a certain number of bales at an agreed price, gin weights to control, delivery to be made at the planter's gin, and payment to be made after delivery and examination of the gin weights, and thereafter the buyer and the agent of a third person went to the planter's gin, and the cotton was sold by the buyer in the presence of such planter, who knew that a sale was being negotiated, to such third person, there was an intent to deliver, so as to pass title from the planter to the buyer, so that he could pass title to the third person, and payment was deferred, even if required by the contract between the planter and the buyer.

[Ed. Note.—For other cases, see *Sales*, Dec. Dig. § 192.*]

3. SALES (§ 182*)—QUESTIONS FOR JURY—DELIVERY.

Whether there was delivery of cotton sold is essentially a question of fact.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 492-495; Dec. Dig. § 182.*]

4. TRIAL (§ 69*)—REOPENING CASE—DISCRETION OF COURT.

Where, in an action for the price of cotton, defendant's whole case rested upon the existence of a certain custom, plaintiff ought to have been permitted to reopen his case, after motion for a peremptory instruction for defendant, and prove, if he could, the nonexistence of the custom, and the discretion of the court was improperly exercised in refusing to permit him to do so.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 164, 165; Dec. Dig. § 69.*]

5. SALES (§ 182*)—ACTION FOR PRICE—QUESTIONS FOR JURY.

In an action for the price of cotton burned, whether there had been such a delivery as to pass title, so that the cotton was thereafter at the buyer's risk, held for the jury.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 492-495; Dec. Dig. § 182.*]

Mayes, J., dissenting in part.

Appeal from Circuit Court, Leflore County; Sydney Smith, Judge.

Action by J. R. Moreland against the Newberger Cotton Company for the price of cotton. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

McClurg, Gardner & Whittington and Mayes & Longstreet, for appellant. Gwin & Mounger, for appellee.

FLETCHER, J. P. P. McLemore, a planter and ginmer of Leflore county, was indebted to Moreland & Townes, a mercantile partnership located at Phillip, and at the beginning of the ginning season of 1903 entered into a written contract with Moreland & Townes by which it was agreed that McLemore should sell and deliver to Moreland & Townes 62 bales of cotton at an agreed price of 11 cents per pound, the gin weights to control, delivery to be made on McLemore's yard, and payment to be made after delivery and examination of the weights, as shown by the ginmer's books. On the 21st of October, 1903, one McGarrity, a cotton buyer in the employ of the Newberger Cotton Company, appellee here, came to Phillip and entered into negotiation with Moreland & Townes looking toward the purchase for his principal of whatever cotton Moreland & Townes might have on hand. McGarrity examined and sampled the cotton which was at Phillip, amounting to 88 bales, and agreed to give 11½ cents per pound for the cotton. Upon being informed by Moreland & Townes that they had some 62 bales at McLemore's gin, McGarrity and Townes, one of the partners, went to this gin, and these 62 bales were examined and sampled. McLemore was present at the gin, and knew that a sale was being negotiated of the cotton covered by his written contract with Moreland & Townes. McGarrity, being satisfied with his examination, agreed with Moreland & Townes to take the entire 150 bales, including the 62 bales at the gin, at an agreed price of 11½ cents, and so advised the Newberger Cotton Company by wire; the cipher telegram, when translated, reading: "We have bought 150 B/C, 25 B/C 1½ staple to 1⅞, nothing below 1½ inch, balance 1⅞ staple, nothing below 1⅞ inch staple; all strict middling to good middling and good middling to strict middling, at 11½ cents, mostly good to strict good middling." Nothing whatever seems to have been said by either party as to how the cotton should be delivered to the railroad company for transportation or how payment should be made; these details being evidently understood between the parties. Of the cotton at the gin 28 bales were destroyed by fire on the night of October 22d. The rest of the 150 bales were by Moreland & Townes delivered to the railroad company, consigned to the Newberger Cotton Company, and bills of lading taken therefor. These bills of lading were

attached to drafts drawn by McGarrity on the Newberger Cotton Company, payable to Moreland & Townes, who collected same in the usual course of business. After some delay, evidently due to Moreland & Townes' desire to be fully advised as to their legal rights and obligations, they paid McLemore for the 28 bales of burned cotton. The firm having dissolved, and Moreland having by written assignment succeeded to all the rights of the partnership, he brings this suit against the Newberger Cotton Company for the value of the 28 bales at the agreed price of 11½ cents per pound.

The action was for cotton sold and actually delivered. On the trial the above facts were disclosed, and it was further shown that it was the custom for the Newberger Cotton Company, in purchasing what may be called "railroad cotton"—that is to say, cotton which would naturally be shipped by rail—to pay for same only after delivery to the carrier, and upon presentation of a draft with the railroad bill of lading attached. It was also shown that this custom required the seller to look after this delivery of the cotton to the carrier and the procuring of the bill of lading. It should be stated that McLemore's gin was situated on the railroad, and was provided with a spur or industrial switch, and that cotton shipped from McLemore's was loaded on the car at the gin and bill of lading secured from the agent at Gerin, the most convenient station where an agent was maintained, and this course was pursued with all the 62 bales, except, of course, the 28 that had been burned. There being evidence, as stated, to show the existence of this custom as to delivery and payment, the defendant, at the conclusion of the plaintiff's testimony, made a motion for a peremptory instruction, not introducing any testimony on its own behalf. This motion was fully argued and sustained by the court. After the motion was sustained, but before the jury had entered its formal verdict in accordance with the peremptory charge, plaintiff asked permission to reopen the case and introduce evidence tending to show that "it was not the custom in the section where the cotton is alleged to have been sold to sell the cotton to the cotton buyer uniformly by draft with the bill of lading attached, and that, on the contrary, it was the custom for cotton to be sold and paid for by the cotton buyers at Phillip and near Phillip, where the cotton is alleged to have been purchased, by check and draft without bill of lading attached, and that numerous sales were made by plaintiff to defendant in that section where drafts with bill of lading attached were not given, and for which checks or drafts were given without bill of lading being attached for the cotton." This request was denied, and a directed verdict was entered for the defendant. This action of the trial court is defended on two grounds: (1) The contract of sale

was invalid under the statute of frauds. (2) There was no such delivery of the cotton to the Newberger Cotton Company by Moreland & Townes as sufficed to pass the title, so that the cotton was thereafter held at the purchaser's risk.

The first of these contentions need not give us much concern. The statute of frauds by its very terms has no application to sales of personal property where the buyer has received part of the personal property. Here it is undisputed that the defendant had actually received and paid for at least 33 bales of the cotton stored at McLemore's gin, and this brings the case squarely within the holding in *Stonewall Mfg. Co. v. Peek*, 63 Miss. 342. We feel certain that the accomplished judge below did not base his peremptory instruction upon any failure to satisfy the statute of frauds.

The second proposition is much more serious. The argument here has two somewhat distinct aspects. It is said in the first place that title to the cotton in controversy had not passed from McLemore to Moreland & Townes, and, this being true, Moreland & Townes could not make delivery to the Newberger people. We think this contention cannot prevail, in the light of the contract between the parties and the testimony as to what happened on the afternoon of October 21st, when McGarrity and Townes visited the gin. It is to be noted that by the terms of the contract delivery was to be made at McLemore's gin, and payment to be made when the cotton was delivered and the gin weights furnished. McLemore testified that he delivered the cotton to Moreland & Townes on that afternoon, and was cognizant of the alleged sale to the Newberger Cotton Company. We observe here that delivery of property sold is often one thing, and payment therefor quite a different thing. We think the contract between these parties, as understood and acted upon by them, meant that payment should not be made until after delivery and examination of the gin weights. In any event, it cannot be said as a matter of law that there was no delivery, as between McLemore and Townes, merely because at the time the gin weights had not been submitted. Payment might as well have been deferred by agreement, although required by the contract, if the intention to deliver existed in the minds of all the parties, and this intention we think is clearly shown by this testimony.

Coming, now, to the question of whether delivery was shown to the Newberger Cotton Company, we need hardly repeat the well-understood principle that this is essentially a question of fact, determined in this case largely by the intention of the parties. We need not consider in this case anything except the single question of delivery. For here nothing remained to be done to transfer the title except to deliver, since the identical cotton had been pointed out, examined,

sampled, and priced, and the company notified of the purchase. Now, under ordinary conditions, in the absence of evidence as to the custom between the parties as to placing the cotton by the seller in the hands of the railroad company for shipment and the method of making payment, it would be tolerably clear that the delivery was complete when the identical property sold or attempted to be sold has been pointed out and examined, and the terms and price agreed on. So that we can find no justification for the peremptory instruction in defendant's favor except the custom shown to exist between the parties as to payment and placing the cotton in the possession of the railroad company for transportation. We think this is a delicately balanced question. Let it be granted that this custom is fully proven; what certain deductions are to be drawn therefrom? Can it be certainly said as a matter of law that, because the seller has been accustomed to place the cotton in the hands of the carrier and draw for the price with bill of lading attached, no legal delivery could exist until these things had been done? It can hardly be maintained that time or method of payment will of themselves control the question of delivery. It may have been, as suggested by counsel, that the seller placed the cotton with the railroad company merely as an act of accommodation to the buyer, or even that this was an implied condition of the sale, without thereby postponing the delivery until the cotton was deposited with the carrier and bill of lading secured. Might I not agree with a purchaser to take my chattels at an agreed price, with the express understanding that delivery was then completed, but further agree to prepare them for shipment and wait for payment until this bill of lading is issued? To propound this query is to answer it.

What conclusion is to be drawn from the proven facts in this case upon the question as to when the parties intended that delivery should be completed? This is the vital point in the case, and is essentially a question of fact. In this state of the record we are forced to conclude that the learned judge should have permitted plaintiff, even after argument, to reopen his case and prove, if he could, the nonexistence of the custom as to payment, upon the existence of which defendant's whole case rested. The peremptory instruction can be justified only upon the idea that there was no conflict in the testimony, and the plaintiff ought to have been permitted, we think, though the application was out of time, to go before the court and jury upon all the facts of his case. The right of the cause demanded it in this particular case, and we think that the discretion of the court in this particular was not properly exercised. But, aside from this, we do not think a peremptory instruction should have been given, even though there was no conflict in the testimony as to what actually

happened between the parties. It is a misconception of the law to say broadly that every case should be taken from the jury merely because there is no conflict in the testimony. The fundamental question here is as to the intention of the parties, and this intention is, of course, to be gathered from the course of dealing between them, the acts performed, and the language uttered at the time the transaction is had. But it is peculiarly for the jury in this precise state of case to say what conclusion should be drawn from all the proven facts and circumstances here in evidence. It is for the jury to consider what weight shall be given to the custom shown as affecting the fact of delivery. It may be that the evidence is not conflicting; but it may well be characterized as equivocal, and in cases it is for the jury to say what construction is to be put upon the acts of the parties. *Gibbons v. Robinson*, 63 Mich. 146, 29 N. W. 533; *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291; *McLaughlin v. Marston*, 78 Wis. 670, 47 N. W. 1058.

Justice MAYES desires it said on his behalf that, while he concurs in the conclusion that the case should be reversed, he is of the opinion that the evidence of the custom between the parties in this case was improperly admitted, and, if admitted, does not even tend to show that delivery was contemplated elsewhere than at the place where the cotton was sold. He thinks that the peremptory instruction should have been for the plaintiff. The other members of the court, however, think that the case is for the jury.

Reversed and remanded.

(93 Miss. 340)

DELTA & PINE LAND CO. v. ADAMS, Revenue Agent. (No. 13,512.)

(Supreme Court of Mississippi. Dec. 7, 1908. Suggestion of Error Overruled. Feb. 1, 1909.)

1. APPEAL AND ERROR (§ 363*)—REVIEW—DISCRETION OF COURT—REFUSING APPEAL FROM DECREE OVERRULING DEMURRER TO BILL.

An appeal from a decree overruling a demurrer to a bill, to settle the principles of the cause, was properly refused, where there were no principles to be settled and an appeal would only result in vexatious delay and expense.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 363.*]

2. TAXATION (§ 362¼*)—COLLECTION OF TAX ON OMITTED PROPERTY—SUIT TO ENJOIN SALE OF LAND UNTIL TAXES ARE PAID—ATTACHMENT IN CHANCERY.

Where a bill is filed to enjoin a corporation from disposing of the balance of its property until taxes due have been paid, and for a personal decree for the amount of the taxes, it is no ground of demurrer that it is an attempt to obtain an attachment in chancery without making the requisite allegations therefor; the suit not being for an attachment in chancery and having no aspect of that sort.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 362¼.*]

3. EQUITY (§ 273*) — PLEADING — AMENDED BILL—INDEPENDENT SUIT.

In a suit to enjoin a corporation from selling the balance of its property until taxes due have been paid, an amended bill, proceeding upon substantially the same facts, but asking as additional relief a personal decree, based upon a judgment rendered between the filing of the original and amended bills, adjudging the taxes to be legal, did not present a wholly new and different case from that of the original bill, and was properly allowed.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 561, 562; Dec. Dig. § 273.*]

4. TAXATION (§ 362¼*) — COLLECTION — BACK TAXES—STATUTORY PROVISIONS.

Code 1906, § 4256, provides that every lawful tax levied by the state, etc., is a debt due by the person owning the property taxed, and may be recovered by action. Section 4740 provides that if, after the fiscal year in which taxes become due, the revenue agent discovers that property has not been assessed, he shall notify the tax collector, who shall assess it, and if the assessment is approved, and no appeal is taken, and the taxes are not paid within 30 days, the property, if realty, shall be ordered sold, as provided by section 4367. *Held*, that section 4256 provides an additional and more effective remedy by which the essential nature of the obligation as for taxes is changed to that of debts and applies to back taxes as well as others, and the method provided by section 4740 for collecting back taxes is not exclusive.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 362¼.*]

5. TAXATION (§ 584*) — COLLECTION — BACK TAXES — CONSTRUCTION OF STATUTES—"ACTION."

The fact that Code 1906, § 4256, provides for a recovery of taxes by "action," does not confine the remedy to courts of law, especially in view of sections 4738, 4742, and 4743, giving the revenue agent authority to sue in either a court of law or equity.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1187; Dec. Dig. § 584.*]

For other definitions, see Words and Phrases, vol. 1, pp. 128-140.]

6. TAXATION (§ 362¼*) — COLLECTION — BACK TAXES—STATUTORY PROVISIONS.

That hardship would result from rendering personal judgments for back taxes, and inconvenience be encountered because mistakes are frequently made from erroneous assessment as to ownership of property, and because through lapse of time evidence to disprove ownership might be lost, would be without weight in determining the exclusive character of the remedy afforded by Code 1906, § 4740, since the argument of inconvenience is for the Legislature, not the courts.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 362¼.*]

7. TAXATION (§ 362¼*) — COLLECTION—STATUTES—CONSTRUCTION—RETROACTIVE EFFECT.

Code 1906, § 4256, made every lawful tax levied by the state a debt, and provided a new method of collecting it by action, while under the prior law back taxes were not debts, and were collectible, when on realty, by sale of the land. *Held*, that section 4256 created a new obligation to pay, as well as a new remedy, and could have no retroactive effect, and hence a personal decree in an action thereunder could not be rendered for back taxes due before the enactment of the section, though assessed thereafter, as they were not debts, but merely taxes.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 362¼.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

8. EQUITY (§ 343*)—PLEADING—ANSWER—VERIFICATION.

Where at the end of an answer there was the statement, "Answer under oath waived," signed by counsel, and the record did not show any agreement that the force of a sworn answer was to be given to it, or what the statement meant, the answer had only the force of an unsworn answer.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 702; Dec. Dig. § 343.*]

9. TAXATION (§ 362¼*)—COLLECTION—ACTIONS—INJUNCTIONS.

Where, in a suit to restrain the selling of land until taxes were paid and for a personal decree for the taxes, an injunction was issued, and on a hearing on the merits a decree for the taxes was rendered, the injunction should have been dissolved, since the decree, when properly enrolled, established a judgment lien on the property for the taxes.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 362¼.*]

10. APPEAL AND ERROR (§ 187*)—REVIEW—QUESTIONS NOT RAISED IN LOWER COURT—DEFEAT OF PARTIES.

In a suit to collect back taxes, the contention that tax assessors and collectors during the period when the taxes should have been assessed ought to have been made parties, where not raised in the lower court, cannot be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1186-1189; Dec. Dig. § 187.*]

11. TAXATION (§ 362¼*)—COLLECTION—ACTIONS—PARTIES—STATUTORY PROVISIONS.

Ann. Code 1892, § 4200, providing that in suits against delinquent taxpayers the assessor and tax collector shall be made parties, and, if it appear that the failure to pay was caused by their willful default or negligence, judgment should be rendered against them for the revenue agent's compensation, does not apply to suits for back taxes, which the taxpayer declined to pay, and which could not be otherwise collected, because of its appeals and contests.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 362¼.*]

Appeal from Chancery Court, Hinds County; G. G. Lyell, Chancellor.

"To be officially reported."

Bill by Wirt Adams, Revenue Agent, against the Delta & Pine Land Company, to enjoin defendant from selling land until back taxes assessed against it had been paid and for a personal decree for the amount of the taxes. Decree for complainant, and defendant appeals. Affirmed in part, and reversed in part, and rendered.

McWillie & Thompson and Frank Johnston, for appellant. W. R. Harper, for appellee.

WHITFIELD, C. J. The original bill of complaint in this case, filed by the Revenue Agent, contained substantially the following averments: that he had had the appellant duly back-assessed for taxes for the years from 1889 to 1906, inclusive, due to the state, county of Hinds, and city of Jackson; that said assessments were for solvent credits owned and held by the appellant during said years, and on which no taxes had been paid; that the said assessments were all contest-

ed by the appellant, and that the taxes due on said assessments could not be collected by distress or "otherwise," by reason of appeals and contests made by appellant; that appellant was due about \$45,000 of such taxes, and declined to pay anything; that appellant had had, originally, a capital stock represented by half a million acres of wild land in this state; that it never had any other capital, and that the appellant had sold all the said lands except 15,000 to 20,000 acres, and distributed the proceeds as dividends among its stockholders; that the appellant was trying to sell all the remaining lands, so as to apportion the proceeds of sale as dividends among the stockholders, so as to place the property and effects beyond the reach of his creditors; that said course on the part of the appellant would render it insolvent before said taxes could be collected, or secured by levy, as required by law, and that thus the state, city, and county would be defrauded of their revenues; and it was further alleged that under sale for taxes it was doubtful if the said remaining lands would bring enough to satisfy the taxes due. The prayer of the said original bill, amongst other things, was for the issuance of a writ of injunction to prevent the appellant from making this said sale until the taxes should have been paid. The injunction issued as prayed for, and the writ was served on March 28, 1907.

Nothing further was done in the cause until April 21, 1908, when the complainant duly obtained leave of the court to file an amended and supplemental bill, which was accordingly duly filed on April 22, 1908. This amended bill sets out substantially the same facts with the original bill; but it prays for new relief, in that it asks for a personal decree for the amount of the taxes against the appellant. This amended bill states that the Revenue Agent had caused the appellant to be back-assessed for the taxes hereinbefore described for the years 1886 to 1904, inclusive, and it then stated that all said assessments had been finally adjudged legal and valid by this court, referring to the case of *Adams v. Delta & Pine Land Co.*, 89 Miss. 817, 42 South. 170; that the appellant had no property in Hinds county, and then, with great detail, set out the taxes for each year due the state, county, and city from 1886 to 1904, inclusive; and the prayer was for a personal decree against the appellant for the sum of \$32,823.38, being the amount of taxes as plainly and clearly shown in detail in the amended bill. It will thus be seen that there is no difference between the original bill and amended bill in substance; the only difference being as to the prayer as to the additional relief sought. But this relief is sought on substantially the same state of facts as made up the case as shown in the original bill. It will here be noted that there

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

had been in the case above referred to a final adjudication by this court of the legality and validity of all these assessments, and therefore a conclusive judgment, as between these parties, that the amount of the taxes so levied was due as taxes from the appellant. This was not the occurrence of any new fact between the filing of the original and amended bill, within the meaning of the rule of pleading as to an amendment making a new case. It was simply the statement, in the amended bill, of the decision of this court on the very same facts declaring the assessment valid, and the prayer, based on such decision, and upon the statute to be noted later, for a personal decree. On the 13th of June, 1908, the appellant took its first step by filing a demurrer to the original and amended bills which demurrer was by the court overruled. The second, fourth, seventh, eighth, ninth, and tenth grounds of demurrer only need be noticed, and they are as follows:

"(2) If, as complainant seems to assume, there is any lien upon said lands for the amount of taxes due by defendant, a sale of said lands could not impair or injuriously affect such lien in any way, and complainant is without right to the intervention of this court."

"(4) The complainant does not allege that defendant has conveyed or is about to convey said lands with intent to hinder, delay, or defraud the complainant, or the state, or any subdivision thereof, or any other creditor; nor does he allege any other illegal intent on the part of defendant, but merely states what he takes to be the effect of a sale of said lands. In other words, the complainant seeks by his bill to accomplish the ends and purpose of an attachment in chancery without making the necessary averments."

"(7) This court is not authorized to render a personal decree for complainant's demand. Code 1906, § 4740, is exclusive of all other remedies, and provides a specific method for the collection of back taxes or taxes on property that has escaped taxation.

"(8) The tax collector alone is entitled to collect back taxes on personalty.

"(9) Back taxes on personalty are not collectible by the sale of lands, but only by distress of personalty, or other proceedings affecting personalty.

"(10) The amended bill was not filed by leave of court, and is not one that should be allowed to be filed herein, since it is not germane to the original bill and is a new and independent suit.

"Wherefore defendant prays that said bill be dismissed," etc.

The other grounds of demurrer are manifestly untenable and need not be discussed. The appellant applied for an appeal from the decree overruling the demurrer, to settle the principles of the cause, and the court very properly refused to grant the appeal, since there were no principles to be settled, and

an appeal would only have resulted in vexatious delay and expense. Respondent then filed on June 18, 1908, its answer, but not under oath, practically denying all substantial allegations of the bill. The answer is a mere wholesale denial of any indebtedness by reason of said taxes in any way whatever. Counsel then agreed in writing that the assessments for the years 1886 to 1904, inclusive, were duly made by the state, county, and municipal authorities as detailed in the bill. The cause was then set down for hearing upon the issue docket upon the pleadings and proof, and the court rendered a final decree against the appellant for the sum of \$32,823.38, with interest upon said amount at 6 per cent. per annum from the date only of the decree; taxes not bearing interest as such. Both the original and amended bill were duly sworn to; but there was no waiver in either of an answer under oath. This appeal was prosecuted, and the contentions following are presented:

The fourth ground of the demurrer may be disposed of at once by the observation that this is not an attachment in chancery, and has no aspect of that sort, and that it does sufficiently aver that the appellant would be rendered insolvent by the sale of its remaining lands, and that its purpose was to so render itself insolvent and escape the payment of its taxes justly due. The averment of the bill is a sufficiently clear one that this appellant had already sold all of its lands down to about 15,000 or 20,000 acres, and that it was doing all in its power to get rid of that balance as rapidly as possible, with the view of defrauding the state, county, and city of the revenue justly due. It must be noted just here that after the final decree of this court in case of *Adams v. Delta & Pine Land Co.*, adjudging these taxes to have been duly and legally assessed, the appellant no longer stands in the attitude of contesting the legality of the taxes; but its defense has degenerated into a miserable effort to defeat by various crafty devices, dealt with in preceding decisions in this case, and its subsequent conduct, the payment to the government of the just taxes due for the protection that government has been extending to it for years past. The appellant occupies just precisely that very unenviable attitude.

The tenth ground of demurrer is not well taken, since, within the principles announced in the case of *Belzoni v. Y. & M. V. R. R. et al.*, 47 South. 468, recently decided, the amended bill did not make any new case. It proceeded upon substantially the same facts; the only difference being that it asked additional relief, a personal decree, based upon the final judgment of this court rendered between the filing of the original and amended bills, adjudging these taxes to have been legally assessed and to be a legal and proper charge, as taxes, against the appellant. It is true the original bill merely sought an injunction to preserve the status

quo of the lands pending final decision of this court as to the validity of the taxes, the result being also, however, to establish most of them as debts; but that injunction was granted by reason of the very same state of facts substantially, relating to the very same taxes, upon which the prayer for a personal decree was based, and in no proper legal sense, and within none of the rules applicable properly understood, can the amended and supplemental bill be said to have presented a wholly new and different case from that made by the original bill. The principles announced in the case of *Belzoni v. Y. & M. V. R. R. Co.* (Miss.) 47 South 468, perfectly cover this proposition.

The seventh ground of demurrer presents the most serious contention made by the appellant, and that contention is that the chancery court could not render a personal decree for these taxes, and that section 4740, Code 1906, is exclusive of all other remedies, and provides a specific remedy for the collection of back taxes, or taxes on property that has escaped taxation by reason of not having been assessed. Several contentions, under this ground of demurrer, are developed in argument with very great ability by learned counsel for appellant, and we will take them up in their order. It will first be necessary to set out section 4256, Code 1906 (which was first introduced into our law in section 3747, Ann. Code. 1892), and section 4740, Code 1906. Those sections are as follows:

"4256. Taxes a Debt Recoverable by Action.—Every lawful tax levied or imposed by the state, or by a county, city, town, village, or levee board, is a debt due by the person or corporation owning the property or doing the business upon which the tax is levied or imposed, whether assessed or properly assessed or not, and may be recovered by action; and in all actions for the recovery of taxes the assessment roll shall only be *prima facie* correct."

"4740. The Same—To Make Additional Assessments.—After the expiration of the fiscal year in which taxes become due should the revenue agent discover that any person, corporation, property, business, occupation, or calling has escaped taxation by reason of not being assessed, it shall be his duty to give notice to the tax collector in writing, and the collector shall, within ten days thereafter, make the proper assessment by way of an additional assessment on the roll or tax list in his hands, and give ten days' notice in writing to the person or corporation whose property is assessed, and all objections to such assessment shall be heard at the next meeting of the board of supervisors of counties or board of mayor and aldermen of municipalities. The board of supervisors or mayor and aldermen shall also be notified in writing by the collector of said assessment, and the state revenue agent may appear at said meeting, and an appeal

to the circuit court may be taken from the order of the board approving or disapproving such assessment by either party. If the assessment be approved and no appeal be taken, and the taxes shall not be paid within thirty days thereafter, the property, if it be real estate, shall be ordered sold as provided by section 4367, and if it be personalty, the tax collector shall proceed to collect by distress or otherwise. If the tax collector shall fail or refuse to make an assessment and report the same as herein required, he shall be liable on his bond for the amount of taxes properly collectible and ten per cent. damages thereon. If the assessment rolls be in the hands of the assessor at the time the revenue agent makes discovery of property which has escaped taxation, he shall give the required notice to the assessor, who shall make the proper assessment, and give the required notices to the owner of the property and to the board of supervisors or mayor and aldermen, under like penalties for failure as provided against the collector, and like proceedings shall be had. When any taxes shall be collected under assessments made as herein required, the revenue agent shall receive therefor at the time of collection, the same compensation allowed him by law for other collections."

It is first insisted, then, that section 4256, Code 1906, making taxes a debt, and providing for their recovery by action, has no relation to back taxes, or taxes which have been back-assessed on property which has escaped taxation by reason of not having been assessed. It is said that the machinery for the collection of such back taxes and the method for their collection are provided, and provided alone, in said section 4740, and that the method therein provided is exclusive. This contention is manifestly unsound. There is nothing in either of the two sections—4740 and 4256—providing that the remedy in section 4740 shall be exclusive, or providing that the remedy provided by section 4256 shall not apply to ordinary taxes assessed in the ordinary way. The manifest purpose of the Legislature in section 4256 was to provide an additional remedy, and to create a new right by which the essential nature of the obligation for taxes as taxes should be changed from the nature such obligation had as taxes alone to the nature or quality they would have as debts, and thus to give to the sovereignty a better right, and an additional and more effective remedy for the collection of taxes. In order to hold that this new remedy applied alone to back taxes, we would have to rest such holding upon nothing at all except the bald fact that one set of taxes had been assessed in the ordinary way and that the other set of taxes had been back-assessed in an extraordinary way. In other words, the new remedy manifestly applicable to all taxes would be denied application to the one set of taxes, and given application to the other set of taxes,

not because of any inherent difference in the nature of the taxes as obligations, but solely and only because, being of the same nature, they had merely been assessed in a different mode. This, of course, is utterly untenable. Along in this track of reasoning the learned counsel for appellant have much to say to the effect that the chancery court will not be transformed into an agency for the collection of taxes, etc., and that taxes are universally collected by the government through the ordinary tax agencies, etc. And many authorities are cited to support this perfectly elementary proposition. Of course, these propositions are generally true. The question here is not whether they are generally true, but whether this section 4256 has not introduced a new remedy for the collection of taxes, and the authorities cited so diligently from states not having this sort of statute, of course, have no manner of application here. In other words, the Legislature must manifestly have meant to add to the remedy the state had for the collection of taxes a new remedy, by the new method provided for in section 4256, and that method was, of course, applicable to the collection of all taxes. The mere fact that section 4740, Code 1906, provided that the method should be (where real estate was involved) by a sale of it, as provided by section 4367 of said Code, and (where personalty was involved) by "distress or otherwise," does not at all conflict with the provision for another and additional remedy provided by section 4256; nor does the fact that the party who shall do the collecting is, under section 4740, the tax collector, at all militate against the right of the revenue agent to bring the suit provided for in section 4256, enforcing that other additional remedy. If the remedy by section 4740 is desired to be pursued, the tax collector works it out. If the remedy provided by section 4256 is desired to be pursued, the revenue agent works it out. These questions as to who shall work it out are mere incidental questions of administration.

It is also said by learned counsel for appellant that the language in section 4256, that these taxes, treated as debts, may be recovered by "action," because of the use of the word "action," excludes the right to proceed in the chancery court. The law has armed the revenue agent, and armed him properly, with the amplest and fullest authority to sue in either a court of law or equity under sections 4738, 4742, and 4743, Code 1906. If it be said that the only right to bring this action is to be found in this particular section 4256, the answer is that, whilst that is perfectly true, the construction which would make the word "action" relate to the circuit court alone is palpably too narrow. What possible reason could be assigned for a purpose, on the part of the Legislature, to restrict the revenue agent to a court of law for the recovery of taxes treated as a debt, in all

cases, universally? Nothing is easier than to conceive of cases so complicated in their facts, and presenting so many difficulties as to the collection of taxes, as that the machinery of the court of chancery alone is elastic enough to deal effectively with the situation. In fact, no better illustration of this statement can be found than is furnished by the evidence in the long and vexatious litigation disclosed in this very cause. It would have been exceedingly easy for the Legislature to have said, if they had so meant, that the remedy should be pursued alone in the circuit court. The Legislature has not said so, all reason is against such a view, and the word "action" must be so construed as to work out what appears clearly to have been the purpose of the Legislature; and we hold, accordingly, that it empowers suit in either court. *Morris Ice Company v. Adams*, 75 Miss. 410, 22 South. 944, held nothing, so far as decision was concerned, except that a personal judgment for taxes could not be rendered in that particular proceeding, which was nothing but an appeal from an order of the board of supervisors making an assessment. Since the board of supervisors had no jurisdiction to render a personal judgment for taxes, an appellate court, reviewing its action, could render none. That, and that only, is the scope of the decision in *Morris Ice Co. v. Adams*, supra.

It is again earnestly urged that the remedy provided for the collection of taxes in section 4740 should be the only one pursued, for the reason that otherwise, if personal judgments are to be rendered for taxes, great hardship would result and great inconvenience be encountered by reason of the fact that mistakes are frequently made, by reason of erroneous assessment, as to ownership of property, and by reason of the further fact that in the lapse of time the evidence that would disprove ownership may become lost or destroyed, etc. This is nothing but the argument *ab inconvenienti*. It has no logical effect in establishing the proposition contended for. The same harshness of result, the same inconveniences in the remedies provided by law, are encountered oftentimes in many other cases. The argument might properly enough be made to the Legislature. It is out of place here. Courts cannot be influenced, where otherwise the line of decision is plain, by arguments arising purely *ab inconvenienti*. Nor is there anything in the proposition that the remedy provided by section 4740 should be exhausted before resort is had to the remedy provided for by section 4256. Three authorities are cited in support of this proposition, but they all apply only in the absence of statutes like section 4256. We are therefore clearly of the opinion, first, that the remedy provided by section 4740 is not exclusive of the remedy provided by section 4256, where back taxes are involved; but that either may be pursued without reference to the other; the remedy provided by section 4256 being

merely cumulative and additional to that provided in section 4740.

The next contention argued, with surpassing ability by the learned counsel for appellant, is that, at least as to the taxes for the years 1886 to 1892, inclusive, there could be no personal decree rendered, because section 4256, appearing first as section 3747, Ann. Code 1892, cannot constitutionally have any retroactive effect as to these taxes for the years specified, since that statute not only creates a new remedy, but also a new right. A very ingenious reply is made to this contention by the learned counsel for appellee. He says that this statute only affects the remedy, and not the right, and that, even if it be true that it does change the essential character and nature of the obligation to pay taxes as taxes, so as to convert the essential nature of that obligation into the character and quality of obligation which a debt imports, so as that what was due theretofore in its character as a tax becomes thereafter due in the far stricter character of debt, that nevertheless all these taxes were assessed long after Ann. Code 1892, § 3747, went into effect, and that, since taxes are not due until they shall have been assessed, all these taxes were first due only from the date of the back-assessment, long subsequent to the passage of this statute in the Annotated Code of 1892, and that hence it was competent for the chancery court to render a personal decree for the taxes for these years also, from 1886 to 1892, inclusive.

But we think this reply is more specious than sound. It does not go to the root of the objection. It would be a perfect reply if we treat these taxes for these years as taxes only, and as having only the obligation of a tax as ordinarily understood, or, what is the same thing, if the effort of the revenue agent in this case be dealt with alone along the line of enforcing the collection of these taxes through the machinery alone provided by section 4740, dealing with the revenue agent as proceeding under this machinery exclusively, and in this case as engaged in the effort to sell these solvent credits under section 4341, according to one of the meanings of the word "otherwise" in section 4740, since he could not get hold of them by distress, they having been scattered all over the commercial world by sale to innocent purchasers for value without notice, we would then have a case of the revenue agent endeavoring to exclusively enforce the collection of these taxes, considered strictly and alone as taxes, so far as their nature and obligation is concerned, and exclusively under the machinery provided by section 4740. If we shut out wholly section 4256, and also shut out wholly the earnest effort made in this suit to enforce it, and look only to section 4740 and the procedure thereunder to collect these taxes from 1886 to 1892, inclusive, treating them as in their nature taxes only, and seeking to collect them alone by the machinery of section 4740,

then, of course, it becomes perfectly clear that since the taxes were never due until assessed, never a legal charge until then and since they were never assessed until long after the Annotated Code of 1892 went into effect, they were exigible according to the provisions of law treating them as taxes alone in their nature when due; that is, when assessed. But that is not this case. It is only half of it. Indeed, it is hardly half of it, since the chief effort here is to collect these taxes, treated, not as taxes, but as debts. These obligations due between the years 1886 and 1892 are not sought, in this suit, to be collected as taxes, so far as the essential and inherent nature of the obligation is concerned; but they are directly and specifically attempted to be collected as debts, and by suit for debt, and they are dealt with as debts as to their inherent obligation, in this proceeding—not as taxes at all, but wholly as debts, with the legal nature of debts, and with a right under section 4256 to collect them as debts.

Now, keeping that view in mind, it is to be noted carefully here, that the effect of section 4256 is not only to furnish a new remedy, but it is to change the essential and inherent nature of the obligation to pay the thing, whether you call it a tax or what-not, so as to make that obligation become the obligation one is under when he owes a debt, and not the obligation one is under when the obligation is merely that of a tax. This undoubtedly is to change the right, and not merely the remedy; and, most manifestly, having the effect to change the right, the section cannot constitutionally have any retroactive effect. Take this further illustrative statement: Suppose the suit is brought as to these taxes to recover them as debts; yet they were not debts until this section 3747, Ann. Code 1892, was passed. They were then taxes. They never were debts until after the passage of this section of the Ann. Code of 1892. Since they were not such in their nature prior to that Code, and only became such after the adoption of that Code, clearly they could not be sued for or recovered in their capacity as debts until after that Code went into effect. In other words, prior to the adoption of this section 3747, these obligations were taxes pure and simple, to be dealt with in the mode prescribed by section 4740, Code 1906, alone. The method of suit to recover them is determined by their character as obligations. But since section 3747, Ann. Code 1892, was adopted, two remedies were presented, either of which may be pursued without reference to the other. So it follows that the judgment of the court is correct, in so far as it rendered a personal decree for all taxes except the taxes for the years 1886 to 1892, inclusive, and that its action was erroneous in rendering a personal decree for taxes for these years.

We come now to the last point which the record presents for decision. It is most earn-

estly insisted by the learned counsel for appellant that the injunction in this case should have been dissolved on the hearing on the merits, and should not have been retained for further proof by the learned court below, for the reasons, first, that since as is said, the answer under oath was not waived, and that answer, as is again said, swore completely away the equities of the bill, the complainant was without evidence, on the hearing on the merits of the bill, as to the injunction, and, second, because, since these taxes have been finally adjudicated by this court to be legal charges, and since, if this personal decree for taxes shall be affirmed, and that decree dealt with according to law, by enrollment and otherwise, so as to secure the judgment lien, the injunction is wholly useless. On reason and principle, the second proposition is manifestly sound. Counsel for appellant is here, as in respect to leave having been obtained to file the amended bill, mistaken. Such leave was granted; but the answer was not sworn to at all, and cannot be given the effect of a sworn answer. There is at the end of the answer this statement, signed by counsel for appellee: "Answer under oath waived." It is urged that this could not have the effect of such waiver of oath "in the bill," and that it meant that such force was to be given to the answer as usually attaches to a sworn answer. It would have been easy to give it that meaning by agreement. We do not know what it meant. But, this being all there is in the record, the answer is to be treated as unsworn. The object of the injunction was in part to hold the lands until the machinery of section 4740 could be invoked for their sale, if possible, after this court had declared these assessments valid. But even if the lands so held by the injunction from sale could have been sold under the machinery of section 4740 for the taxes due on these solvent credits, as most manifestly they could not have been, yet even, in that mistaken view, there would have been no occasion for the injunction when this hearing on the merits was had below, for the obvious reason that there was established by the decree below, when enrolled, etc., a judgment lien on these lands, and all other property of this appellant subject in this state to such judgment lien; and, no matter to whom these lands might have been sold, they could have been pursued under that lien and made to respond to the decree for the full amount of these taxes and interest. We are therefore of the opinion clearly that the court below ought to have dissolved this injunction, when it decided the case on its merits, for the second reason indicated. The injunction, if properly issued originally, on the debt theory, should have been dissolved on the hearing, because then no longer needed.

There is nothing in the contention that un-

der section 4200, Ann. Code 1892, the tax assessors and tax collectors during the period when these taxes should have been assessed ought to have been made parties to this suit, for two very obvious reasons: First, because no such point was made in the court below, and it should not be raised here for the first time; and, second, if the point had been made the section has no application under the facts of this case.

We have given this case the most careful and painstaking consideration possible. It follows from the views we have announced: First, that the action of the court below in overruling the demurrer and in rendering a personal decree against the appellant for all the taxes herein involved, save only those for the years 1886 to 1892, inclusive, was correct, and it is to that extent hereby affirmed; second, that the action of the court below in rendering a personal decree against the appellant for the taxes from 1886 to 1892, inclusive, was erroneous, and the decree in that respect is hereby reversed; third, that the action of the court below in failing to dissolve the injunction at the hearing on the merits was erroneous, and the decree in that regard is hereby reversed.

Let decree be entered here, in accordance with this opinion, awarding appellant the amount of taxes sued for for the years 1893 to 1904, inclusive. Let each party pay half the costs.

(122 La. 755)

No. 17,322.

GOODEN et al. v. POLICE JURY OF LINCOLN PARISH et al.

(Supreme Court of Louisiana. Nov. 30, 1908.
Rehearing Denied Jan. 18, 1909.)

MUNICIPAL CORPORATIONS (§ 874*)—STATUTES (§ 183*)—RAILROADS—MUNICIPAL AID—ELECTIONS—PETITION—SUFFICIENCY.

The plaintiffs in this case obtained a judgment setting aside a special tax which had been voted for by the property tax payers of ward 1 of Lincoln parish in favor of a railroad corporation under the provision of article 270 of the Constitution and Act No. 202, p. 483, of the same year, and enjoining the police jury from collecting the tax. The tax had been voted at an election ordered by the police jury upon a petition of property tax payers. The ground assigned for setting aside the special tax and enjoining its collection was that the petition addressed to the police jury did not set forth the amount to be raised each year, but only a rate of five mills per annum was stipulated to be raised each year, and that it did not set out any definite number of years that the tax should run, but only that it should not exceed 10 years. *Held*, for reasons assigned, that the judgment appealed from was erroneous. Judgment reversed.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1851; Dec. Dig. § 874; * *Statutes*, Cent. Dig. § 261; Dec. Dig. § 183.*]

(Syllabus by the Court.)

Appeal from Fourth Judicial District Court, Parish of Lincoln; Robert Brooks Dawkins, Judge.

Suit by J. W. Gooden and others against the Police Jury of Lincoln Parish and others. Judgment for plaintiffs, and defendants appeal. Reversed, and suit dismissed.

Barksdale & Barksdale, for appellants. Barnette & Roberts, for appellees.

NICHOLLS, J. The plaintiffs alleged that they are residents, citizens, and taxpayers of ward 1, Lincoln parish; that about the month of January, 1908, one-third or more of the citizens and taxpayers of ward 1, Lincoln parish, La., who were authorized to vote under the Constitution and laws of this state, petitioned the police jury for Lincoln parish to order a special election for said ward of said parish to vote upon a proposition of levying a special ad valorem tax of five mills on the dollar upon all the assessable property in said ward, for the purpose of aiding in the building and construction of the proposed line of railroad through a portion of Lincoln parish, to be known as the "Ruston, Natchitoches & Northeastern Railroad Company," for a period of time not to exceed 10 years; that the said police jury failed to order said election as prayed for, whereupon the courts of said parish were appealed to for a writ of mandamus to compel the police jury to order said election. After trial of said cause the courts granted the writ, whereupon the said election was ordered, same being ordered held according to law, at the regular polling places in said ward, which election was duly held on the 5th day of May, 1908.

Petitioners represent that they are citizens and taxpayers of said ward and have a right to appear and contest this tax; that they have interest in same being annulled and set aside; that the said tax as above alleged is illegal, null, and void, and should be set aside for the following reasons, to wit:

First. That the petition praying for the election did not set forth the amount to be raised each year; that only a rate of five mills was stipulated to be raised each year.

Second. That the petition did not set out any definite number of years that said tax should run, but only that it should not exceed the constitutional limit of 10 years, this pretended limitation having no effect whatever, for the stipulation would have been written therein by the Constitution of this state, had said petition been silent upon this point. Petitioners aver that for the two reasons above stated the said tax is an absolute nullity; that both the amount to be raised each year and the exact time that the tax shall run must be set out in said petition, under the pain of nullity; that this suit is filed within three months from the holding and promulgation of this election; that the act of the said police jury in ordering this election upon this fatally defective petition

is illegal, null, and void; that the said police jury should be cited to answer hereto; that each member should be so cited, and served in accordance with law; that said Ruston, Natchitoches & Northeastern Railroad Company should also be cited to appear and defend whatever interest it may have in the result of this suit.

In view of the premises, petitioners prayed for service hereof and citation in accordance with law upon the members of the police jury of Lincoln parish, La., also upon the said Ruston, Natchitoches & Northeastern Railroad Company, a corporation also domiciled in Lincoln parish, with J. C. Nolan, of same residence, as its president, and, after due and legal trial had, for judgment in their favor, annulling, avoiding, and setting aside the tax as above alleged, and enjoining the police jury from levying said illegal tax. They prayed for all needful orders and decrees, and for costs and general relief.

Defendants answered. After pleading a general denial, they admitted that more than one-third of the property owners entitled to vote in the election in question petitioned the police jury according to law to order said election as alleged; that said election was regularly held in accordance with said petition and according to law on May 5, 1908, the returns regularly canvassed, and result promulgated according to law. Defendants alleged that said petition in all respects fairly, substantially, and completely complied with the law. They prayed that plaintiffs' demand be rejected with costs, and for general relief.

The district court rendered judgment in favor of the plaintiffs, annulling, avoiding, and setting aside the tax voted to the Ruston, Natchitoches & Northeastern Railway Company on May 5, 1908, in ward 1, Lincoln parish.

The Ruston, Natchitoches & Northeastern Railway Company have appealed.

The petition of taxpayers referred to in plaintiffs' petition was as follows:

"Ruston, La., Jan. 28th, 1908.

"State of Louisiana, Parish of Lincoln.

"To the Honorable the Police Jury of the Parish of Lincoln, State of Louisiana.

"The undersigned citizens and property taxpayers of ward 1, Lincoln parish, La., being and constituting more than one-third of the property tax payers in said ward 1, Lincoln parish, La., entitled to vote in the election herein prayed for, in number and value, respectfully request your honorable body to order a special election to be held in ward 1, Lincoln parish, La., for the purpose of submitting to the property tax payers of said ward 1, Lincoln parish, La., who are qualified to vote in said election under the Constitution and laws of the state of Louisiana, the question whether they, the said property tax payers, will authorize your honorable body, the police jury of Lincoln parish, to assess, levy, and collect annually from year to year, not exceeding ten years a special tax of five mills on the dollar on all of the assessable property in said ward 1 of Lincoln Parish, La., until the full sum of seventy-five thousand dollars be thereby collected.

"Said tax to be levied for and said sum to be

paid to Ruston, Natchitoches & Northeastern Railroad Company, a corporation organized under the laws of the state of Louisiana and domiciled at Ruston, Lincoln Parish, La., for the purpose of aiding in the building and the operating of a railroad from a point within the town of Ruston, La., in a northeasterly direction through the parishes of Lincoln and Union, La., to a point at or near the town of Farmerville, Union Parish, La. Said special tax to be levied and collected during the years 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, and 1919, and the proceeds thereof up to the aforesaid sum of seventy-five thousand dollars to be annually paid as collected to said Ruston, Natchitoches & Northeastern Railroad Company, its successors or assigns, provided that the said railroad or such railroad as it may form a part of, shall be completed and in operation on or before the first day of July, 1910, from Ruston, La., to a point at or near the town of Farmerville, Union parish, La.

"That said special election be ordered and held pursuant to article 270 of the Constitution of the state of Louisiana, Act No. 202, p. 483, of the General Assembly of Louisiana of the year 1898, and Act No. 23, p. 26 of the General Assembly of Louisiana of the year 1904, and in all respects according to law, not sooner than 30 days after the official publication of this petition and the ordinance of your honorable body ordering said election.

"That the police jury on behalf of ward 1 of Lincoln Parish, La., shall after due and legal delays and the due and legal promulgation of said election immediately pass an ordinance levying such tax for the time and for the years herein above specified, and designating the years for which said taxes shall be levied and collected."

Here follow the signatures of taxpayers.

The police jury of Lincoln parish, La., acted upon this petition in its ordinance No. 68, entitled:

"An ordinance ordering an election in pursuance to petition of the property tax payers of ward 1, of Lincoln Parish, Louisiana, including the town of Ruston, for the purpose of submitting to the property tax payers entitled to vote thereat, the proposition whether or not they will authorize the police jury of Lincoln parish, to levy and collect annually from year to year, a special tax of five mills on the dollar for ten years, on all assessable property in said ward to the amount of seventy-five thousand dollars in favor of the Ruston, Natchitoches and Northeastern Railroad Company for the purpose of aiding said Ruston, Natchitoches and Northeastern Railroad Company in building and operating a standard gauge steam railroad from the town of Ruston, La., to a point at or near to the town of Farmerville, La., the avails of such a tax to be paid annually to said railroad company, its successors or assigns, provided said Ruston, Natchitoches and Northeastern Railroad, or such railroad as it may form part of shall have been completed and in operation on or before July 1st, 1910, fixing the date and providing for the manner of holding said election."

The ordinance so adopted was as follows:

"Be it ordained by the police jury of Lincoln Parish, La., in special session convened for this purpose, that by reason of the foregoing petition an election of the legally qualified property tax payers of said ward 1 of Lincoln Parish, La., held on Tuesday 5th day of May, 1908, A. D., at the polling places at which the last preceding general election was held in accordance with the general election laws of the state, so far as applicable, and especially article 270 of the Constitution of Louisiana, and Act No. 202 of the General Assembly of Louisiana, approved July 14th, 1898, and acts amendatory there-

of for the purpose of taking the sense of the property tax payers in said ward 1 of Lincoln parish, La., to levy a special tax of five mills on the dollar on all the property in said ward subject to taxation for ten years or until the sum of seventy-five thousand dollars shall be collected and paid to the Ruston, Natchitoches & Northeastern Railroad Company, a corporation organized under the laws of Louisiana, domiciled at Ruston, Lincoln Parish, La., to aid in the building and construction and operation of a standard gauge steam railroad from a point in the town of Ruston, La., in a northeasterly direction through the parishes of Lincoln and Union, to a point at or near the town of Farmerville, La., said special tax to be levied and collected for and during the years 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918 and 1919, and the proceeds thereof to be paid annually as collected up to the sum of seventy-five thousand dollars to the Ruston, Natchitoches & Northeastern Railroad Company, its successors or assigns, provided said Ruston, Natchitoches & Northeastern Railroad, or such railroad as it may form a part of, shall be completed and in operation on or before the first day of July, 1910, from Ruston, La., to a point at or near Farmerville, Union parish, La.

"Sec. 2. Be it further ordained, etc., that the petition of the property tax payers and notice of election fixing the time and polling places, and the manner of holding said election, and giving names of commissioners of election, and prescribing the manner of counting the votes and making returns thereof, shall be published for more than 30 days preceding the holding of said election in the official journal of Lincoln parish.

"Sec. 3. Be it further ordained, etc., that all of the property tax payers voting at this election shall be registered voters (except women taxpayers) of ward 1, Lincoln parish, La., and that in order to determine the assessed value of the property voted, the voter shall endorse his name on the ballot together with the amount of property voted before depositing the same in the ballot box.

"Sec. 4. Be it further ordained, etc., that the tax assessor is hereby directed and required to furnish the commissioners of election at each polling place in ward 1, Lincoln Parish, La., a full and complete list of the qualified taxpaying voters with the amount of property assessed to each.

"Sec. 5. Be it further ordained, etc., that the returns of said election shall be made in accordance with law, by the commissioners of election to the board of supervisors of election of the parish of Lincoln, and also to the police jury of Lincoln parish not later than the 6th day of May, 1908, after said election, and result of said election shall be promulgated by the said police jury and also by the said board of supervisors of election in the manner prescribed by law.

"Sec. 6. Be it further ordained, etc., that the following named properly qualified taxpaying voters of said ward 1 are hereby appointed commissioners, and clerk of said election at Ruston precinct, viz.: G. A. Adams, Newt B. Jackson, O. K. Huey, commissioners; T. E. Ridge, clerk. At Vienna precinct, S. F. Ray, J. W. Gooden, J. M. Harrison, commissioners; O. W. Kinman, clerk.

"Sec. 7. Be it further ordained, etc., that this ordinance shall take effect from and after its promulgation."

The motion to adopt having been duly seconded and roll being called, the vote resulted as follows: Yeas, J. L. Bell, J. H. Deloney, D. S. Aswell, T. L. Waugh. Nays, none. Absent, G. W. Dye, J. W. Hawthorn, J. C. Jones. The president declared the ordinance adopted.

On May 16th a meeting of the police jury of Lincoln parish was held, at which the following proceedings took place:

"The minutes of the last meeting were read and approved, and in accordance with law, the board of supervisors of election, being present, submitted and presented to the police jury the ballot boxes and election returns of special election held in and for ward 1 of Lincoln parish on May 5, 1908, for the purpose of authorizing the levy of a five-mill tax for 10 years in aid of the Ruston, Natchitoches & Northeastern Railroad Company, together with the following procès verbal of the canvassing and tabulating of said returns, to wit:

"State of Louisiana, Parish of Lincoln.

"Be it remembered that we, the undersigned board of supervisors of election for the parish of Lincoln, state of Louisiana, did this day repair to the courthouse of said parish, for the purpose of canvassing and compiling the returns and ballots returned by the commissioners of election at the polling places at Ruston and Vienna, in ward 1 of Lincoln parish, La., of an election held therein on the 5th day of May, A. D. 1908, on the question of whether or not the police jury for Lincoln parish shall be authorized to levy and collect annually a special tax of five (5) mills on the dollar on the assessable property of said ward for ten (10) years for the purpose of collecting and paying to the Ruston, Natchitoches & Northeastern Railroad Company, the sum of seventy-five thousand dollars (\$75,000) for aid of the construction of a standard gauge steam railroad from Ruston, La., to a point at or near the town of Farmerville, Union Parish, La., said road to be completed and in operation on or before the 1st day of July, 1910, A. D., according to the laws of this state, and in pursuance of the ordinance and proclamation of the police jury for Lincoln Parish, La., and notice of election of the board of supervisors of election.

"And then and there having arrived, we proceeded in the presence of J. J. Booles and S. L. Barksdale and J. D. Barksdale, witnesses, duly qualified as electors in and for the said parish and ward, and others who chose to be present, and said returns and the number of votes cast for and against the said special tax having been by us ascertained from said compilation, and it appearing from said compilation of the votes cast in said polling places in ward 1 that the total number of votes cast in said election in favor of said special tax are as follows, to wit:

"Number of votes for said special tax, two hundred eighty-six (286).

"Number of votes against said special tax, one hundred twenty-three (123).

"Amount of property voted in favor of said special tax, \$429,622.09, four hundred twenty-nine thousand six hundred twenty-two and 9/100 dollars.

"Amount of property voted against said special tax \$59,562, fifty-nine thousand five hundred and sixty-two dollars.

"And, having made public proclamation of the above results, we have closed the present procès verbal of said compilation of votes, which is hereby made in triplicate as required by law.

"Thus done and signed at Ruston, Lincoln Parish, La., this sixth day of May, 1908, A. D.

"J. K. McAllister,

"Geo. Knowles,

"Board of Supervisors of Election.

"Witnesses:

"J. J. Booles.

"Sam. L. Barksdale.

"J. D. Barksdale.

"Sworn and subscribed before me, the undersigned authority, the sixth day of May, 1908.

"J. M. Sims.

"Clerk District Court and Ex Officio Recorder."

On motion duly seconded, all the members present voted in favor of the reception and adoption of said procès verbal, and the resolution was declared adopted, and the clerk ordered to spread said procès verbal on the minutes.

The police jury then proceeded with the examination of the returns of said election, and on motion of J. H. Deloney, seconded by T. L. Waugh, the following Ordinance No. 68 was adopted, to wit:

"Ordinance No. 68.

"An ordinance promulgating the result of special election held in ward 1 of Lincoln parish, La., pursuant to the petition of the property tax payers of said ward entitled to vote therein and ordinance No. 66 of the police jury of Lincoln parish, as well as the proclamation of election and notice of election by the board of supervisors of election of Lincoln parish, on the proposed special tax of five mills on the dollar on the assessable property in said ward for ten years for the purpose of collecting and paying to the Ruston, Natchitoches & Northeastern Railroad Company the sum of seventy-five thousand dollars, in aid of the building and operation of a standard gauge steam railroad from the town of Ruston, to a point at or near the town of Farmerville, Union parish, La., upon condition that same be completed and operated on or before the first day of July, 1910, levying the said special tax and providing for the assessment and collection of the same.

"Whereas, upon the question of more than one-third of the property tax payers entitled to vote in the election therein prayed for and pursuant to Ordinance No. 66 of the police jury of Lincoln parish, La., adopted on the 23d day of March, 1908, A. D., and pursuant to the election proclamation of said police jury of date March 23d, 1908, and notice of election by the board of supervisors of election in and for Lincoln parish, of same date, the said petition, ordinance, proclamation and notice of election having been duly advertised by publication in the Ruston Leader, a weekly newspaper, published in the town of Ruston, La., according to law, for more than thirty clear days prior to the fifth day of May, 1908, a special election was held according to law in ward 1, Lincoln Parish, La., on Tuesday the fifth day of May, A. D. 1908, at the two polling places of said ward, at which the last general election was held, to wit: Ruston and Vienna.

"Whereas, the returns of said election have been made according to law and in accordance with the said ordinance, and proclamation of election by the police jury of Lincoln parish, La., and notice of the board of supervisors of election of Lincoln parish, La., and

"Whereas, the said police jury of Lincoln parish, La., and the said board of supervisors of election have canvassed and compiled the returns of said special election, and have found and promulgated the result thereof, declaring that the majority in number and assessed value of the property tax payers of said ward 1, voting at said special election voted in favor of said special tax: Now therefore:

"Section 1. Be it ordained by the police jury of Lincoln parish, La., in session convened for the purpose, that the said police jury does hereby declare, promulgate and proclaim that the majority in number and assessed value of the property tax payers of said ward 1, Lincoln parish, La., voting at said election voted in favor of said levy of said special tax, and does hereby proclaim and promulgate said special election in favor of said special tax in aid of the said Ruston, Natchitoches & Northeastern Railroad Company.

"Sec. 2. Be it further ordained, etc., that in accordance with said special election a special tax of five (5) mills on the dollar, or so much thereof as shall be necessary, be and the same is hereby levied upon all the assessable property in said ward 1 of Lincoln parish, La., for the purpose of collecting and paying to the Ruston, Natchitoches & Northeastern Railroad Company the sum of seventy-five thousand dollars (\$75,000.00) in aid of the construction and operation of its standard gauge steam railroad from the town of Ruston, La., to a point at or near the town of Farmerville, Union parish, conditioned upon and provided the said standard gauge steam railroad, or such standard gauge steam railroad as it may form a part of, shall have been completed and in operation on or before the first day of July, 1910, from the town of Ruston to a point at or near the town of Farmerville, beyond the Bayou D'Arbonne, and to such point as shall be necessary and practicable for the transportation of freight and passengers to and from the town of Farmerville; said special tax to be levied and collected in ten (10) equal installments of \$7,500.00 each, during the years 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, and 1919; said special tax to be levied and assessed and collected annually during said years in addition to other taxes on all of the assessable property in said ward 1, and the collection of the same to be enforced by the same authority and means as is authorized or may be authorized by law for the collection of other taxes.

"Sec. 3. Be it further ordained, etc., that the said special tax when so collected, up to the amount of seventy-five thousand dollars (\$75,000.00) shall be paid over annually to the Ruston, Natchitoches & Northeastern Railroad Company through its proper officer or its assigns after deducting lawful commissions for the assessment and collection of the same.

"Sec. 4. Be it further ordained, etc., that this ordinance shall take effect from and after its promulgation according to law."

"The motion to adopt being duly seconded, and roll being called, the result was as follows:

"Yeas: L. J. Bell, J. H. Deloney, G. W. Dye, T. L. Waugh. Nays: None. Absent: J. W. Hawthorn, J. C. Jones, D. S. Aswell.

"The president declared the ordinance adopted.

"L. J. Bell,

"President Police Jury, Lincoln Parish, La.

"J. T. M. Hancock, Clerk Police Jury Lincoln Parish, La."

It is admitted that the assessment of ward No. 1 of Lincoln parish for the year 1907 was \$1,322,864, and for the year 1908 \$1,573,981. The taxpayers prayed that the election be held under article 270 of the Constitution of 1898, Act 202 of 1898, and Act 23 of 1904.

Article 270 of the Constitution reads as follows:

"The General Assembly shall have power to enact general laws authorizing the parochial ward and municipal authorities of the state by a vote of the majority of the taxpayers in number authorized to vote, under the provisions of this Constitution and in value to levy special taxes in aid of public improvements or railway enterprises; provided that such tax shall not exceed the rate of five mills per annum, nor extend for a longer period of ten years; and provided further that no taxpayer shall be permitted to vote at such election unless he shall have been assessed in the parish, ward or municipality to be affected for property the year previous."

Act No. 202 of 1898 is entitled:

"An act authorizing the parochial ward and municipalities of the state by a majority vote

of the property tax payers in number entitled to vote under the provisions of the Constitution of 1898 and in value to levy special taxes in aid of public improvements or railway enterprises prescribing the manner in which special elections shall be held and the rate and duration of said special taxes and carrying into effect article 270 of the Constitution of 1898."

The first section of the act authorizes the parochial, ward, and municipal authorities of the state to order elections in their respective parishes, wards, or municipalities in the written petition of one-third of the property tax payers of such parish, ward, or municipality entitled to vote therein, and to levy special taxes in aid of public improvements or railway enterprises when authorized by a vote of the majority of the property tax payers in number entitled to vote under the provisions of the Constitution and in value, provided that such tax shall not exceed the rate of five mills per annum nor extend for a larger period than 10 years; and provided further that no taxpayer shall be permitted to vote at such election unless he shall have been assessed in the parish, ward, or municipality to be affected for property the year previous.

The second section provides that the petition mentioned in section 1 of the act should be signed by the property tax payers of such parish, ward, or municipality, and shall designate the object and amount of the taxes to be levied each year, and the number of years during which it shall be levied.

The fifth section provides that if a majority in number and assessed value of the property tax payers of such parish, ward, or municipality voting at such election shall vote in favor of such levy of such special tax, then the police jury on behalf of such parish, or any ward therein, or the municipal authorities for and on behalf of such municipality, shall immediately pass an ordinance levying such tax, and for such time as may have been specified in the petition, and shall designate the years in which such taxes shall be levied and collected.

The seventh section provides that the police jury of any parish, for said parish or any ward therein, or the municipal authorities or any municipality, shall, when the vote is in favor of the levy of said taxes, levy and collect annually, in addition to other taxes, a tax upon all taxable property within said parish, ward, or municipality, for an amount sufficient to pay the amount specified to be paid in said petition; and such police jury and municipal authorities shall have the same authority and right to enforce the collection of such special tax as may be authorized by such election as is or may be conferred upon them for the collection of other taxes, which taxes so collected shall be used for the purposes named in said petition, and paid over when collected by the proper officers to the treasurer for the person or corporation entitled

thereto, after deducting lawful commission for collecting same.

Act No. 23 of 1904 amends the third section of No. 202 of 1898, but as no issue arises in this case, under and by reason of that amendment, it is needless to do more than refer to the fact that an amendment of that act had been enacted.

In *Bennett v. Police Jury et al.*, 113 La. 68, 36 South. 891, six taxpayers of the Cheneyville school district of the parish of Rapides enjoined the Secretary of State from promulgating the result of an election held in the school district mentioned at which the taxpayers of that district had voted in favor of a school tax for the purpose of purchasing grounds and building a schoolhouse, and enjoining the police jury from levying the tax voted for. The tax was sought to be imposed under article 232 of the Constitution and Act No. 131, p. 200, of 1898. The last-mentioned act was the legislative act carrying that article of the Constitution into effect.

The article referred to declared that the state tax on property for all purposes whatever, including expenses of government, schools, levees, and interest, shall not exceed in any one year six mills on the dollar of its assessed valuation, and, except as otherwise provided in the Constitution, no parish, municipal, or public board tax shall exceed in any one year ten mills on the dollar of valuation, provided that, for giving additional support to public schools and for the purpose of erecting and constructing public buildings, public schoolhouses, bridges, wharves, levees, sewerage work, and other works of permanent public improvement the title to which shall be in the public, any parish, municipal corporation, ward, or school district, may levy a special tax in excess of said limitation whenever the rate of such increase and the number of years it is to be levied and the purpose for which the tax is intended shall have been submitted to a vote of the property tax payers of such parish, municipality, ward, or school district entitled to vote under the election laws of the state and a majority of the same in number and in value voting at such election shall have voted therefor.

The General Assembly in Act No. 131 of 1898, entitled "An act to prescribe the manner in which special elections shall be held in any parish, municipality, ward or school district of this state, for the purpose of levying special taxes for the support of public schools and for the purpose of erecting and constructing public buildings, public schoolhouses, bridges, wharves, levees, sewerage work and other works of permanent public improvement the title to which shall be in the public in such parish, municipality ward or school district and to carry into effect article 232 of the Constitution of 1898," enacted in its first section that:

"Whenever one-third of the property tax payers of any parish, municipality, ward or school

district in this state shall petition the police jury of such parish or the municipal authorities of such municipality to levy a special tax for the support of public schools and for the purpose of erecting and constructing public buildings, public schoolhouses, bridges, wharves, levees, sewerage work and other works of public improvement the title to which shall be in the public, the said police jury or municipal authorities shall order a special election for that purpose and submit to the property tax payers of such parish, municipality, ward, or school district, the rate of taxation, the number of years it is to be levied and the purposes for which it is intended; provided that said election shall be held under the general election laws of the state and at the polling places at which the last preceding general election was held and not sooner than thirty days after the official publication of the petition and ordinance ordering the election."

In its second section it provided that:

"The petition mentioned in section 1 of the act should be in writing and designate the object and amount of the tax to be levied each year and the number of years during which it shall be levied."

The tax voted for in the Cheneyville school district was enjoined in that suit on the ground that under the law the petition of taxpayers must under pain of the nullity of the proceedings state the amount proposed to be raised each year from the tax; that it did not suffice that the petition specified the rate of the proposed tax. That, in the case then before the court, the amount proposed to be raised each year from the tax had not been stated in the petition of taxpayers, but the rate of the proposed tax had been. The Supreme Court (two justices dissenting) rendered judgment in favor of the plaintiff enjoining the police jury from levying the tax voted for.

The General Assembly, in Act No. 145, p. 317, of 1904, amended section 2 of Act No. 131 of 1898, so as to read that:

"The petition mentioned in section 1 of this act shall be in writing or print and shall designate the object and rate of the tax to be levied each year, and the number of years during which it shall be levied."

In the present case, the proceedings taken were not taken under the provisions of article 232 of the Constitution of 1898 and Act No. 131 of 1898, but under article 270 of that Constitution and Act No. 202 of 1898. These articles of the Constitution bear upon different subjects, as do also the two statutes mentioned. Proceedings which may be sufficient and correct under the first article (article 232) and the statute giving it effect may have been entirely insufficient and wrong under the second article (article 270) and the statute giving it effect. Article 232 of the Constitution relates to governmental taxes and the power and authority of the different subdivisions of the state in reference to such taxes, while article 270 relates to contributions in the nature of taxes (but not governmental in character) voted by the property taxpayers themselves in aid of certain objects and purposes deemed by them

to be beneficial to themselves and their property in particular localities.

Article 232 of the Constitution declares that no parish, municipal, or public board tax should exceed in any one year 10 mills on the dollar of valuation. It, however, authorized any parish, municipal corporation, ward, or school district to levy special taxes in excess of said limitation when the property tax payers within their respective territories should have voted in favor of conferring such authority upon them at an election at which the proposed rate of increased taxation and the number of years the tax was to be levied and the purpose for which the tax was intended had been submitted to them.

It will be seen that the Constitution itself fixed the precise questions which were to be submitted to the vote of the taxpayers at elections to be held for the purpose of conferring additional powers of taxation upon the different bodies named. These bodies themselves in ordering elections to be held for the purpose of obtaining authority to levy the special taxes referred to, had to conform to the directions of the Constitution touching the questions which were to be submitted to the taxpayers thereat. The General Assembly, in enacting Act No. 131 of 1898, intended to carry out the provisions of article 232, in referring to its second section to the petition of taxpayers mentioned in the first section of the act, said:

"It should be in writing and shall designate the object and amount of the tax to be levied each year and the number of years during which it shall be levied."

In framing their petition in the matter of the Cheneyville school tax the petitioners failed to designate the amount of the tax to be realized each year, and that failure gave rise to the litigation reported in *Bennett v. Police Jury*, 113 La. 68, 36 South. 891.

Basing themselves upon sections 2 and 5 of Act No. 131, plaintiffs in that case insisted that the petition of taxpayers must under pain of nullity designate the amount to be realized each year from the tax, and if, as in the case before the court, the rate of the tax was alone stated in the petition, without the amount to be realized, the law was not complied with.

They maintained that the General Assembly had the legal right to require the petitioners asking for the holding of an election to insert in their petition declarations additional to those called for by the provisions of article 232 of the Constitution, and that it was the duty of the petitioners to conform to the requirements of the statute.

This court sustained plaintiffs in the position which they took, and set aside the result of the election.

The General Assembly of 1904, by Act No. 145 of 1904, amended the second section of Act No. 131, making it now read as has been stated.

We are asked in this case to reverse the judgment of the district court setting aside and annulling the tax voted for by the taxpayers of ward No. 1 of Lincoln parish, and enjoining the police jury of that parish from levying the tax voted for.

It appears from the petition of the plaintiffs that the police jury of the parish of Lincoln parish (the body primarily called upon to decide whether the petition that had been presented to it, asking for the holding of an election conformed to the requirements of the statute or not) refused to order the election prayed for; that on application to the district court it was directed by mandamus to do so. On what ground the refusal was based does not appear from the record. The judgment of the court (whatever may have been its basis) was acquiesced in by the police jury and carried into execution. The advertisement for the election is not in the transcript, and there is nothing to show the form of the ballots which were voted. There is no contention made that they did not conform to and did not submit properly the questions which the petition prayed should be submitted to the taxpayers. No issue has been made as to the right of the General Assembly to declare what recitals should be made in the petition of taxpayers. Article 270 of the Constitution did not refer to any petition of taxpayers and of course said nothing as to what such a petition should contain. It did not direct what questions should be submitted for decision at an election to be ordered by the police jury. It left those matters to be dealt with by the General Assembly. It simply conferred upon the General Assembly the power through general laws to authorize the parochial, ward, and municipal authorities to levy special taxes in aid of public improvements or railway enterprises when by a vote of the majority of the property taxpayers they have consented to then have their property taxed for such a purpose. The power, right, and authority of the taxpayers to give their consent to the levying of such taxes could not exceed under the constitutional provisions, the levying of a tax of five mills per annum, nor extend for a longer period than 10 years.

Any vote of the taxpayers by which they should have consented to the levying of a tax exceeding five mills per annum or extending for a longer period than 10 years would be violative of the Constitution, null, void, and of no effect. Any vote, however, which authorized the levying of special tax of five mills per annum or less, or extended for a period of 10 years or less, would, so far as constitutional provisions were concerned, be legal and authorized. There is no claim made in this case that constitutional provisions have been violated. What is charged is that statute provisions have not been complied with. An examination of the

proceedings taken in this matter shows, we think, beyond doubt, that the taxpayers of ward 1 of Lincoln parish, at the election held on the 5th of May, 1908, consented to their property being taxed to the amount of \$75,000 in aid of the building and construction of the railroad named; that they consented that the police jury should assess, levy, and collect annually from year to year, not exceeding 10 years a special tax of five mills on the dollar, on all the assessable property in ward 1 of Lincoln parish, until the full sum of \$75,000 had been thereby collected; that said special tax should be levied and collected during the years 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, and 1919; and that the proceeds of said tax, up to the sum of \$75,000, be annually paid as collected to the said railroad. The prayer of the petition was that the police jury should, after legal promulgation of the election, immediately pass an ordinance levying such special tax for the time and for the years specified, and designating the years for which said taxes should be levied and collected.

This was what the taxpayers consented to. Counsel of appellants contend in their brief that the citizens of ward 1 of Lincoln parish have fairly and substantially complied with the provisions of Act No. 202 of 1898 in all its essential elements, according to the construction placed upon it by the majority opinion of the Supreme Court. That the petition of taxpayers for an election on a proposition of granting aid to a railway enterprise is to be construed as a whole, giving effect to every part of it, and a substantial compliance with the provisions of the enabling act, in the absence of fraud, deception, or injury, is sufficient.

That a petition which sets forth the particular years in which the proposed tax is to run and be levied, and the total amount to be raised by the tax is declared, is a fair, substantial and complete compliance with the statutory provision that the petition shall set forth the object and amount of the taxes to be levied each year and the number of years during which it shall be levied.

That when the petition designates 10 particular years in which the tax shall be levied and collected, and fixes the amount to be raised thereby at \$75,000, the fair, reasonable construction to be placed on the petition is that the tax is to be levied and collected at the rate of \$7,500 a year. That when such a construction of the petition is subsequently in question the construction and action of the police jury and parties interested without objection from any source should be considered as the rule of interpreting the intention of the petitioners and the taxpayers voting at the election.

Appellants contend that the construction placed upon the petition by the police jury was sustained by the law. That the law re-

gards that as certain which is capable of being ascertained—citing *Mobile R. R. Co. v. Tenn.*, 153 U. S. 497, 14 Sup. Ct. 968, 88 L. Ed. 793; *U. S. v. Smith*, 5 Wheat. 159, 5 L. Ed. 57. That the petition as well as the statute is to be construed as a whole, giving effect to every part of it. *Civ. Code*, arts. 16, 1948, 1955. That, if the meaning of the petition were doubtful, the construction placed upon the parties and the manner in which it has been executed by the police jury with the assent and acquiescence of all parties interested should furnish a rule for its interpretation. *Civ. Code*, art. 1958; *State ex rel. R. R. Co. v. Knowles*, 117 La. 134, 41 South. 439.

That where a petition from taxpayers is the foundation of the proceedings technical defects will be disregarded. *Cooley on Taxation*, p. 563; *Scott v. Hansheer*, 94 Ind. 1; *Jussen v. Board*, 95 Ind. 567. That a substantial compliance with the law, in the absence of fraud, is sufficient. *Wilmington R. R. v. Commissioners*, 116 N. C. 563, 21 S. E. 205.

They cite *Elliott on Railroads* as saying that:

"Some of the courts lay it down as a strict rule, and hold that they will not undertake to say that any requirement of the statute is immaterial; but this we regard as an extreme doctrine. We think there may be provisions, a departure from which the courts may well adjudge of such little importance as not to invalidate the proceedings. Statutes empowering municipalities to grant aid to railroads are unquestionably to receive a strict construction, but not such a construction as will make matters important that are clearly immaterial." *Elliott on Railroads*, p. 850.

Counsel of defendant cite additionally, in support of their position, *Elliott on Railroads*, pp. 836, 858; *Williams v. Hall*, 65 Ind. 129; *Wilson v. Hamilton*, 68 Ind. 507; *Yarish v. Cedar Rapids Co.*, 72 Iowa, 566, 34 N. W. 417; *St. Louis & S. F. R. Co. v. Gracy*, 126 Mo. 472, 29 S. W. 579; *Clifton v. Hobgood*, 106 La. 535, 31 South. 46; *V. S. & P. R. Co. v. Goodenough*, 108 La. 442, 32 South. 404, 66 L. R. A. 314; *James v. Ark. Southn. R. R.*, 110 La. 146, 34 South. 387. They say that:

"Plaintiffs' sole reliance is the strictest possible construction of the petition. It does not state in so many words and figures that the amount to be raised by the tax is \$7,500 each year, but we contend that this requirement is substantially and completely complied with nevertheless.

"The essence and substance of the requirement is to limit and fix the amount to be collected by the tax and paid to the railroad company. The petition definitely and unequivocally fixes this amount at \$75,000. It definitely and unequivocally fixes the number of years, and designates the particular years in which the tax must run. The only fair and reasonable construction that can be put on the petition as a whole in this respect is that the amount is to be paid in 10 annual installments, as the police jury has construed it and as they have levied the tax. We fail to see the difference in principle or in substance between stating the total amount to be realized and the number of years the tax must

run, and stating the amount to be realized each year and the number of years it must run. In the one case the total amount is arrived at by the process of multiplication, and in the other by the process of division. Under this petition the tax must run for the full certain years. If the five-mill tax, by reason of an unexpected increase in the assessment, should be sufficient to pay the total amount of \$75,000 in a shorter time, the tax must run nevertheless, according to the petition, for the full 10 years. The police jury in such case could only be required to levy (as they have levied) such a part of the five-mill tax as may be necessary to raise the annual installments as they fall due. The police jury fairly and properly construed the annual installments as stipulated in the petition to mean and intend equal annual installments. If the amount to be realized from the tax each year be considered mandatory and sacramental, then, by a fair and reasonable construction of the petition as a whole, the annual amount is easily obtained by calculation.

"The assessment of the ward in 1907 was \$1,322,000. In 1908 it is \$1,573,981. The natural increase in value and the increased valuation of railroad mileage have already so increased the assessment that the five-mill tax will more than pay the \$7,500 in 1910. After that, if the assessment increases as may be reasonably expected, the police jury will have to estimate the assessment and levy such part of the five mills voted as may be necessary to pay each installment of \$7,500 as it comes due. There is no complaint of this, and we understand their action to be in compliance with the law."

Plaintiffs say:

"Vigorous complaint is made against strict construction, but the trouble is not strict construction, but strict conditions imposed by law. Defendants are simply asking that we strike out of the law the words 'the amount to be levied each year.'"

But the lawmaker has seen fit to include them, and we have no right to nullify that part of the law. However forcible an argument may appear, the court can only say:

"When a law is clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." *Arrowsmith v. Durell*, 21 La. Ann. 295.

There has been no violation of the constitutional provisions in this case by either the General Assembly, the police jury of Lincoln parish, or the property tax payers of ward 1 of that parish. The latter have consented and voted that the police jury of Lincoln parish should levy a special tax on the property of that ward of \$75,000 in favor of the Ruston, Nachitoches & Northeastern Railroad, in aid of the building and construction of its railroad, said tax not exceeding a rate of five mills per annum, nor extending for a longer period than 10 years.

The levying of this special tax by the police jury of Lincoln parish was consented to by a majority of all the property taxpayers in said ward 1 (in number and amount), at an election held under the orders and authority of the police jury, the call for the election having been granted upon petition of the taxpayers of the ward.

The police jury to whom the petition was

addressed was necessarily called upon to examine its recitals and determine whether or not this conformed to legal requirements. In reaching its conclusions it was not confined to the exact wording of the petition. It had the right to consider the petition as a whole, and ascertain from it whether it covered all the matters necessary to be stated for it to legally submit to a vote of the property taxpayers of the ward the matters which the petitioners—property tax payers—sought to have submitted to them, with such certainty as to convey to the latter all the issues which the statute intended and required should be placed before them to enable them to cast their votes intelligently, and without danger of being misled upon the propositions submitted to them.

Even in criminal matters, where very great strictness in matters of recital is required, the tendency of modern jurisprudence is to look rather to substance than to spirit, to conform to ideas rather than to words, and to hold that while an indictment under a statute creating an offense must set forth the facts constituting the crime with such certainty that, upon hearing the indictment read, the defendant should clearly understand the charge he is called upon to answer, and the court shall feel no doubt as to the judgment to be pronounced, the indictment need not follow *ipsisssimis verbis* the language of the statute.

In the present civil case, the police jury, after examination correctly reached the conclusion that the petition addressed to it was sufficient, and, acting upon that conclusion, it submitted to a vote of the property tax payers of ward 1 the proposition which it contained and embraced, using the language which it did.

The taxpayers of the ward voted upon the propositions as submitted to them without objection or question from any quarter as to the terms of the issues submitted to them being at variance with the prayer of the petition, or as to the right and authority of the police jury to order the election and submit the issues which they did to the voters. It is not pretended that the voters have been misled, or that the vote cast and promulgated does not express the willingness and consent of the majority of the taxpayers of the ward that the special tax as submitted and voted for should be levied and collected. We must assume that the police jury will in due and proper time levy and collect the special tax, as it was submitted to be voted for and as voted for in 1910, and the following years up to and including the year 1919. We think the judgment of the district court is erroneous, and it should be set aside.

For the reasons herein assigned, it is hereby ordered, adjudged, and decreed that the judgment appealed from be, and the same is hereby, annulled, avoided, and reversed, and

it is now ordered and decreed that plaintiffs' demand be rejected and their suit dismissed.

(122 La. 779)

No. 17,222.

FONTENOT v. COLORADO SOUTHERN, N. O. & P. R. CO. et al.

(Supreme Court of Louisiana. Jan. 4, 1909.)

RAILROADS (§ 114*)—USE OF STREET—RIGHTS OF ABUTTING OWNER—DAMAGES.

Defendant company was by the council of the city of Opelousas granted the privilege of running its trains through a certain street in that city. Under that permission it threw up an embankment, which obstructed the street and greatly affected the values of the properties abutting thereon. The plaintiff, instead of opposing the constructions as made, under article 856 et seq., of the Revised Civil Code, acquiesced in the same and sought to recover damages from the company. Judgment having been rendered against it, it has appealed, claiming that the amount awarded is too large. The judgment appealed from is affirmed. Exemplary damages are disallowed. *Lewis v. Colorado Southern & New Orleans R. R. Co.*, 47 South. 906.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 351, 370; Dec. Dig. § 114.*]

(Syllabus by the Court.)

Appeal from Sixteenth Judicial District Court, parish of St. Landry; Edward Taylor Lewis, Judge.

Action by Delphine Fontenot, for herself and minor children, against the Colorado Southern, New Orleans & Pacific Railroad Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Miller, Dufour & Dufour, Henry Mooney, and Dudley Louis Gullbeau, for appellants. Robert Lee Garland and Lewis & Lewis, for appellee.

Statement of the Case.

NICHOLLS, J. The plaintiff alleged: That she owned personally, and also in indivision with the minor children, on whose behalf she sued, a lot of ground situated on Cheney street in the city of Opelousas (which she described), she owning one undivided half, and the said minor children the other undivided half, having thereon a dwelling house erected as a family residence and occupied as such about eight years, and which was occupied by herself and family up to the time of her marriage with her present husband. That the said dwelling house and a barn and other out buildings were well built, of good material, and at a considerable expenditure of money. That said location was chosen by her deceased husband as an eligible spot for a residence, being perfectly well drained from its proximity to the Tesson gully, and being upon a side street near the center of town, and at the same

time away from the commercial avenues and much-used highways of the town.

That the only avenue of ingress and egress to and from the residence and lot of ground was over and through Cheney street; the said lot of ground being bounded upon the front by said Cheney street, and on the three remaining sides by the property of adjoining proprietors.

That some time in the month of December, 1906, the Colorado Southern, New Orleans & Pacific Railroad Company, acting under color of authority granted to it by the board of aldermen of the city of Opelousas, took exclusive possession of Cheney street, and constructed thereon an embankment as a part of its transcontinental system to the city of New Orleans.

That Cheney street, in front of petitioner's property has been so entirely monopolized by said railroad company as to effectually shut out of the premises and bar all approach to it, or from it, of wheel vehicles of any description, for the purpose of delivering on the premises groceries, fuel, or other material, or household necessities of any kind, and so far as to preclude the use of carriage or buggy or horses by occupants of the premises; that the shutting off the premises is rendered more complete and effectual by the railroad bed in front of the lot, which ranges in height from six to nine feet, and by a high and close plank fence on the opposite side from one end of the square to the other.

That the lot of ground in question has no commercial value, and was only valuable for residential purposes, and that while its value has been considerably augmented by the general rise in value of properties of that description, owing to the prosperity which has prevailed in the country for several years past, and owing to the construction of the Opelousas, Gulf & Northeastern Railroad through the northern portion of the city of Opelousas, yet all the increase of value given to the property from those sources has been more than destroyed by the construction of the defendant company's road over Cheney street and the destruction of that street as a highway.

That the property in question, in addition to the cause of damage above set forth, has been lessened materially in rental and salable value by the proximity of the residence to the defendant company's track, the continuous noise from the passing of trains, freight and passenger, which will soon take place, by the nuisance from smoke, falling cinders, and soot, by danger of fire from sparks from the locomotive engines, by the puffing of escaping steam and the shaking and trembling of the ground necessarily incident to the frequent passing of trains, and by the constant danger to life and limb of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the children and family of persons who may occupy the residence. It is further represented: That the loss of value of the property, and the consequent damage to the owners by the defendant company, as set forth above, amounts very nearly to the full value of the property, and in the sum at least of \$2,500.

That the defendant company, in taking possession of said street and in constructing its road thereon, was not acting in pursuance of any legal right, but was acting under color of an ordinance hastily granted by the board of aldermen of the city of Opelousas, on the 27th day of January, 1906, at a special meeting held on the same day that the call for the same was issued, and under circumstances which precluded the opportunity for considering and adopting measures for the preservation of Cheney street as a thoroughfare, and for the protection of the interest of the public. And, furthermore, the said ordinance was passed without having previously taken the sense of the voters of the city, at an election held for that purpose, whether a right of way should be granted to the defendant company over Cheney street, as required by Act No. 79, p. 113, of 1896, of the Legislature of the state of Louisiana, requiring such election to be held; and the ordinance of the board of aldermen in question is illegal, null, and void for that reason. Said ordinance is illegal for the further reason that, inasmuch as Cheney street has a width of only 40 feet, the construction of the defendant company's railroad and the maintenance and operation thereon of its passenger and freight service necessarily implied the exclusive use and monopolization of said street, and its complete destruction as a public highway, a consequence which must have been known to the defendant company's officials at the time of granting said franchise. It was therefore averred that plaintiffs had the right to recover by this action, not only the damages directly caused them, but any remote or consequential damages, as also exemplary damages.

In view of the premises petitioner prayed that said defendant railroad company be cited to answer this petition through its proper officer; that the city of Opelousas be also cited, in order that it may appear herein and represent its interests, if any it has, in this litigation. She also prayed for judgment against the said Colorado Southern, New Orleans & Pacific Railroad Company in the sum of \$2,500 as actual damages and \$250 as exemplary damages, and condemning said company to pay said sums in the proportion of one-half for your petitioner, Delphine Fontenot, and one-half for the aforesaid minor children. And she prayed for costs and for general relief in the premises.

Defendant excepted that the petition was too vague, indefinite, and insufficient to

permit of defendant safely and intelligently answering thereto. It prayed that plaintiff's suit be dismissed. The court overruled the exception. Defendant, under reservation of the exception, answered, pleading a general denial. Further answering, it averred that by ordinance adopted by the mayor and board of aldermen of the city of Opelousas on January 20, 1906, it was granted the right to lay its main track in the center of Cheney street; that the board of aldermen aforesaid had full authority under the charter of said city, being Act No. 136, p. 224 of 1898, to grant this right. As to the embankment in front of plaintiff's property, respondent showed that the physical condition of the ground at this point made the same absolutely necessary, and that it had not taken exclusive possession of said street in the sense prohibited by law. In conclusion, respondent company declared that it was legally in Cheney street; that the construction of its roadbed was done in a scientific and workmanlike and legal manner; that its trains are being operated in the like manner; and that any damages plaintiff may suffer aside from such damage as was alleged to be occasioned by the railroad embankment, and here denied, are "damages absque injuria."

In view of the premises, respondent company prayed that plaintiff's damages may be rejected, her suit dismissed, with costs, and for general relief.

The district court rendered judgment in favor of the plaintiff and for her minor children, and against the defendant, for the sum of \$2,000 as actual damages, with legal interest thereon from the date of the judgment until paid.

It rejected and disallowed plaintiff's prayer to be awarded punitive damages. Defendant appealed, and plaintiff has answered the appeal, praying that the judgment be increased by allowing them \$250 as punitive damages.

Opinion.

The issues raised by the plaintiffs in the matter before us are identical with those submitted to and recently decided by this court in *Lewis against the same defendant corporation*. *William B. Lewis v. Colorado Southern, New Orleans & Pacific R. R. Co. et. al.* (not yet officially reported) 47 South. 906. The present case differs from that referred to only in respect to the quantum of damages which resulted to the owners of the two different properties from the action taken by the defendant.

The present plaintiffs (as did Lewis in his case) acquiesced in the fact itself of the taking possession by the defendant company of the street in front of their property under an ordinance of the city council. They did not oppose the construction of the road under article 856 et seq. of the Revised Civil Code, nor do they claim now the right of

having the constructions made by the defendant in the street removed (Rev. Civ. Code, arts. 861 et seq. 868).

Accepting the present situation, the only relief which they ask is that they be awarded damages arising from and out of that situation.

The damages claimed looked to a permanent occupancy by the railroad company of the street and rest on that fact as a basis. In addition to compensatory damages, plaintiffs pray that exemplary damages be awarded them for the course taken by the defendant. The same character of damages were claimed against defendant by Lewis in his suit; but his demand quoad those damages was disallowed. As the claim for exemplary damages herein is predicated upon action taken by the defendant under the same circumstances as that which was taken in reference to the property of Lewis, the same ruling should be made to govern and control the rights and obligations of the parties to the present action. The only remaining question, therefore, to be passed upon by the court, is the amount of compensatory damages to which plaintiffs are entitled.

The trial court fixed plaintiffs' damages at, and rendered judgment in their favor for, \$2,000. Defendant contends they did not exceed \$1,326. Counsel for defendant urges that the district court gave too much weight to the testimony of plaintiffs' witnesses, who were also claiming damages from defendant for damages to their properties by reason of the construction of its road on Cheney street. He insists that, in view of that interest, this court, in reaching its conclusion, should disregard their testimony altogether. That we cannot do. The witnesses were all competent and legal witnesses. The fact of interest affected only their credit and the weight to be given to their testimony. We must assume that the district judge, who knew the witnesses, dealt with it with discretion and good judgment. Trial judges, who know witnesses, and who are doubtless familiar with local conditions, are in much better position to judge correctly, where conclusions must almost necessarily rest upon opinion testimony, than is an appellate court.

We do not find in this record ground for a reversal of the judgment appealed from. It is therefore affirmed.

(54 Fla. 319)

GREEN v. ROU.

(Supreme Court of Florida, Division B. Dec. 19, 1908. Headnotes Filed Jan. 27, 1909.)

1. DISMISSAL AND NONSUIT (§ 60*)—WANT OF PROSECUTION.

Where a defendant's pleas are filed in May, 1907, and the plaintiff on the 1st of June, 1907, files a motion to require the defendant to make said pleas more specific, and on the same date files a demurrer to said pleas, it is error for

the court, on the 23d of the next ensuing January, at a hearing upon such motion and demurrer, to dismiss said cause for want of prosecution.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 141; Dec. Dig. § 60.*]

2. LIMITATION OF ACTIONS § 182*)—PLEADING STATUTE AS DEFENSE—NECESSITY.

The bar of the statute of limitations must be interposed by the diligence of the debtor, and as early as possible. It will not be raised by the court unsolicited; and, if not taken advantage of by plea, it will be considered to have been waived by the defendant.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 678; Dec. Dig. § 182.*]

(Syllabus by the Court.)

Error to Circuit Court, Marion County; William S. Bullock, Judge.

Action by Louen N. Green against Adam B. Rou. Judgment for defendant, and plaintiff brings error. Reversed.

L. N. Green, in pro. per. R. A. Burford, for defendant in error.

TAYLOR, J. The plaintiff in error, as plaintiff below, sued the defendant in error, as defendant below, in the circuit court of Marion county, in assumpsit, for the recovery of compensation for professional services rendered as an attorney in and about the recovery for the defendant of a judgment at law upon a claim against a third party; the first count of the plaintiff's declaration alleging as follows in part:

"For that whereas the plaintiff at all times herein mentioned was and is a practicing attorney at law in said county, and during the month of January or February, 1897, one James H. Hill, with the full knowledge and acquiescence of said Adam B. Rou at that time or shortly thereafter given or thereafter ratified, placed with this plaintiff as an attorney for collection on behalf of said Rou a certain paper writing in words and figures as follows: * * * There follows a copy of a promissory note for \$1,000, made to said Adam B. Rou by one R. B. McConnell. The declaration then alleges a suit brought upon said note by the plaintiff as attorney in favor of the defendant, Rou, and the recovery of judgment thereon, including the sum of \$100 incorporated in the judgment recovered for the judgment plaintiff's attorney's fee, as provided in the note sued upon. Then follow allegations of an execution issued to enforce said judgment, and a levy thereof on property of the judgment debtor, and a sale thereof, and a purchase thereof at the sale by the defendant, Rou, who did not pay his bid therefor in money, but had it credited on the judgment.

The defendant, Rou, filed two pleas to this declaration, denying the employment of the plaintiff as attorney, and alleging that he employed James H. Hill, who is an attorney at law, to sue upon and collect said note

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and reduce the same to judgment, and paid the said Hill a sum agreed upon between them in full for such services, and that, if said Hill procured the plaintiff to perform such services, it was done without the knowledge, consent, or authority of defendant, and, if the plaintiff acted in the matter, he acted as the agent and attorney of said Hill, whom defendant employed and paid in full for such services.

These pleas of the defendant were filed on the 4th day of May, 1907; and on the 1st day of June, 1907, the plaintiff filed a motion to require the defendant to amend his pleas in divers particulars, and on the same day, June 1, 1907, the plaintiff filed a demurrer to the pleas of the defendant upon divers grounds.

On the 23d of January, 1908, this motion and demurrer came on for hearing, and the court below made the following order and judgment:

"This cause came on to be heard, and the same was argued by the attorneys for both parties, on a motion of the defendant to dismiss the said cause for want of prosecution, and on the motion of the plaintiff for a compulsory amendment of the pleas, and on the plaintiff's demurrer to the defendant's pleas, and they were all argued at the same time. On this argument it is made to appear to the court, which is determined to be true, that after notice to dismiss for want of prosecution was given then the plaintiff gave notice to hear the demurrer and the motion for a compulsory reformation of the defendant's pleas, and set the same for an earlier date for the hearing.

"The pleas are without doubt bad. They are argumentative, prolix, uncertain, and indefinite, and tender no single fact as an issue, nor admit nor deny the attempted allegations of the declarations.

"A bad plea is a good answer to a bad declaration, and the plaintiff's demurrer reaches back to the declaration. The declaration is bad. The first count is an attempt to charge the defendant on certain facts creating an implied obligation to pay, or implied promise to pay. It does not state that 'James H. Hill' was the attorney of, the agent for, or had any authority to bind, the defendant; nor does it state when defendant ratified the act of Hill, or that defendant knew of the plaintiff's service before or during the time he was performing the same. It further shows that as early as the year 1897 the plaintiff made a demand on defendant for pay for the same services, and that it was refused, and that the said claim is a stale demand, and to be answered by the plea of the statute of limitations, if the declaration was amended so as to be a good one in form and substance. The said second count is but a reiteration of 'realleging' the first count, with more matter by way of argument and reasoning, more appropriate for a bill in chancery than a declaration, but

in no essential feature different, except to show the defendant appropriated the judgment and bought lands thereunder. Whether or not the causing the lands to be sold and purchasing the lands at the sale was such a ratification as would then make defendant liable in a bill in equity it is not now decided, for the answer might be properly made that the defendant would lose his status as a judgment creditor, or lose prior rights of lien, and many other equitable matters. In this state of the record, to now allow an amendment to the declaration, to allow proper pleas to a stale demand, one in which the plaintiff has manifested too little concern or interest, would be to encourage and put a premium on gross negligence in a case where attorney and client is the same person, and especially where, most likely, no good can be accomplished. It is considered and ordered that plaintiff's demurrer and motion be overruled and denied, and the motion to dismiss is sustained, and the cause is dismissed, at the cost of the plaintiff, to which rulings plaintiff excepts. Done at chambers in Ocala, Florida, January 23, 1908. W. S. Bullock, Judge."

The plaintiff below brings this judgment here for review by writ of error.

The court below erred in rendering the judgment appealed from.

The court below in its order decides in substance that the plaintiff's claim is barred by the statute of limitations. The statute of limitations had not been invoked or pleaded in the case by the defendant, and the court had no authority to inject it into the case of his own motion.

It is well settled that the bar of the statute must be interposed by the diligence of the debtor and as early as possible, and that it will not be raised by the court unsolicited, and if not taken advantage of by plea it will be considered to have been waived by the defendant. Wood on Limitations (3d Ed.) § 7, and cases there cited.

The court also holds the declaration of the plaintiff to be bad, because it does not state that James H. Hill was the attorney of, the agent for, or had any authority to bind, the defendant, and because it does not state when defendant ratified the act of Hill, or that defendant knew of the plaintiff's services before or during the time he was performing same. We do not think the declaration is subject to demurrer on these grounds. As before seen, the declaration distinctly alleges "that one James H. Hill, with the full knowledge and acquiescence of said Adam B. Rou, at that time or shortly thereafter given or thereafter ratified, placed with this plaintiff as an attorney for collection on behalf of said Rou a certain paper writing," etc.

We think that the court should have sustained the plaintiff's demurrer to the defendant's second plea, as it sets up nothing in defense, and tenders no sort of issue.

The judgment of the court below in said cause is hereby reversed, at the cost of the defendant in error.

HOCKER and PARKHILL, JJ., concur.

SHACKLEFORD, C. J., and COCKRELL and WHITFIELD, JJ., concur in the opinion.

(56 Fla. 735)

WILLIAMS v. ATLANTIC COAST LINE R. CO.

(Supreme Court of Florida, Division B. Dec. 8, 1908. Headnotes Filed Jan. 29, 1909.)

1. NEGLIGENCE (§ 56*)—PROXIMATE CAUSE.

Before liability in damages for a negligent act or omission can arise, it is necessary that a causal relation, such as the law recognizes as being sufficient, should exist between the damage complained of and the act alleged to have occasioned the damage. If such a relation does not exist, the damage is said to be remote, and cannot be recovered. If such a relation does exist, then the damage is said to be a proximate result of the wrongful act to which it is attributed, and, conversely, the wrongful act is said to be the proximate cause of the damage.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 69; Dec. Dig. § 58.*]

2. CARRIERS (§ 105*)—CARRIAGE OF FREIGHT—SPECIAL DAMAGES.

Only such damages may be recovered as were contemplated or might reasonably be supposed to have entered into the contemplation of the parties to the contract of carriage. If the owner of the goods would charge the carrier with any special damages, he must have communicated to the carrier all the facts and circumstances of the case which do not ordinarily attend the carriage or the peculiar character and value of the property carried, for otherwise such peculiar circumstances cannot be contemplated by the carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 451, 452; Dec. Dig. § 105.*]

3. CARRIERS (§ 105*)—CARRIAGE OF FREIGHT—SPECIAL DAMAGES.

In an action against a railroad company for damages caused by the failure of the company to deliver within a reasonable time orange boxes intrusted to the defendant to transport for hire, the plaintiff cannot recover the loss and damage in the enforced idleness of persons employed to pack and ship his oranges on his orange groves, where the defendant was not informed that men had been employed to pick the oranges, or the time within which the oranges were to be picked, and the contract of carriage did not fix any specific time for the transportation and delivery of the boxes.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 451, 452; Dec. Dig. § 105.*]

4. CARRIERS (§ 103*)—CARRIAGE OF FREIGHT—ACTIONS—DECLARATION—SUFFICIENCY.

In an action against a railroad company for damages caused by its failure to transport and deliver orange boxes within a reasonable time, the allegations of the declaration, "that by reason of the premises the plaintiff incurred loss and damage in being unable to pack and ship part of his oranges for the Christmas market," are not stated with such certainty as to show the liability of the defendant therefor.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 436; Dec. Dig. § 103.*]

5. CARRIERS (§ 105*)—CARRIAGE OF FREIGHT—DELAY—DAMAGES—PROXIMATE CAUSE.

The freezing of plaintiff's oranges on the trees is not so direct, natural, and proximate a result of the failure of a railroad company to deliver to the plaintiff within a reasonable time orange boxes intrusted to the defendant company to transport for hire as to make such company liable therefor by reason of such delay, where the contract of carriage did not fix any specific time for the transportation and delivery of the boxes, and the defendant company was not informed that the plaintiff would leave the oranges on the trees, exposed to the dangers of the cold, until the boxes were delivered.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 451, 452; Dec. Dig. § 105.*]

6. PLEADING (§ 246*)—AMENDMENT—DECLARATION.

Allegations in the declaration of the plaintiff's loss or damage may not be so wholly irrelevant as to be amenable to a motion to strike, and yet subject to compulsory amendment under the statute.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 246.*]

7. DAMAGES (§ 141*)—PLEADING—DEMURRER—NOMINAL DAMAGES.

When the allegations of the declaration show the legal right of the plaintiff has been invaded, he may recover at least nominal damages, and a demurrer thereto should be overruled.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 407, 419; Dec. Dig. § 141.*]

(Syllabus by the Court.)

8. NEGLIGENCE (§ 56*)—"PROXIMATE CAUSE."

"Proximate cause" is that which naturally leads to or produces or contributes directly to produce a result such as might be expected by any reasonable and prudent man as likely to directly and naturally follow or flow out of the performance or nonperformance of an act.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 69; Dec. Dig. § 58.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5758-5769; vol. 8, p. 7771.]

Error to Circuit Court, Orange County; Minor S. Jones, Judge.

Action by H. S. Williams against the Atlantic Coast Line Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

The plaintiff in error, on the 19th day of October, 1906, filed in the circuit court for Orange county a declaration against the defendant in error; the first count thereof being as follows:

"For that the plaintiff on or about December 7, 1904, purchased from the Oxford Crate Company, doing business at Crystal River in the state of Florida, one car load of orange boxes, to wit, 2,500 boxes, to be shipped forthwith, and on or about the 7th day of December, 1904, the said Oxford Crate Company delivered the said goods to the defendant, who was then and there a common carrier of goods for hire, at Crystal River aforesaid, a station on the defendant's railway, for transportation and delivery to the plaintiff at Rock Ledge, state aforesaid, a station on the railway line of the Florida East Coast Railway Company; and the de-

fendant then and there agreed and undertook to transport the said goods from Crystal River aforesaid to Rock Ledge aforesaid, and to deliver them to the plaintiff at Rock Ledge aforesaid within a reasonable time, for reward to the defendant in that behalf; yet the defendant failed to deliver the said goods within a reasonable time, and carelessly and negligently did not deliver them to the plaintiff until the expiration of a long and unreasonable time, a period of at least 30 days, when the usual and reasonable time for said transportation was 5 days, and by reason of the premises the plaintiff incurred loss and damage in the enforced idleness of persons employed to pack and ship his oranges on his orange groves at Rock Ledge aforesaid, and also in being unable to pack and ship part of his oranges for the Christmas market, and also in the freezing of a large part of his orange crop, to wit, 1,200 boxes of oranges which were frozen on the trees, to wit, on January 24, 1905, and which would have been packed and shipped but for the negligence of the defendant aforesaid. And that plaintiff says that he used all due diligence to secure the orange boxes, but without avail, and that the defendant well knew the purpose, namely, the packing and shipping of the oranges then on the trees in the plaintiff's groves, for which said orange boxes were to be used, and well knew the danger in which plaintiff's oranges were from cold, and the necessity of guarding them against such danger by packing and shipping them without delay."

The second count differs from the first in alleging the negligence of the defendant to consist in unreasonable delay in delivering the said goods to the connecting carrier. The plaintiff claimed \$5,000 damages.

The defendant demurred to each count in the declaration, and stated the substantial matters of law to be argued as follows:

(1) That neither count in said declaration states any cause of action.

(2) That said declaration in each count thereof is vague and uncertain.

(3) That the damage claimed by said plaintiff, if any, was caused by an act of God, and not by the negligence of the defendant.

(4) Because said declaration does not show in either count that the defendant was informed of any immediate necessity for moving said orange crates, nor had it agreed to carry the same within any specified time.

Afterwards the defendant filed a statement of additional substantial matters of law to be argued, as follows:

(1) Because neither the said declaration nor either count thereof states a cause of action against said defendant.

(2) Neither count of said declaration charges sufficient facts to bring home to the defendant the probability of a freeze destroying the orange crop.

(3) Neither count in said declaration char-

ges sufficient facts brought home to the notice of the defendant to make it liable for any damage suffered by the plaintiff on account of the idleness of his employés, or any loss on account of the oranges not reaching the Christmas market.

The defendant filed, also, the following motion to strike certain portions of counts in the declaration:

"Now comes the defendant in the above-entitled cause and moves the court to strike out from the first count in the declaration filed in said cause the following language, to wit: 'And by reason of the premises the plaintiff incurred loss and damage in the enforced idleness of persons employed by him to pack and ship his oranges on his orange grove at Rock Ledge aforesaid.' 'And also in being unable to pack and ship part of his oranges for the Christmas market.' For the reason that said allegations are immaterial and irrelevant and not the natural result of the alleged negligence on the part of the defendant.

"Second. Because said declaration does not show that the defendant was informed of the employment of the persons to pick said oranges, nor that the plaintiff intended said oranges for the Christmas market.

"And the defendant also moves the court to strike out from said declaration in the first count thereof the following language: 'And also in the freezing of a large part of his crop, to wit, 1,200 boxes of oranges which were frozen on the trees on the 24th day of January, 1905, and which would have been picked and packed and shipped but for the negligence of the defendant aforesaid.' Because the freezing of said oranges was not the proximate result of defendant's negligence and was not caused by the alleged negligence of the defendant at all, but by an act of God.

"And the defendant also moves the court to strike out from the second count of said declaration the following language, to wit: 'And by reason of the premises the plaintiff incurred loss and damage in the enforced idleness of persons employed to pack and ship his oranges on his grove at Rock Ledge aforesaid, and also in being unable to pack and ship part of his oranges for the Christmas market.' For the reason that it is not shown in said declaration that the defendant was informed either of the employment of persons to pick said oranges or of the plaintiff's intent to ship said oranges for the Christmas trade.

"The defendant also moves the court to strike out from the second count of said declaration the following language: 'And also in the freezing of a large part of his crop, to wit, 1,200 boxes of oranges which were frozen on the trees on the 24th of January, 1905, and which would have been packed and shipped but for the negligence of the defendant aforesaid.' For the reason that the freezing of said oranges was

not the proximate or actual result of the alleged negligence on the part of the defendant, and that the negligence of the defendant did not cause said freezing, but the same was caused by an act of God."

Afterwards the defendant added the further ground to the motion to strike that there are no facts alleged in said declaration to bring home to the defendant knowledge of the probability of the freezing of said crop of oranges.

On September 18, 1907, the court sustained the foregoing demurrer and granted the said motion to strike.

The plaintiff not desiring to amend his declaration, final judgment was entered against him. From this judgment, plaintiff seeks relief here by writ of error.

Hudson & Boggs and L. O. Massey, for plaintiff in error. Sparkman & Carter, for defendant in error.

PARKHILL, J. (after stating the facts as above). The question presented by the assignments of error is whether the special damages claimed by the plaintiff may be recovered from the defendant company. We have had occasion to declare over and over again that before liability can arise it is necessary that a causal relation, such as the law recognizes as being sufficient, should exist between the damage which is complained of and the act alleged to have occasioned the damage. If such a relation does not exist, the damage is said to be remote, and cannot be recovered. If such a relation does exist, then the damage is said to be a proximate result of the wrongful act to which it is attributed, and, conversely, the wrongful act is said to be the proximate cause of the damage.

In *Benedict Pineapple Co. v. Atlantic Coast Line R. Co.*, 55 Fla. 514, 46 South. 782, the negligent act or omission for which a party is liable in damages is said to be one that proximately—i. e., in ordinary, natural sequence—causes or contributes to causing an injury to another, when no independent, efficient cause intervenes, and the injured party is not at fault.

In *Moore v. Lanier*, 52 Fla. 353, 42 South. 462, we said: "'Proximate' cause is that which naturally leads to or produces or contributes directly to produce a result such as might be expected by any reasonable and prudent man as likely to directly and naturally follow or flow out of the performance or nonperformance of any act." See, also, *Jacksonville, T. & K. W. Ry. Co. v. Peninsular Land, Transp. & Manufg. Co.*, 27 Fla. 1, 157, 9 South. 661, 17 L. R. A. 38, 65; *Florida East Coast R. Co. v. Wade*, 53 Fla. 620, 43 South. 775.

In *Brock v. Gale*, 14 Fla. 523, 14 Am. Rep. 356, this court held that only such damages may be recovered as were contemplated or might reasonably be supposed to have enter-

ed into the contemplation of the parties to the contract of carriage. On page 532 of 14 Fla. (14 Am. Rep. 356), the court said: "If the owner of the goods would charge the carrier with any special damages, he must have communicated to the carrier all the facts and circumstances of the case which do not ordinarily attend the carriage or the peculiar character and value of the property carried, for otherwise such peculiar circumstances cannot be contemplated by the carrier." The opinion then proceeds to quote from the famous case of *Hadley v. Baxendale*, 9 Exch. 341: "For had the special circumstances been known, the parties might have expressly provided for the breach of the contract by special terms as to the damage in that case, and of this advantage it would be very unjust to deprive them." And then the opinion quotes the following language of Judge Selden, in *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718: "The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract; that is, they must be such as might naturally be expected to follow its violation, and they must be certain, both in their nature and in respect to the cause from which they proceed."

With these principles of the law to guide us, we must determine whether the defendant company may be held liable for the special damages set up in the declaration. We think it perfectly clear that the defendant, in view of the allegations of the declaration, cannot be held liable for loss and damage in the enforced idleness of persons employed to pack and ship plaintiff's oranges on his orange groves at Rock Ledge. It cannot reasonably be supposed that this element of damage entered into the contemplation of the parties to this contract of carriage. From what we know of this contract and the circumstances of its making and the shipment of the boxes, the railroad company could not have contemplated that the plaintiff would hire persons to pack his oranges as soon as the boxes were shipped over defendant's road and keep them idle until the boxes were delivered. These facts and circumstances were not communicated to the defendant. They do not ordinarily attend the carriage of orange boxes. It does not follow that, because the plaintiff contracted for the transportation and delivery of boxes to be used in packing and shipping his oranges, he must necessarily hire hands to pack and ship the oranges.

Although the declaration alleges, generally, that the defendant knew the purpose for which said orange boxes were to be used and the danger in which the oranges were from cold and the necessity of guarding against such danger, it does not allege that defendant knew that men had been employed to pick the oranges, or the time within which the oranges were to be picked, and the contract

did not fix any specific time for the transportation and delivery of the boxes.

This element of damage is not the natural, direct, or proximate result of the breach of this contract, and was properly stricken on motion. As the Supreme Court of Kansas said, in *Johnson v. Mathews*, 5 Kan. 118, text 122: "The proximate cause of the plaintiff's loss was his own act, * * * the hiring of hands, * * * and the hiring of hands was a collateral agreement between the plaintiffs and third parties, having no necessary connection whatever with the original contract, or the breach of it. * * * According to the petition and evidence in this case, the defendant did not at the time of making the contract, or even at any other time before the trial, know that the plaintiffs had, or intended to have, any hired hands for the purpose of running the machine or for any other purpose. If the defendant had known at the time of making the contract that the plaintiffs intended to hire these hands, then he would have virtually authorized the same, and the plaintiffs could recover the damages they claim." See *Guess & Glover v. Southern Ry.*, 73 S. C. 264, 53 S. E. 421.

We do not think the allegations of the plaintiff's loss or damage caused by his inability to pack and ship his oranges for the Christmas market are stated with such certainty as to show the liability of the defendant therefor.

This allegation of the declaration, however, that "by reason of the premises the plaintiff incurred loss and damage * * * in being unable to pack and ship part of his oranges for the Christmas market," does not seem to be so wholly irrelevant as to be amenable to a motion to strike, though it may be subject to compulsory amendment under the statute. If the breach of duty by unreasonably delaying the transportation of the orange boxes as alleged proximately caused a failure to reach an advantageous market, and a loss ensued which should reasonably have been contemplated, the carrier may be liable in damages for such losses as are capable of definite ascertainment that were proximately caused by the delay and not by the intervention of another efficient cause or by the fault of the plaintiff. On the motion to strike, the court could have made an appropriate order for compulsory amendment. See *Jackson Sharp Co. v. Holland*, 14 Fla. 384, text 389; *Camp v. Hall*, 39 Fla. 535, text 569, 22 South. 792; *Benedict Pine Apple Co. v. Atlantic Coast Line R. Co.*, 55 Fla. 514, 46 South. 732, text 736; *Russ v. Mitchell*, 11 Fla. 80; *Hildreth v. Western Union Tel. Co.* (decided at this term) 47 South. 820.

It is clear that the defendant cannot be held liable for the freezing of plaintiff's orange crop.

The defendant did not agree to deliver the orange boxes within any specified time,

and the declaration does not charge that the defendant knew the plaintiff would leave the oranges on the trees, exposed to the dangers of the cold, until the orange boxes were delivered. The defendant could not contemplate that the plaintiff would thus expose his fruit beyond a reasonable time for the delivery of the boxes. The declaration does allege that the defendant knew the danger in which plaintiff's oranges were from cold and the necessity of guarding them against such danger by packing and shipping them without delay, but the plaintiff knew all this as well as the defendant knew it.

If the carrier wrongfully delayed the transportation and delivery of the orange boxes, the shipper could not leave the oranges exposed to the weather at the carrier's loss. It would still be his duty to preserve the property and house, or protect the same from damage by cold, if it could be reasonably done, and it would be his right to recover of the carrier the reasonable expense therefor, together with the proximate damages for the delay. *St. Louis, Arkansas & Texas R. Co. v. Neel*, 56 Ark. 279, 19 S. W. 963, 55 Am. & Eng. R. Cases, 428.

In order for a shipper or consignee to recover of a carrier for delay in the shipment or transportation of goods, it must be made to appear clearly that the delay was the proximate cause of the injury complained of. 5 Am. & Eng. Ency. Law (2d Ed.) 253.

Under the allegations of the declaration the freezing of plaintiff's oranges on the trees was not the natural, direct, or proximate result of the failure of the railroad company to deliver the orange boxes within a reasonable time.

The delay in the transportation of the orange boxes cannot be said to have directly caused or contributed directly to causing the result (the loss of the oranges) without the intervening of an independent efficient cause (the freezing of the oranges). In this connection, the Supreme Court of Michigan in *Michigan Central R. Co. v. Burrows*, 33 Mich. 6, text 14, said: "The contract which the defendant entered into in this case was to carry the property safely and deliver it within a reasonable time to the next carrier at Chicago. The only breach of this agreement complained of was the failure to deliver within a reasonable time. Are, then, the damages claimed the natural and proximate consequence of such breach? We think not. To be so the loss must be immediately connected with the supposed cause of it. The loss in this case might or might not have occurred even had there been no delay. If in the ordinary course of events a certain result usually follows from a given cause, then we may well consider the immediate relation of the one to the other to be established. Cold, freezing weather does not, however, in the ordinary course of events, follow from mere delay. Such is not the natural and di-

rect result of the delay. It is true that in certain climates, and at certain seasons, such an injury would be much more likely to result from delay, while at others there would be not even a possibility of such a result following. It is very evident therefore that as we approach the one or the other we must enter upon debatable ground, where it would be very difficult, if not indeed impossible, to say what the result of a given delay would be. Where fruit is to be carried a long distance, especially in such a country as this, where the climate is so changeable, it would as frequently result that delay would be the cause of averting such an injury as of contributing to it. It may be true that, had there been no delay whatever on the part of defendant, the loss would not have happened. The law, however, cannot enter upon an examination of, or inquiry into, all the concurring circumstances which may have assisted in producing the injury, and without which it would not have occurred. To do so would only be to involve the whole matter in utter uncertainty, for when once we leave the direct, and go to seeking after remote causes, we have entered upon an unending sea of uncertainty, and any conclusion which should be reached would depend upon more conjecture than facts."

The case of *Benedict Pine Apple Co. v. Atlantic Coast Line R. Co.*, 55 Fla. 514, 48 South. 732, is not inconsistent with the holding in the instant case. That was a case where a canvas cover was put over growing plants and fruit by the owner thereof to protect them from ordinary and usual cold and frost that would probably occur, and such cover was burned by the negligence of the defendant, without the fault of the owner, and the plants and fruit were injured by such cold and frost before the burned cover could by reasonable diligence have been restored; and this court held such injury to the plants and fruit was not such an act of God, or such an independent, efficient cause as would relieve from liability the party who negligently burned the cover.

In that case the owner was not at fault, and the plants were injured by the frost before the burned cover could by reasonable diligence have been restored, and the defendant company was the active, moving, efficient cause of the destruction of the plants that had been actually covered by the prudent owner, to prevent their injury by cold and frost that would probably occur at the time and place of the negligence.

In the instant case, the owner of the oranges was at fault. The boxes were delivered to the defendant on the 7th day of December, 1904, and it should have delivered them to the plaintiff in five days or on the 12th day of December, and although they were not delivered for 42 days, or until the 24th day of January, 1905, the plaintiff does not appear

to have made any attempt to procure other boxes and made no effort to protect the oranges; but he left the oranges on the trees all that time, exposed to the dangers of the cold, when he might have gathered the crop and housed the same, and perhaps under a proper showing might have a just claim against the defendant for the extra expenses of thus protecting the same, and the defendant company, unlike the defendant in the *Pineapple Case*, was not the active, moving, efficient cause of the destruction of fruit that had been properly protected by the owner, but merely delayed the transportation and delivery of boxes intended for the shipment of the oranges. This is not a case where a railroad company, having possession of oranges for transportation, negligently unloaded and exposed the same so that they were destroyed by freezing weather.

As the allegations of the declaration show that the legal right of the plaintiff to have his orange boxes carried and delivered within a reasonable time has been invaded, he may recover at least some damages, and for this reason the demurrer should have been overruled. 13 Cyc. 14; *Western Union Tel. Co. v. Milton*, 53 Fla. 484, 43 South. 495, 11 L. R. A. (N. S.) 560; *Borden v. Western Union Tel. Co.*, 32 Fla. 394, 13 South. 876; *Crutcher v. Choctaw, O. & G. R. Co.*, 74 Ark. 358, 85 S. W. 770.

The judgment is reversed.

TAYLOR and HOCKER, JJ., concur.

SHACKLEFORD, C. J., and COCKRELL and WHITEFIELD, JJ., concur in the opinion.

(56 Fla. 217)

CHARLOTTE HARBOR & N. RY. CO. v.
BURWELL et al.

(Supreme Court of Florida, Division B. Dec. 8, 1908. Headnotes Filed Jan. 25, 1909.)

1. CONTRACTS (§ 232*)—EXTRA WORK—WAIVER OF ENGINEER'S ORDER.

Where a contract is entered into not under seal between a railway company of the one part and a firm of contractors of the other, for the construction of certain trestle and bridge work, and among other things provides that no claim for extra work shall under any circumstances be allowed or considered unless the same shall have been done in pursuance of an order in writing given by the engineer, but nothing shall be deemed or construed as extra work which can be measured and estimated under the terms of the contract, such a provision, and other like ones, intended for the benefit of the railway company, while legal, may be waived, and such waiver may be shown by the subsequent course of dealing between the parties.

[Ed. Note.—For other cases, see *Contracts*. Cent. Dig. §§ 1091, 1092; Dec. Dig. § 232.*]

2. WORK AND LABOR (§ 28*)—EVIDENCE—SUFFICIENCY.

In a suit to recover for work and materials when the compensation therefor is not fixed by

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

contract, it is essential to a recovery that there should be proof of the reasonable value of such work and materials, and the evidence of the plaintiff that he paid a subcontractor for this work upon estimates furnished by a resident engineer of the defendant is not sufficient proof of such reasonable value.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. § 55; Dec. Dig. § 28.*]

3. FRAUDS, STATUTE OF (§ 89*)—SALES OF GOODS—ACCEPTANCE.

Where the owner of certain crushed granite offers to sell the same to a party upon whose premises the rock is located, and the latter agrees to buy the same, but there is nothing given by way of earnest to bind the bargain or in part payment, and no note or memorandum in writing of the bargain or contract signed by the parties or their agents thereunto lawfully authorized, it is essential to a consummated sale under the statute of frauds (section 2518, Gen. St. 1906) that the alleged purchaser should have done some act showing an acceptance of the rock, as, for instance, that he sold or attempted to sell or dispose absolutely of the whole or some portion of the rock, or alters its nature, or the like, and such facts must be clearly shown.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 166, 167; Dec. Dig. § 89.*]

(Syllabus by the Court.)

4. WORDS AND PHRASES—"WAIVER."

"Waiver" is where one in possession of any right, whether conferred by law or by contract, and of full knowledge of the material facts, does or forbears the doing of something inconsistently with the existence of the right, or of his intention to rely upon it. Thereupon he is said to have waived it, and he is precluded from claiming anything by reason of it afterwards.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 8, pp. 7375-7381, 7831, 7832.]

Error to Circuit Court, Duval County; Rhydon M. Call, Judge.

Action by Blair Burwell, Jr., and another, copartners, against the Charlotte Harbor & Northern Railway Company. Judgment for plaintiffs, and defendant brings error. Reversed.

Cooper & Cooper, for plaintiff in error. Kay, Doggett & Smith, for defendants in error.

HOCKER, J. On the 18th of July, 1907, the defendants in error, whom we shall term the plaintiffs, brought an action of general assumpsit against the plaintiff in error, treated herein as the defendant, in the circuit court of Duval county. The declaration and bill of particulars are as follows:

"Blair Burwell, Jr., and Charles E. Hillyer, copartners doing business as Burwell & Hillyer, by their attorneys, Kay, Doggett & Smith, sue Charlotte Harbor & Northern Railway Company, a corporation organized and existing under the laws of the state of Florida, for that, on the 1st day of July, A. D. 1907, the defendant was indebted to the plaintiffs in the sum of \$2,000 for money payable by the defendant to the plaintiffs for goods bargained and sold by the plaintiffs to the defendant.

"Second. And in the like sum for work done and materials provided by the plaintiffs for the defendant at its request.

"Third. And in the like sum for money lent by the plaintiffs to the defendant.

"Fourth. And in the like sum for money paid by the plaintiffs for the defendant at its request.

"Fifth. And in the like sum for money received by the defendant for the use of the plaintiffs.

"Sixth. And in the like sum for money found to be due from the defendant to the plaintiffs on accounts stated between them.

"Seventh. And in the like sum for interest on divers sums of money due to the plaintiffs by the defendant, forborne to the defendant at its request by the plaintiffs before this time.

"Wherefore, plaintiffs bring this their suit, and ask damages in the sum of \$2,000.

"And plaintiffs attach hereto a bill of particulars of the account sued on.

"Kay, Doggett & Smith,

"Attorneys for the Plaintiffs."

"Jacksonville, Florida, June 10th, 1907.

"The Charlotte Harbor & Northern Ry. Co. to Burwell & Hillyer, Dr.

To 207 caps, 12" x 12" x 12", 29,808 ft. B. M. replaced at Gasparilla Sound where taken off by direction of chief engineer, actual amount paid by us to J. R. Chambliss for this work, @ \$7.00 per M.....	\$208 65
To 4 Gasparilla bridge seats, exact cost to us over and above the \$10.50 per M. B. M. allowed us in the estimate	\$123 00
To 272 drift bolts at 10 cts. each on the 4 Gasparilla bridge seats.....	27 20
	\$150 20
To 10% profit on the cost of these Gasparilla bridge seats.....	16 02
	176 22
To 16 caps, 12" x 12" x 12", 2,304 ft. B. M. replaced at Myakka river where taken off by direction of chief engineer, actual amount paid by us to J. R. Chambliss for this work, @ \$7.00 per M.....	16 13
To 2 Myakka river bridge seats, exact cost to us over and above the \$10.50 per M. B. M. allowed us in the estimate.....	\$ 69 00
To 110 drift bolts at 10 cts. each on those 2 Myakka river bridge seats	11 00
	\$ 80 00
To 10% profit on the cost of these Myakka river bridge seats.....	8 00
	88 00
To 4½ tons of coal returned with floating driver which you charged to us at \$4.75 per ton.....	21 37
	\$510 37

"Jacksonville, Florida, July 1st, 1907.

"Charlotte Harbor & Northern Ry. to Burwell & Hillyer, Dr.

"Statement of bills sent to Charlotte Harbor & Northern Ry. which were passed by Mr. L. M. Fouts, 2d Vice Prest. and Gen.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Mgr. C. H. & N. Ry., and sent to Auditor for payment.

May 1st.	1 bbl. of cement taken from first shipment.....	\$ 2 75	
	1 bbl. of cement taken from Myakka by Mr. Spencer, resident engineer.....	2 75	
	1 bbl. of cement left at Coral Creek for Va. B. & I. Co. on request of Mr. Bruce, through Mr. Spencer.....	2 75	\$ 8 25
May 1st.	240 drift bolts, 680 lbs. @ 3 cts.....	\$ 19 80	
	Labor, boring, and drifting at Myakka draw, 10 bents each side.....	2 00	
	Cash to C. Lowe on request of Mr. Spencer.....	1 00	
	14 hrs. towing raft from Cape Hays @ 75¢.....	10 50	23 30
May 9th.	3,143 lbs. cast washers @ 3 cts.....	94 29	
	827 lbs. boat spikes @ \$3.40.....	28 13	
	71 " cut washers @ 4 cts.....	2 84	
	353 " drift bolts @ 3 cts.....	10 59	
	309 lbs. machine bolts @ 3 cts.....	9 27	
	311 lbs. lag screws, 243 screws, @ 6.4 cts.....	15 87	
			190 98
			\$202 58

"Jacksonville, Florida, July 1st, 1907.

"The Charlotte Harbor & Northern Ry. Co. to Burwell & Hillyer, Dr.

To 112 cubic yards crushed granite at \$3.84 lbs. per cu. yard, which equals 133½ tons @ \$2.716..... \$362 58"

The defendant pleaded "never indebted as alleged," and "never promised as alleged," and an additional plea admitting indebtedness of \$181.19 for the following claims named in the declaration, viz:

1907.

May 9th.	3,143 lbs. cast washers @ 3 cts.....	\$ 94 29	
	827 lbs. boat spikes @ \$3.40.....	28 13	
	71 lbs. cut washers @ 4 cts.....	2 84	
	353 lbs. drift bolts @ 3 cts.....	10 59	
	309 lbs. machine bolts @ 3 cts.....	9 27	
	311 lbs. lag screws 243 socs. @ 6.4 cts.....	15 87	
May 1st.	1 bbl. cement taken from first shipment.....	2 75	
May 1st.	1 bbl. cement taken from Myakka by Mr. Spencer.....	2 75	
	1 bbl. cement left at Coral Creek for the V. B. & I. Co. on request of Mr. Bruce through Mr. Spencer.....	2 75	
	4½ tons coal returned at \$4.75 per ton.....	21 87	
			\$190 60
Less	200 drift bolts furnished by Conolly mail boat, 235 lbs., @ 3 cts., April 10/07.....	\$6 75	
For	unloading rock returned from Myakka to Liverpool.....	2 06	\$ 41
			\$181 19

—and setting up a tender and offer to pay that amount in settlement of said claims and demands, which amount was paid into the registry of the court.

On the trial the plaintiff recovered a ver-

dict for the full amount claimed in the bill of particulars, and a judgment was duly entered for that amount and interest, which judgment is here for review.

It appears that on April 4, 1906, the plaintiffs entered into a contract not under seal, with the defendant then existing under another name, containing, among others, the following clauses, under paragraph 1:

"First. The contractors agree that they will construct, build, and in every respect complete the trestle bridging for a single track railroad, on the line of the Alafia, Manatee & Gulf Coast Railway Company, in Manatee and De Soto counties, state of Florida, from and including the Peace River bridge near Ft. Ogden, and Miakka River bridge and the bridge across Gasparilla Sound to Gasparilla Island, and all intermediate openings of not less than fifty feet (50').

"Second. The contractors hereby agree that they will, at their own expense, cost, and charge, find and provide a full and ample supply of the best and most suitable tools and appliances required to be used in the performance of the said work, and will furnish and provide in sufficient numbers all mechanics, laborers, and other workmen, also all things that may be necessary and requisite for constructing and completing, within the time herein stipulated, the whole work herein agreed to be done.

"Third. The work shall be done in strict conformity with such lines, levels, stakes, profiles, plans, maps, drawings, specifications, and instructions as shall from time to time be given by the company's engineers as herein provided, for the guidance and direction of the contractors, provided the character or amount of the work is not changed.

"Fourth. The work shall be commenced within 10 days after the date of this agreement, and the aforesaid bridges across Peace river and Gasparilla Sound shall be completed on or before the 1st day of October, A. D. 1906, and the bridge across the Miakka river and the intermediate bridges shall be completed on or before the 1st day of December, A. D. 1906."

The contract under paragraph 2 and first clause contains the prices to be paid by the defendant for pile driving and "for framing, working, bolting lumber in place complete as per plans and specifications, including all iron, viz., bolts, nuts, washers, spikes, nails, etc., necessary for the same, ten dollars and fifty cents (\$10.50) per thousand B. M."

The second clause, paragraph 2, is as follows:

"Second. The said company is to furnish all piling, timber, and other material necessary, except the iron above referred to, in raft or on lighters, or on shore at the work, provided, however, when delivering such piling and timber in rafts or on lighters, such delivery at the site along the line where the

said bridges are being constructed will be a fulfillment of the terms of this contract on the part of the company."

The fourth clause, paragraph 2, provides for monthly and final estimates to be paid on the certificate of the chief engineer.

The fifth clause, paragraph 2, provides that the chief engineer in making final estimates is not to be bound by previous monthly estimates.

The fifth clause of paragraph 3 provides that, if work is required not contemplated, the chief engineer of the railroad company shall fix the price by which the parties are to abide.

The sixth clause of paragraph 3 provides that the company shall have the right to make alterations that may be deemed necessary in the location, line, grade, plan, form, or dimensions of the work, then in writing, and how such work shall be paid for.

The seventh clause of paragraph three, is as follows:

"Seventh. No claim for extra work shall under any circumstances be allowed or considered unless the same shall have been done in pursuance of an order in writing given by the engineer, but nothing shall be deemed or construed as extra work which can be measured and estimated under the terms of this contract."

Clause 8, under paragraph 3, provides that nothing herein shall be construed into a liability for damages, that no charge or claim shall be made by the contractors for delay, and provides that the contractors shall have such extension of time for the completion of the work as shall be determined by the chief engineer to be equal to the delay caused by the omission of the company.

The twelfth and thirteenth clauses under paragraph 3 are as follows:

"Twelfth. All questions, differences or controversies which may arise between the company and the contractor, under or in reference to this agreement and specification, or its performance or nonperformance, or the work to which they relate, or in any way whatever pertaining to or connected with said work, shall be referred to the chief engineer of the company, and his decision shall be final and conclusive to both parties.

"Thirteenth. Whenever the word 'engineer' or 'chief engineer' is used herein, it shall be understood to refer to the chief engineer of the Alafia, Manatee & Gulf Coast Railway Company."

Whether the defendant was legally liable for any part of the amount claimed and recovered, except the item of \$362.58 for crushed granite, and the items which are admitted to be due, depends upon whether or not the contract above referred to controls that liability. It is contended by the plaintiff in error that the amounts claimed as extra for bridge seat work at Gasparilla Sound and Miakka river are not to be allowed because it was a part of the trestle and bridge work

covered by the contract, and already paid for by the defendant, and also that, if it is to be regarded as extra or additional work, it was done without any written order by the chief engineer of the defendant as provided in the contract. The same contention is made by the defendant as to the items for capping or recapping the piling, and the sundry items for drift bolts used in that connection and the profits on the bridge seat work.

For the plaintiffs it is contended that under the course of dealing between the parties during the construction of the work provided for in the contract a strict adherence to provisions of the contract requiring that changes, alterations, extra and additional work, etc., should only fix liability on the railway company when ordered in writing by the chief engineer was not adhered to, and that the defendant waived a strict observance of these provisions, and so acted in the premises as to render itself liable for work and benefits actually received and not paid for. There does not seem to be any dispute that the defendant received the benefit of every one of the items charged in the bill of particulars, except that for crushed granite, but denies that there has been any waiver by it of the strict requirements of the contract, and contends that, except as to the admitted items, the plaintiff has been paid all that it is liable to pay under the contract. It is furthermore contended there was no legal proof made of the reasonable value of the work, materials, etc., upon which the verdict was founded.

There does not seem to be any question about the validity of the provisions of the contract which have been heretofore set forth. *Howard v. Pensacola & A. R. Co.*, 24 Fla. 560, text 606, 5 South. 353; *Finegan & Co. v. L'Engle & Son*, 8 Fla. 413, text 424. At the same time it seems to be well settled by high authority that such provisions may be waived by the parties. In the case of *Bartlett v. Stanchfield*, 148 Mass. 394, 19 N. E. 549, 2 L. R. A. 625, there was a provision in a building contract "that no charge shall be made for extra work or materials, unless the same is ordered in writing and the price thereof agreed upon," may be waived by the parties. In the opinion the court says: "The main argument for the defendant is that, if the work fell within the provisions of the contract, there was no evidence of a waiver. We are of opinion that there was evidence for the jury. Attempts of parties to tie up by contract their freedom of dealing with each other are futile. The contract is a fact to be taken into account in interpreting the subsequent conduct of the plaintiff and defendant, no doubt; but it cannot be assumed, as matter of law, that the contract governed all that was done until it was renounced in so many words, because the parties had a right to renounce it in any way, and by any mode of expression, they saw

fit. They could substitute a new oral contract by conduct and intimation, as well as by express words. In deciding whether they had waived the terms of the written contract, the jury had a right to assume that both parties remembered it, and knew its legal meaning. On that assumption, the question of waiver was a question as to what the plaintiff fairly might have understood to be the meaning of the defendant's conduct. If the plaintiff had a right to understand that the defendant expressed a consent to be liable, irrespective of the written contract, and furnished the work and materials on that understanding, the defendant is bound"—citing authorities. See, also, to the same effect, *Copeland v. Hewett*, 96 Me. 525, 53 Atl. 36; *Bishop on Contracts* (2d Enlarged Ed.) § 767. In the case of *McLeod v. Genius*, 31 Neb. 1, 47 N. W. 473, the construction of a building contract was involved. It contained a provision that "no new work of any description done on the premises, nor work of any kind whatsoever shall be considered as extras unless a separate estimate in writing for the same before it is commenced shall have been submitted by the contractor to the superintendent and proprietor and their signatures obtained thereto." It was held that such a provision may be waived by the parties by parol, and it was further held that "the owner of a building is liable for work and materials furnished by the contractor in its construction, not called for by the original written contract where the owner or his authorized agent, by a subsequent oral agreement promised to pay therefor, or knew that the contractor would charge for the same as extras, and assented thereto, or permitted the same without objection." In *Bishop on Contracts* (2d Enlarged Ed.) § 792, a "waiver" is defined as follows: "Waiver is where one in possession of any right whether conferred by law or by contract, and of full knowledge of the material facts, does or forbears the doing of something inconsistently with the existence of the right or of his intention to rely upon it; thereupon he is said to have waived it, and he is precluded from claiming anything by reason of it afterwards." Again, in section 804, it is said that, "to a large extent, the binding effect of waiver proceeds from the doctrine of estoppel, where no consideration is required." 29 Am. & Eng. Ency. Law (2d Ed.) 1091 et seq. It is held by this court in *Robinson v. Hyer*, 35 Fla. 544, 17 South. 745, that a written contract not under seal may be waived or added to by subsequent oral agreement upon a sufficient consideration, as to its terms to be performed in the future, and that a consideration emanating from some injury or inconvenience to the one party, or from some benefit to the other, is a recognized legal consideration.

We deem it pertinent to say that the evidence of Mr. George S. Bruce, the chief engineer of the defendant, shows: That the de-

fendant did not furnish the contractors with lumber and material as they were needed by the contractors, especially in June and July, 1906; that from a letter of his dated July 18, 1906, to the plaintiffs, he thought it not advisable to withdraw the bridge force, as he had advices from the mills that the lumber would be forthcoming; that the work was done under his direction and under that of the resident engineer who represented him; that he was occasionally down when the work was being done; that he knew the work of slipping the caps was going on, and that it would cost as much to replace them as it would to place them first; that he did agree to pay for anything they considered extra work outside the contract which they ordered done; that the replacing the caps was not covered by the contract; that the lumber was not there for the caps, and if the caps were not slipped the pile driver would have to stop work; that there was delay in getting timber for the work, which caused the slipping of the caps; that the contract did not provide for pulling and replacing the caps; that the bridge seat work was not included in the contract, was the last work done; and that Mr. Spencer, the resident engineer, was in charge of the completion of this work. It further appears from Mr. Bruce's testimony that several items of extra work, approved by the resident engineer and Mr. Bruce, were paid by the railroad company, though this extra work had not been authorized in writing by the chief engineer as required by the contract. It also appears from the statements accompanying Mr. Fouts' testimony that several of them were paid which were only approved by Spencer, the resident engineer.

Mr. Hillyer testified, among other things, in substance: That the items amounting to \$33.30 were done by the direction of the resident engineer who told him the company would pay them; that when the trestle was practically completed Mr. Spencer, the resident engineer, directed the contractors to build the bridge seats, and they were built under his direction, and he practically had charge of the men, and said he would allow pay for them; that they were not embraced in the contract; that Spencer agreed to allow 10 cents a piece for the drift bolts used; that as to the recapping at Gasparilla Sound the caps were taken off and put ahead by direction of the chief engineer; that replacing them was not required by the contract; that witness spoke to the chief engineer about it, and he told witness at Hull he would pay for that. There was other testimony along this line, but we have mentioned this as tending to show the course of dealing between the parties and as tending to show that there was not a strict insistence by the officers of the company having supervision of the work upon a rigid adherence to the terms and conditions of the contract, and we do not think the court

erred in submitting the case to the jury upon this theory.

We cannot find, however, in this record, any clear proof of the reasonable value of the work and materials used by the contractors in the bridge seat work, or in the recapping of the piles. As to the work for recapping, it appears from Mr. Bruce's testimony that this involved double work, and inferentially that it was rendered necessary by the delay of the company in furnishing the timber for capping while the piles were being driven. Mr. Hillyer says that he paid the subcontractor for this work upon estimates furnished by the resident engineer; but he does not say that the resident engineer estimated the reasonable value of the work, and it does not follow, if he did do so, that these estimates represented such reasonable value. The same thing is true of the bridge seat work. The plaintiffs, if they recovered at all, were only entitled to recover for the reasonable value of the work performed and materials furnished, and as to this there is no clear proof at all.

As to the item of \$362.58, we are constrained to say, under our view of the law, there is no proof upon which to charge the defendant. The testimony of Mr. Burwell shows, in substance: That plaintiffs had some crushed granite left from work done by them at Liverpool upon premises which seem to have been in the control of the defendant. That Mr. Burwell met Mr. L. M. Fouts, general manager of the defendant company, at the Seminole Club in Jacksonville in January or February, 1907. That he offered this granite to Mr. Fouts for his company at less than cost, viz., \$2.71 per ton. That Fouts said "very well, in that case he would take the rock. Witness said to him (Fouts) that he would leave it there. That witness did not know how much he had, but Mr. Fouts' engineer could measure it and send witness a check for it. Mr. Fouts said all right." Subsequently, on June 10, 1907, the plaintiffs sent a telegram to Geo. S. Bruce, chief engineer of the defendant company, in these words: "Wire quick about number of tons rock Liverpool." Mr. Bruce turned over the telegram to Mr. E. E. Bradford, assistant engineer, who measured the rock and telegraphed the plaintiffs there were 112 cubic yards of rock at Liverpool. It does not appear that Mr. Bruce knew of what had taken place between Mr. Burwell and Mr. Fouts, but he says he had the rock measured simply because he was requested so to do by the plaintiffs. It does not appear that subsequent to the conversation in the Seminole Club the defendant company ever touched the rock, or gave any orders in regard to it, or did anything whatever indicating a purpose to change the possession from the plaintiffs to the defendant. The rock simply remained where the plaintiffs had left it on the premises of the defendant. Mr. Fouts in his testimony distinctly repudiates any purchase by him of the

rock in the conversation at the club or elsewhere. He admits having a conversation about the rock, but says that he told Mr. Burwell he did not know whether the defendant could use it, but, if the defendant could, it would be glad to do so as an accommodation to Mr. Burwell, and that he would request Mr. Bruce to measure it, but thinks he never did so; that he never took possession of the stone, and has no knowledge of any delivery of the stone to the defendant. Nothing was ever paid for the rock, nothing given as earnest to bind the bargain, and no note or memorandum in writing was made of said bargain, signed by the parties or their agents.

Section 2518, Gen. St. 1906, is as follows: "No contract for the sale of any personal property, goods, wares or merchandise shall be good, unless the buyer shall accept the goods (or part of them) so sold and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or some note or memorandum in writing of the said bargain or contract be made and signed by the parties to be charged by such contract, or their agents thereunder lawfully authorized."

Even upon the theory that the rock in this case was at the time of the proposed sale and thereafter in the possession of the defendant as bailee because it was on premises which the latter controlled, it was absolutely necessary, under the circumstances, to a consummated sale, that the defendant should have done some act showing an acceptance by it of the rock.

In Benjamin on Sales (5th Ed.) 215, where the question of acceptance is treated, the author quotes from Lillywhite v. Devereux, 15 M. & W. 285, as follows: "No doubt can be entertained after the case of Edan v. Dudfield, which was well considered by the Court of Queen's Bench, that this (acceptance) is a question of fact for the jury; and that, if it appears that the conduct of a defendant in dealing with goods already in his possession is wholly inconsistent with the supposition that his former possession continues unchanged, he may properly be said to have accepted and actually received such goods under a contract so as to take the case out of the operation of the statute of frauds, as, for instance, if he sells or attempts to sell the goods, or if he disposes absolutely of the whole or any part of them or attempts to do so, or alters the nature of the property or the like. But we think such facts must be clearly shown." And the author says that in this case the court disagreed with the jury and set aside the verdict, as not justified by the evidence.

In the case of Dorsey v. Pike, 60 Hun, 534, 3 N. Y. Supp. 730, in discussing what constitutes an acceptance under the statute of frauds, where the property alleged to have been sold was in the possession of the defendant, the court says: "The mere fact that the property was in the possession of the

defendant at the time of making the contract furnished no evidence of acceptance in its support (quoting authorities) But there must be some act or conduct on the part of the buyer in respect to the property which manifests an intention to accept it pursuant to, or in performance of, the contract of sale and purchase which the parties have sought to make; and, when the evidence is such as to warrant that conclusion, the question is usually one of fact for the jury."

In the case of *Silkman Lumber Co. v. Hunholz*, 132 Wis. 610, 112 N. W. 1081, 11 L. R. A. (N. S.) 1186, 122 Am. St. Rep. 1008, it is held: "Where the subject of a verbal sale agreement of personal property is in the possession of the contemplated vendee as bailee, or to some extent, by reason of its being on his premises by his permission, the mere agreement, consisting of an offer to sell on specified terms and acceptance thereof, does not work a change of possession, so as to satisfy the statute. To satisfy the statute of frauds in a situation such as last mentioned, there must be some affirmative act on the part of the purchaser manifesting an intention to accept the property under the sale agreement, in order to make transition of title from seller to purchaser."

We are of opinion that, applying these principles, there is not sufficient proof in this record of the acceptance of the rock by the defendant so as to take the case out of the statute of frauds above cited. Section 2518, Gen. St. 1906.

There are a large number of assignments of error based on the admission in evidence of divers letters from the plaintiffs to the officers of defendant company setting up claims for remuneration for the work, labor, materials, etc., stated in the bill of particulars, and also to the admission of testimony on the part of witnesses of the plaintiffs upon the same matters. The objections are that such evidence was incompetent and irrelevant, and in some instances that it tended to vary the terms of the written contract. Upon the theory that parties to a written contract may subsequently to its execution by parol and the course of dealing between themselves waive the conditions and vigorous requirements of a written contract, we cannot say that any of the testimony was entirely irrelevant or incompetent, as it all more or less tended to show the course of dealing between the parties. There are also a large number of assignments based on charges and instructions given by the court, and on instructions refused by the court on the theory that there could not be a waiver of the requirements of the written contract. We have not discovered any serious and reversible error under these assignments.

The only other assignment which we think it necessary to notice is based on the overruling of the motion in arrest of judgment.

It seems to be insisted that the bill of particulars was made a part of the declaration, and stated no cause of action, because in the bill of particulars certain amounts are stated as having been paid J. R. Chambliss, a subcontractor. The bill of particulars is not made a part of the declaration, and the declaration itself is in the usual form. Shipman's Common Law Pleading, p. 21. The bill of particulars contains no reference to a subcontractor. We discover no ground for a motion in arrest of judgment.

There are 64 assignments of error presented here, and, in addition, question presented arising out of the overruling by the court of motions in arrest of judgment and for a new trial. We cannot within any reasonable compass treat in detail these assignments, and have simply endeavored to discuss those which seemed to present the salient features of the case.

Because we do not think the item for crushed granite has been proven, and because there was no proper proof of the reasonable value of the other items mentioned, the judgment below is reversed, and a new trial granted.

TAYLOR and PARKHILL, JJ., concur.

SHACKLEFORD, C. J., and COCKRELL and WHITFIELD, JJ., concur in the opinion.

(56 Fla. 1)

ADAMS v. STATE.

(Supreme Court of Florida. Dec. 11, 1908.
Headnotes Filed Jan. 20, 1909.)

1. CRIMINAL LAW (§ 578*)—CONTINUANCE.

The rule prevailing here in granting continuances in criminal cases is the same as the one that obtains in civil cases, except that in criminal cases the grounds for the motion should be scanned more closely than in civil cases, on account of the superior temptation to delay.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1306; Dec. Dig. § 578.*]

2. CRIMINAL LAW (§§ 586, 1151*)—CONTINUANCE—REVIEW—DISCRETION OF COURT.

An application for a continuance of a cause is addressed to the sound discretion of the court, and the action of the trial court thereon will not be reversed unless there has been a palpable abuse of that discretion to the injury of the accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1311, 3045-3049; Dec. Dig. §§ 580, 1151.*]

3. CRIMINAL LAW (§ 1144*)—REVIEW—PRESUMPTIONS—CONTINUANCE.

All facts necessary to show a clear abuse of the discretion of the court in ruling upon an application for the continuance of a cause to the injury of the defendant must be presented, and, whenever the record is either silent or uncertain on any point material to establish an abuse of such discretion, the presumptions are all in favor of the correctness of the ruling.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3022; Dec. Dig. § 1144.*]

4. CRIMINAL LAW (§ 603*)—CONTINUANCE—AFFIDAVITS—SUFFICIENCY.

An affidavit filed in support of a motion for the continuance of a cause is fatally defective when it fails to state: (1) That the applicant expects to procure said testimony at the next term; or (2) that the absent witness resides in the county where the suit is pending, or, if out of the county, good cause is not shown for not taking his deposition; or (3) that the application is not made for delay only; or (4) that the absent witness has been duly served with a subpoena, or a satisfactory reason assigned for the omission.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1349, 1353, 1357, 1360; Dec. Dig. § 603.*]

5. CRIMINAL LAW (§ 1159*)—REVIEW—QUESTIONS OF FACT.

Where there is evidence from which all the elements of the crime of which the defendant stands convicted may be legally inferred, and it does not appear that the jury were not governed by the evidence adduced at the trial, the appellate court will not disturb the verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

6. JURY (§ 4*)—RIGHT TO TRIAL BY—NUMBER OF JURORS.

The defendant, having been convicted of murder in the second degree, stood acquitted of the crime of murder in the first degree charged against him. Thereafter he could only be put upon trial for the crime of murder in the second degree, and, this not being a capital crime, he should be tried by a jury of six men.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 4.*]

7. HOMICIDE (§ 254*)—EVIDENCE—SUFFICIENCY—MURDER IN SECOND DEGREE.

The evidence examined and found to be sufficient to support a verdict of guilty of murder in the second degree.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 254.*]

Taylor and Hocker, JJ., dissenting.

(Syllabus by the Court.)

8. WORDS AND PHRASES—"CAPITAL CASE."

A "capital case" is a case in which a person is tried for a capital crime.

9. WORDS AND PHRASES—"CAPITAL CRIME."

A "capital crime" is one for which the punishment of death is inflicted.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, p. 958.]

In Banc. Error to Circuit Court, Hernando County; William S. Bullock, Judge.

January Adams was convicted of murder in the second degree, and he brings error. Affirmed.

Davant & Davant, for plaintiff in error.
W. H. Ellis, Atty. Gen., for the State.

PARKHILL, J. This is the second appearance of this case in this court. The first report of it will be found in 46 South. 152.

The plaintiff in error was indicted, at the fall term, 1907, of the circuit court for Hernando county, for the murder of one George Green, and upon trial was convicted of murder in the second degree and sentenced to the state prison for the term of his natural life. This judgment and sentence was re-

versed in this court on the 24th day of March, 1908, and the defendant was convicted a second time of murder in the second degree, and again sentenced to the state prison for life. From this last sentence he seeks relief by writ of error.

The first assignment of error is based upon the refusal of the trial court to grant a motion made by defendant for a continuance of this cause because of the absence of one Joe Ruth.

In support of the motion for a continuance, the defendant filed the following affidavit: "Now comes the defendant, January Adams, and, being by me duly sworn, on his oath says that one Joe Ruth is a necessary and material witness on his behalf, and that he cannot safely go to trial without the said witness; that, from an affidavit heretofore filed in the said case by one H. F. Price, it appears that the said Ruth was an eye-witness of the shooting in which George Green lost his life, and will testify that, at the time the said George Green was killed by said defendant, the said George Green was attempting to take the life of the said defendant with a single-barrel shotgun, which the said Green was at that time pointing at said defendant. Deponent further says that he has had subpoena issued for the said witness, and that same has been placed in the hands of the sheriff for service. Deponent further says that he cannot safely go to trial without the said witness, but that the same is necessary to his defense, and that the said witness is absent without the consent, procurement, or connivance of the said defendant, either directly or indirectly given.

his

"January X Adams,
mark

"Sworn to and subscribed before me this twenty-ninth day of April, A. D. 1908.

"Frank E. Saxon,

"Clerk Circuit Court. [Seal.]"

When this case was here before, it was reversed because we thought that, in view of the unsatisfactory character of the evidence upon which the verdict was rendered and of the offer of the newly discovered evidence of this same Joe Ruth, the motion for a new trial should have been granted. Now we are asked to say that the court erred in a refusal to grant a continuance of the case because of the absence of Joe Ruth.

The rule in granting continuances in civil cases has been stated by this court to be as follows: "When a party applies in a civil suit for a continuance for the term on the ground of the absence of a witness, it must be shown by affidavit: That the witness has been duly served with a subpoena, or a satisfactory reason assigned for the omission; that he is absent without the consent of the party, directly or indirectly given;

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that he resides in the county where the suit is pending, or, if out of the county, good cause must be shown for not taking his deposition; that the testimony is material; that the applicant expects to procure said testimony at the next term; that the application is not made for delay only; that he cannot safely proceed to trial without the evidence of said witness. And the party must further state the facts expected to be proved by said witness." *Harrell v. Durrance*, 9 Fla. 490; *Gladden v. State*, 12 Fla. 623.

The rule prevailing here in granting continuances in criminal cases is the same as the one that obtains in civil cases, except that in criminal cases the grounds for the motion should be scanned more closely than in civil cases, on account of the superior temptation to delay. *Gladden v. State*, supra; *Bryant v. State*, 34 Fla. 291, 16 South. 177; *Bynum v. State*, 46 Fla. 142, 35 South. 65; *Ballard v. State*, 31 Fla. 266, 12 South. 865.

An application for a continuance of a cause is addressed to the sound discretion of the court, and the action of the trial court thereon will not be reversed unless there has been a palpable abuse of that discretion to the injury of the accused. All facts necessary to show a clear abuse of discretion in this regard to the injury of the defendant must be presented, and, whenever the record is either silent or uncertain on any point material to establish such an abuse of discretion, the presumptions are all in favor of the correctness of the ruling. *Gass v. State*, 44 Fla. 70, 32 South. 109; *Hall v. State*, 35 Fla. 534, 17 South. 638; *Hicks v. State*, 25 Fla. 535, 6 South. 441; *Ballard v. State*, supra.

Considering the application for a continuance herein in the light of these principles of the law, we find it to be fatally defective, and the same was properly denied.

The affidavit filed in support of the motion for continuance fails to state "that the applicant expects to procure said testimony at the next term." In *Easterlin v. State*, 43 Fla. 565, 31 South. 350, we declined to adjudge erroneous the refusal of an application for continuance because of the absence of a witness when the affidavit filed in support thereof omitted to state "that the applicant expects to procure said testimony at the next term."

The affidavit filed herein is fatally defective by reason of another omission. It fails to state that the absent witness resides in the county where the suit is pending, or, if out of the county, good cause is not shown for not taking his deposition. An allegation of this kind has been held to be essential. *Webster v. State*, 47 Fla. 108, 36 South. 584.

The affidavit is fatally defective for the further reason that it does not show that the witness has been duly served with a

subpoena, or a satisfactory reason assigned for the omission. *Gladden v. State*, supra.

This affidavit is fatally defective for the further reason that it does not show "that the application is not made for delay only." All that the affidavit shows may be true, and yet if the applicant did not expect to procure the testimony of the absent witness at the next term of the court, and if the application for continuance was made for delay only, the court very properly denied the said application. If we proceed according to the rule that "all facts necessary to show a clear abuse of discretion in this regard to the injury of the defendant must be presented, and whenever the record is either silent or uncertain on any point material to establish such an abuse of discretion the presumptions are all in favor of the ruling," we must presume that the application for a continuance was made for delay only, and that the applicant did not expect to procure said testimony at the next term, for the record is silent on these particulars, and it is the duty of the defendant to show by affidavit that the application is not made for delay only, and that he expects to procure said testimony at the next term.

When this case was reversed here and sent back to the court below for a new trial, it did not become the duty of that court of its own motion to grant the defendant a continuance because of the absence of Joe Ruth. If the defendant did not desire a continuance of his case, he was not compelled to have it because of the action of this court reversing the judgment of his first conviction. If the defendant desired a continuance of his case, it was his duty to ask for it, and the court was not required to grant a continuance unless the defendant made an application therefor in accordance with law.

The first thing that an affidavit for a continuance must show is "that the witness has been duly served with a subpoena, or a satisfactory reason assigned for the omission." The defendant is not required to show by affidavit that a subpoena has issued and been placed in the hands of the sheriff, but the affidavit must show that the witness has been duly served with a subpoena, or a satisfactory reason assigned for the omission. The defendant's affidavit only shows "that he has had a subpoena issued for the said witness, and that same has been placed in the hands of the sheriff for service." From the evidence introduced in behalf of the motion, it appears that a subpoena for Joe Ruth issued on the 16th day of April, 1908, and another subpoena for the same witness issued on the 27th day of April, 1908. In the record proper appears the return of the sheriff on the first subpoena, as follows: "Received this subpoena April 16, 1908, and have not been able to get service on this witness for the reason that he is not within the county of Hernando and that he was

informed that the witness' family was at Crystal River in Citrus county, and that I did just after the last term of the court in November send a warrant to the sheriff of Citrus county to be executed, but that he has been unable to get the man; the warrant having been returned by the sheriff of Citrus county. After diligent inquiry and search, I have been unable to find the said witness. W. E. Law, Sheriff."

If we may consider the return of the sheriff as it appears in the record proper, no showing has been made for the continuance of this case; and, if we may not consider what appears in the record proper, then the only showing made by the defendant on this point is that he has had subpoena issued for the witness and placed the same in the hands of the sheriff for service. So here was the trial court asked to continue this case by the defendant upon this weak and improper showing. It will not do to say that but two days after the issuance of the second subpoena, without any return by the sheriff upon this last subpoena, and in the absence of such newly discovered witness, and notwithstanding the application for continuance by the defendant on the ground of the absence of such witness, the defendant was hurried into trial, because we cannot say the judge erred in refusing to grant a continuance on such an affidavit as was presented to him—an affidavit that shows the defendant could not or would not say his application was not made for delay only, an affidavit that shows the defendant could not or would not say he expected to procure the testimony of the witness at the next term, an affidavit that fails to show that the witness resided in the county where the trial was had, or, if out of the county, good cause is not shown for taking his deposition, an affidavit that shows merely that subpoena had issued for the witness. If the return of the sheriff upon the subpoena ought to have been exhibited, it was the duty of the defendant to have shown this. If he failed in this regard, it is his fault, and the court cannot be condemned for hurrying the defendant into a trial without the sheriff's return. It is the duty of the defendant to make any error of the trial court appear to this court. We have so often declared our views upon this matter. All facts necessary to show a clear abuse of the discretion of the court in this regard must be presented by the defendant. If they are not presented, the court cannot be blamed, and his action set aside, unless we are prepared to set aside and disregard many previous decisions of this court holding that, whenever the record is either silent or uncertain on any point material to establish such an abuse of discretion, the presumptions are all in favor of the correctness of the court's ruling. See *Clements v. State*, 51 Fla. 6, 40 South. 432, and many cases there cited.

The other assignment of error is based

upon the court's overruling the motion for a new trial. Under this assignment it is contended that the verdict is contrary to the evidence and the law.

When this case was here before, the evidence considered by us was circumstantial in its nature. No witness in the first trial of this case testified that he saw the shooting. Upon the second trial an eyewitness to the shooting, Robert Robinson, was produced and testified for the state.

The evidence of the witnesses for the state, as shown now by the bill of exceptions in this case, proves, or tends to prove, the following facts: George Green was killed by the defendant, January Adams. The killing was unlawful, because, according to the witness Robinson, Green was not armed at the time of the difficulty and was not making any attempt or demonstration to harm or assault Adams. The killing took place near Herbert Pugh's house. Earlier in the night, about an hour before the killing, Adams, Dan Pedee, Nell Belcher, Prince Williams, and Herbert Pugh were in the latter's house, when Green came in and asked Dan for a quarter that he had borrowed from Green. Dan did not have a quarter, and Adams said: "Here is a quarter; give it to him, and let him go." That made Green mad. He had a gun, and some one pushed him out of the house and shut the door. Green remained outside and cursed Adams. According to the witness Jim King, January Adams said when George Green cursed him, "If you curse me, I will split you open." After awhile Green went away. Adams and Pedee started to go out of the house, Adams saying, "I am going out." Some one said, "January, don't go out," but he said, "I am going out." Adams and Pedee went out and remained out about half an hour. They came back into the house, and January was in the house a good little while, and after awhile he said, "I am going out," and some said, "January don't go out," and he said, "I am going out." "January took his pistol out when he went out. And just about the time he got out on the outside some one slammed the door to, and just then the shooting commenced. It seemed to me like three or four shots were fired." The witness Robinson said he saw Green and Joe Ruth standing at Pugh's gate just before the shooting. He said: "They were at Pugh's gate. When they came up there in front of his gate he whistled—Joe Ruth whistled—and by that time his door opened, and January Adams came out and shot three times, and George fell, and he fell to the ground when he was shot. George went off towards the still—towards the old ———, George Green did. He got up again. George did not have a pistol. Question: Wasn't armed at all? Answer: No, sir." "January went around the chimney to the end of the house. Joe Ruth went off that way. I have not seen Joe Ruth since that time. That is all that occurred there.

I didn't hear anything else. Nobody said anything on that occasion. I leave right off. I was about 10 steps from the shooting. None of these people said a word. Joe didn't say anything, only whistled. Green didn't say anything. January didn't say anything. * * * I didn't know what time it was. It was a moonshine night. It was bright moonlight."

Twelve witnesses testified for the state and for the defendant. We have carefully examined the testimony. We will not attempt to set it all out in this opinion. The defendant and his witnesses testified that, when he left Pugh's house just before the killing, he said he believed he would get his wife and go home. Adams said: "I seen a man standing just inside the gate, but I didn't know who he was, and I called to him three times, quick as possible, and he began to back out of the gate, and he pointed the gun. That is when the shooting started. I shot at him. I did not know who the man was, but I supposed it was the man who had promised to kill me, George Green. * * *

Just as I went out the door I seen a man standing just inside the gate. I called to the man three times quick, and after he began to run backwards and point the gun I believed it was George Green. After I called and seen the gun, he ran backwards and pointed the gun at me. I called him as fast as I can. I called him 'George! George! George!'" The defendant testified at considerable length.

The state's witness Prince Williams testified: "I did not hear January say anything as he was about to leave the house. I suppose I would have heard it if I was paying attention and listening to it. I did not hear him say, 'Well, boys, I will go home.' He might have said it, but I didn't hear it. I am sure I did not hear that."

This evidence is sufficient to sustain this verdict upon the theory that Joe Ruth was the man who was looking out for the defendant, that Joe Ruth whistled to let the defendant know that Green was out there, that Adams therefore drew his pistol before he left the house and shot down a man who was not armed and was making no effort to assault him, that the defendant was acting from a premeditated design to kill the deceased because the deceased had cursed him in a shameful manner about an hour before; the defendant declaring at the time to George Green, "If you curse me, I will split you open." The evidence for the state would sustain a verdict of murder in the first degree, and therefore a verdict of murder in the second degree.

If the defendant killed the deceased unlawfully, but without any premeditated design to effect the death of any particular individual, by an act imminently dangerous to another and evincing a depraved mind regardless of human life, he would be guilty of murder in the second degree. If the defendant did not know who the deceased was at the time, or

if he believed he was George Green, and shot the deceased, who was unarmed and making no attempt to harm the defendant in the manner detailed by the witnesses, said shooting was an act imminently dangerous to another and evincing a depraved mind regardless of human life, and the defendant would be guilty of murder in the second degree, even though he killed the deceased without any premeditated design to effect the death of any particular individual. Taking either view of this testimony, we think it sufficient to sustain the verdict that was rendered in this case.

There is evidence here from which all the elements of the crime of which the defendant stands convicted may legally be inferred, and we cannot see, from the record before us, that the jury were not governed by the evidence adduced at the trial, and therefore we will not disturb this verdict.

The defendant testified that the deceased pointed a gun at him when the shooting started. It is sufficient as to this to say that the eyewitness Robinson contradicts the defendant. Furthermore, other witnesses who saw the deceased only a few minutes before and after the killing testified that he was not armed, and there is no evidence that a gun was found at or near the place where the deceased was shot. In addition to this, is it not unreasonable to believe that the deceased pointed a gun at the defendant and did not shoot, although the deceased had time to shoot, for, according to defendant's statement, he pointed the gun at him and ran backwards, while the defendant called him three times and shot at him three times, and after that the deceased was able to get up and walk some distance away?

There is conflict in the evidence in this case; but this court will not reverse the ruling of the trial court for this reason, where there is evidence legally sufficient to support the verdict, unless the preponderance is such that the jury must have been improperly influenced to render such verdict. *Lindsey v. State*, 53 Fla. 56, 43 South. 87. We cannot say such is the preponderance of this evidence. There is evidence here legally sufficient to support this verdict. Many reasons are urged by counsel why the testimony of the new witness Robinson should not be believed. It is pointed out by counsel that this witness did not mention to any one, not even to his wife, the fact that he saw the shooting in question until about a week before the second trial of the defendant; that the witness was present at the first trial and heard all the evidence. These considerations were doubtless urged with great force by counsel to the jury that tried this case. These matters were very proper to be presented to the jury. The jury and the court, too, saw all the witnesses and heard what they had to say; and yet this jury, composed of citizens who lived near the scene of the killing, rec-

onced the seeming conflict in the evidence, or believed the testimony of witnesses for the state, and convicted the defendant, and a conscientious learned judge, who presided at two trials of the defendant and listened to the statements of the witnesses and observed their demeanor and conduct on the stand, refused to grant a motion for a new trial and approved this verdict. The defendant was ably defended and had a fair trial. We cannot disturb the verdict of this jury or overrule the action of this judge on the testimony as we read it.

Another ground of the motion for new trial is: "That the said defendant has not had a fair and impartial trial before a jury of his peers as provided by the Constitution and laws of the state of Florida, in that the jury impaneled and before whom the said defendant was tried consisted of only 6 men; whereas, the said panel should have contained 12 men."

Section 3910 of the General Statutes of 1906 provides: "Twelve men shall constitute a jury to try all capital cases, and six men shall constitute a jury to try all other criminal cases." A "capital case" is a case in which a person is tried for a capital crime. A "capital crime" is one for which the punishment of death is inflicted. The crime of murder in the second degree is punished by imprisonment in the state prison for life, and is not a capital crime.

The defendant having been convicted of murder in the second degree at the former trial, he stood acquitted of the crime of murder in the first degree. Thereafter the defendant could only be put upon trial for the crime of murder in the second degree; and, this not being a capital crime, he should be tried by a jury of six men. *West v. State*, (Fla.) 46 South. 93.

Finding no error, the judgment is affirmed.

SHACKLEFORD, O. J., and WHITEFIELD, J., concur.

COCKRELL, J. (concurring). I yield a reluctant assent to the affirmance of this judgment.

The motion and affidavit for a continuance were evidently prepared with a haste that finds some excuse under the circumstances, and many of the deficiencies can be overcome. There is one omission, however, that forces me to sustain the denial of the motion—the entire absence of a suggestion that at any future time the testimony of the particular witness could be procured.

Two juries have found the evidence sufficient to justify a conviction of murder in the second degree, and it is not so scant as to justify me in saying now that it is insufficient.

TAYLOR, J. (dissenting). I am unable, under the peculiar circumstances of this case, to agree to the conclusion of affirmance arrived at therein in the opinion prepared by Mr. Justice PARKHILL. I admit that the affidavit for continuance filed by the defendant at the last trial was defective in several formal particulars, but, notwithstanding this, what were the facts within the knowledge of the trial judge outside of such affidavit for continuance? The defendant had appealed his case from a former conviction to this court, and this court, on the ground that the trial court had erred in not granting him a new trial on the ground of newly discovered evidence, that newly discovered evidence being the evidence of this same witness whose absence was the basis of the application for such continuance, reversed the first judgment of conviction and remanded the cause to the circuit court. Upon hearing of the reversal here the defendant did not wait for our mandate to go down, but promptly, though unauthorizedly, had subpoena issued for such newly discovered but absent witness, and put the same in the hands of the sheriff for service. The mandate of this court was received by the circuit court during the term of such circuit court at which the defendant was last tried. As soon as such mandate was received, the defendant again promptly had an alias subpoena issued for such newly discovered but absent witness, and put the same in the hands of the sheriff for service, but two days thereafter, without any return by the sheriff upon this last subpoena, and in the absence of such newly discovered witness, and, notwithstanding the application for continuance by the defendant on the ground of the absence of such witness, the defendant was hurried into trial. This court had reversed the first judgment of conviction practically upon the ground of the absence of an opportunity to the defendant to obtain the evidence of this absent witness, thereby recognizing its importance to the defendant in his trial, and the defendant was again hurried into a second trial two days after the mandate of this court was received by the circuit court without the evidence of such important witness. Under these circumstances, I think that the defendant's application for continuance should have been granted, even though his affidavit therefor was defective in form, and that the court below erred in forcing him to a second trial without ample opportunity being afforded him to obtain the attendance of such absent witness, and that the last judgment of conviction should likewise be reversed.

HOCKER, J., concurs with TAYLOR, J.

O'NEAL v. STATE. (No. 13,621.)

(Supreme Court of Mississippi. Jan. 25, 1909.)
HOMICIDE (§ 234*)—SUFFICIENCY OF EVIDENCE—MANSLAUGHTER.

Where the only evidence to connect accused with the killing was testimony of an alleged dying declaration that decedent died from injuries inflicted by accused, which was so incredible as to require it to be disregarded, and credible witnesses testified that decedent had an ailment which might have produced the symptoms shown by her and caused her death, the cause of which was not shown by medical testimony, a conviction for manslaughter will be reversed.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 234.*]

Appeal from Circuit Court, Pike County; M. H. Wilkinson, Judge.

Paul O'Neal was convicted of manslaughter, and he appealed. Reversed and remanded.

The appellant was convicted of manslaughter for the killing of his wife. The evidence is entirely circumstantial, and for conviction the only testimony connecting appellant with the death of his wife is the alleged dying declarations, made to certain witnesses for the state, to the effect that appellant had given deceased a beating and so injured her as to produce her death.

M. McCullough, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

FLETCHER, J. The state relies entirely in this case upon the alleged dying declarations made to the witnesses Levenia Munley and Murry Campbell. This testimony comes before us bearing such manifest evidences of falsity that it carries with it its own refutation. If it be conceded that the predicate was properly laid for its admission, its inherent weakness is evident from a casual reading of the record, and we are constrained to ignore it entirely. Without this evidence there was no sort of proof that the woman, Lula O'Neal, died from other than natural causes. Reputable witnesses show that she was suffering from an ailment which might well have produced all her symptoms and caused her death, and no physician was produced to enlighten the jury as to her trouble. Reluctant as we are to disturb the finding of a jury, we cannot permit this man to go to the penitentiary upon the facts disclosed in this record.

Reversed and remanded.

66 Miss. 293)

STEIN v. HYMAN-LEWIS CO. (No. 13,683.)

(Supreme Court of Mississippi. Jan. 18, 1909.)
LANDLORD AND TENANT (§ 109*)—LEASE—SURRENDER—ACCEPTANCE.

A tenant in a verbal lease for a year, to begin at the expiration of a prior lease, notified the landlord before the expiration of the prior lease that he would surrender the premises at

the expiration of the prior lease. The landlord did not object to the surrender, nor notify the tenant that he would be liable for the rent for the year, but made efforts to procure other tenants. Held to show, as a matter of law, a surrender of the lease and an acceptance thereof.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 352, 364; Dec. Dig. § 109.*]

Appeal from Circuit Court, Leflore County; Sydney Smith, Judge.

"To be officially reported."

Action by Samuel J. Stein against the Hyman-Lewis Company. From a judgment for defendant, rendered after the court gave a peremptory instruction for defendant, plaintiff appeals. Affirmed.

Plaintiff brought suit against defendant for rent on storehouses for the year beginning April 14, 1906. He based his right of recovery on an alleged verbal contract made the latter part of the year 1905. He afterwards reduced this contract to writing and brought it to defendant for signature, but defendant declined to sign it. Later, about the latter part of December, 1905, defendant informed plaintiff that he would be ready to surrender the buildings at the expiration of the then existing lease, April 14, 1906. It was not shown that plaintiff objected to the surrender, or that he gave defendant any notice that he expected to hold him for the rent for the following year; but, on the contrary, he made efforts to get other tenants for the building.

Gwin & Mounger, for appellant. Gardner & Whittington, for appellee.

WHITFIELD, C. J. We think the testimony shows there was a valid verbal lease, made for the year from the 14th of April, 1906, to the 14th of April, 1907. Indeed, counsel for appellee do not seriously combat this contention. But we also think that the testimony shows a surrender of this lease and an acceptance of the surrender by the lessor, Stein. There is nowhere in the record any suggestion that Stein ever gave the appellee any notice that he would hold it for the rent for the year. In the case of Auer v. Penn, 99 Pa. 370, 44 Am. Rep. 114, it appeared that the lessor declined to accept the surrender, and notified the lessee that he would hold him for the rent. In the case of Alsup v. Banks, 68 Miss. 664, 9 South. 895, 13 L. R. A. 598, 24 Am. St. Rep. 294, it also appeared that the lessor refused to accept the surrender, and notified the administrator that he would hold the estate of the lessee for the rents. In the case of Kiernan v. Germain, 61 Miss. 498, it was counted on as a most important fact that no hint was given the lessee by the lessor, that there was no objection to his leaving the premises, or that any attempt would be made to hold him for the rent afterwards. In 24 Cyc. p. 1374, it is said that an absolute and unqualified tak-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes
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ing of possession shows an acceptance, unless the landlord indicates to the tenant his purpose to hold him liable for the rent. Again, in paragraph 4, p. 1375, and in paragraph 6, same page, the failure to notify the tenant that he will rent the premises on the tenant's account is counted on as an important fact. See, also, the notes to these pages of Cyc., and see, especially, *White v. Berry*, 24 R. I. 74, 52 Atl. 682, and *Duffy v. Day*, 42 Mo. App. 638, and the cases cited in note 25, p. 1375; one of them being our own case of *Alsup v. Banks*, supra.

What does or does not constitute a surrender of the lease and an acceptance thereof must be determined from all the facts in each particular case. Without stating in detail all the testimony on that point in this case, we think it is a fair deduction from the testimony that there was such a surrender here, and an acceptance of it, especially in view of the fact that the appellant never notified the lessee at any time, not even after receiving the notification in December, 1905, that they would not renew the lease, that he expected to hold the lessee for the rent. On the whole case, we think the peremptory instruction was properly given.

Affirmed.

(95 Miss. 1)

GRAY v. ROBINSON. (No. 13,604.)

(Supreme Court of Mississippi. Jan. 18, 1909.)

1. GAMING (§ 49*)—EVIDENCE—WAGERING CONTRACTS—CONSIDERATION.

In an action on a promissory note given by defendant in settlement of losses sustained in purchases for future delivery through a cotton broker, evidence held to show that the sales did not contemplate actual delivery, but were wagers on the future price of cotton.

[Ed. Note.—For other cases, see *Gaming*, Dec. Dig. § 49.*]

2. BILLS AND NOTES (§ 375*)—WAGERING CONTRACTS—NOTES—BONA FIDE PURCHASERS.

A note payable to bearer, given for debts incurred under contracts for the purchase of "futures," which contracts Ann. Code 1892, § 2117, provides shall be unenforceable and shall not be a valid consideration for any promise, cannot be enforced against the maker, even by an innocent transferee for value.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 975; Dec. Dig. § 375;* *Gaming*, Cent. Dig. § 44.]

Appeal from Circuit Court, Alcorn County; E. O. Sykes, Judge.

"To be officially reported."

Action by W. C. Gray against S. H. Robinson. From a judgment for defendant, plaintiff appealed. Affirmed.

One George Hazard, doing business as the Corinth Brokerage Company, was engaged in buying and selling cotton for future delivery. Among his customers was S. H. Robinson, appellee here, who had numerous dealings with said company. So far as the record discloses, in all the dealings between these par-

ties no actual cotton was ever received or delivered by either of them, but all settlements were made on the difference between the contract price and the price at the time of settlement. On June 28, 1906, Robinson's losses amounted to \$2,600, for which he gave Hazard his notes, payable to bearer, one of which, for \$1,000, Hazard assigned for value received to Gray, the appellant here, who, after Robinson's refusal to pay the same, instituted suit to recover thereon. Appellee filed a plea of the general issue, and also a special plea setting forth the fact that the transactions in the settlement of which said notes were given were gambling transactions and condemned by section 2117 of the Annotated Code of 1892, which was in force at the time said transactions were made. Appellant demurred to this latter plea, the demurrer was overruled, and issue in short was joined on said second plea. After hearing all the testimony for both plaintiff and defendant, the court granted a peremptory instruction to find for defendant, and the plaintiff appeals.

There are two assignments of error relied upon for reversal: First, regarding the action of the court in overruling appellant's demurrer to the second plea, because Gray was an innocent purchaser for value of the note sued on, which fact the plea does not deny; and, second, the granting of the peremptory instruction. In support of this second ground, appellant relies upon the testimony of Hazard that it was the intention of the parties to receive and deliver the actual commodity bought and sold, and the fact that in the confirmation of the transactions there is a stipulation as follows: "We receive no orders except with the understanding that the actual delivery of the property bought or sold is in all cases contemplated and understood." Robinson denies that there was any intention on his part to deal with the actual commodity, and the proof fails to show a delivery of actual cotton in any of the transactions between them; but every settlement was made upon the difference between the contract price and the price at the time of settlement. This seems to have been the case, not only with appellee, but with all other persons dealing with Hazard.

Lamb & Johnston, for appellant. Geo. T. Mitchell, for appellee.

WHITFIELD, C. J. It is held in *Montjoy v. Delta Bank*, 76 Miss. 402, 24 South. 870, that "a contract violative of public policy, or of a positive rule of law, or against good morals, will not be enforced, even at the suit of an innocent transferee, although it be evidenced by a promissory note payable to bearer." It was held in *Campbell v. National Bank*, 74 Miss. 526, 21 South. 400, 23

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date; & Reporter Indexes

South. 25, that "a contract for the payment of differences in prices, arising out of the rise and fall in the market price above or below the contract price, is a wager on the future price of the commodity, and is therefore invalid." It is perfectly plain, from the testimony in this case, that the contracts here were exactly of this latter kind. Not one bale of actual cotton is shown to have been delivered in the four years of dealing.

The judgment is affirmed.

FLETCHER, J., takes no part in the decision of this cause.

(94 Miss. 128)

ANDERSON v. MAXWELL. (No. 13,573.) (Supreme Court of Mississippi. Feb. 1, 1909.)

APPEAL AND ERROR (§ 171*) — REVIEW — GROUNDS NOT SUGGESTED BELOW.

Appellant cannot challenge the result of the trial upon a theory not suggested below, where the case was tried without objection upon testimony and instructions recognizing the regularity of the proceedings and the competency of the testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053-1066; Dec. Dig. § 171.*]

Appeal from Circuit Court, Lincoln County; M. H. Wilkinson, Judge.

Action between J. R. Anderson and W. J. Maxwell. From the judgment, Anderson appeals. Affirmed.

J. W. Cassidy and J. A. Naul, for appellant. P. Z. Jones, for appellee.

FLETCHER, J. This case was tried in the circuit court without objection upon testimony and instructions which recognized the regularity of the proceedings and the competency of the testimony. In this court it is sought for the first time to challenge the result of the trial upon grounds never suggested in the conduct of the case below. We think it is too late to alter the scope of the issue or the course of the pleadings. Appellant must stand upon the record which he made in the circuit court.

Affirmed.

(94 Miss. 363)

BAILEY v. STATE. (No. 13,627.)

(Supreme Court of Mississippi. Feb. 1, 1909.)

1. CRIMINAL LAW (§ 942*) — NEW TRIAL — GROUNDS—NEWLY DISCOVERED EVIDENCE.

A new trial will not be granted for newly discovered evidence impeaching one of the witnesses for the state.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2331; Dec. Dig. § 942.*]

2. CRIMINAL LAW (§ 413*)—EVIDENCE—SELF-SERVING DECLARATIONS—ADMISSIBILITY.

Proof that accused had while awaiting trial an opportunity to escape from prison, but declined to do so, and warned the sheriff of the escape of a fellow prisoner, is inadmissible as

self-serving, though the state previously showed the flight of accused immediately after the commission of the offense and prior to his imprisonment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 930, 931; Dec. Dig. § 413.*]

Appeal from Circuit Court, Monroe County; E. O. Sykes, Judge.

Bud Bailey was convicted of manslaughter, and he appeals. Affirmed.

Leftwich & Tubb, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

FLETCHER, J. We cannot reverse this case on account of the court's action in refusing to set aside the verdict on the ground of newly discovered evidence. Such evidence tended only to impeach the evidence of the witness McLendon, by no means the only, or indeed the strongest, witness for the state. The rule is well established that a new trial will not be granted on the ground of newly discovered evidence, the only effect of which is to impeach the credibility of a witness. Moore v. Chicago, etc., R. R. Co., 59 Miss. 243.

The only other question seriously pressed is that the court erred in refusing to admit evidence to show that the defendant had an opportunity to escape from prison, and not only declined to do so, but actually warned the sheriff of the escape of a fellow prisoner. This testimony was offered after the state had proven the flight of the prisoner immediately following the homicide. It should be stated that the defendant was permitted to explain this flight fully, and that the evidence excluded related to a matter which transpired some time after the defendant had surrendered, and was entirely distinct and independent of the first occurrence. It is argued, and the argument is sustained by the great authority of Prof. Wigmore, that, since the state is permitted to prove flight as showing a "consciousness of guilt," the defendant should be permitted to prove a refusal to escape when opportunity offers as showing a "consciousness of innocence." 1 Wigmore on Evidence, 293. The learned text-writer, however, concedes that this view is opposed to the great weight of authority, and with that candor which is one of the chief qualities of his great intellect appends in the note a list of cases which utterly repudiate and reject his conclusion.

In this instance the majority of the court prefers the reasoning and conclusions of these cases, rather than the conclusion reached by the author. This is not wholly because of the number and distinction of the courts so holding, but because we think the rule rejecting such testimony is correct on principle. If a declaration against interest is admitted, while a self-serving declaration is rejected, why should it not be true that conduct showing guilt is admissible, while con-

duct alleged to show the opposite is rejected? Nothing can be better settled than that a litigant cannot manufacture testimony in his own behalf. This is but a form of this familiar principle. If the rule announced by Wigmore is correct, a prisoner who deliberately refuses to escape is but availing himself of the opportunity to manufacture testimony for himself—a thing which can never be permitted. Testimony as to a damaging admission made by a prisoner on trial is admitted manifestly because it shows a consciousness of guilt; but it will never be contended that the same prisoner can proclaim his innocence and have the benefit of such declaration on the trial as showing a "consciousness of innocence." And yet in the opinion of the majority of the court there can be no logical distinction between acts and words in this connection.

Chief Justice WHITFIELD, while differing from the majority on this point, and agreeing with Wigmore's announcement of the rule, does not regard such evidence as of high value one way or the other, and therefore concurs in the result, since, as he thinks, the guilt of the defendant is manifest, and the result could not possibly have been affected by this error of the court.

Affirmed.

(94 Miss. 225)

BACOT v. STATE. (No. 13,622.)

(Supreme Court of Mississippi. Jan. 25, 1909.)
INTOXICATING LIQUORS (§ 229*)—UNLAWFUL SALES—PROSECUTIONS—GOOD FAITH OF ACCUSED—EVIDENCE—ADMISSIBILITY.

Aside from the exception in the case of pharmaceutical preparations, the law punishes the fact of selling intoxicants, regardless of the intent of the seller; and hence, in a trial for unlawfully selling liquor, evidence that the liquor was represented to accused to be non-intoxicating and that he believed it to be so was inadmissible.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 289; Dec. Dig. § 229.*]

Appeal from Circuit Court, Pike County; M. H. Wilkinson, Judge.

Albert Bacot was convicted of the unlawful sale of intoxicants, and appeals. Affirmed.

Appellant's defense was that he was dispensing a drink represented to him as being nonintoxicating, and believed by him to be nonintoxicating. On appeal he assigned as error the refusal of the court to permit testimony to this effect.

Clem V. Ratcliff and Quin, Williams & Niles, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

FLETCHER, J. This case is totally unlike the cases of *King v. State*, 58 Miss. 737, 38 Am. Rep. 344, *Bertrand v. State*, 73 Miss. 51, 18 South. 545, and *Goode v. State*, 87 Miss. 495, 40 South. 12, cases dealing with

the sale of compounds to be used exclusively for medical purposes. In that class of cases the substance was not offered for sale as a beverage, but as a medicine, and the good faith of the merchant was properly in issue. But in this case the so-called "phosphate" was kept for sale and sold as a beverage, and in such cases the seller must take the risk and bear the consequences if the fluid dispensed is in fact intoxicating. Aside from the well-known exception in the case of pharmaceutical preparations, the law punishes the fact of selling intoxicants, regardless of the intent of the seller. He must see to it that the beverages he dispenses are non-alcoholic to the extent that intoxication in any degree will not be produced by even excessive consumption of the beverage. The circuit judge was correct in excluding evidence and refusing instructions relative to the good faith of the appellant.

We take occasion to say that the sale of intoxicating liquors, disguised under unusual names and unfamiliar labels, will not be encouraged by this court.

Affirmed.

KING v. STATE. (No. 13,640.)

(Supreme Court of Mississippi. Jan. 25, 1909.)

HOMICIDE (§ 340*)—ASSAULT WITH INTENT TO KILL—INSTRUCTIONS—APPEAL AND ERROR—HARMLESS ERROR.

Where, in a trial for assault with intent to kill, it appeared that prosecutor was assaulted and shot on the porch of his home, in the presence of his wife and guests, by accused, under circumstances showing neither provocation nor justification, and the evidence demonstrated accused's guilt beyond all doubt, an instruction that if accused went to prosecutor's house, carrying concealed a deadly weapon, for the purpose of using it, if necessary, to overcome prosecutor, and provoked a difficulty with prosecutor, striking him, and during the encounter used the weapon, he was guilty, even though he shot in self-defense, though erroneous, was not reversible error; it not being probable that the jury would ever reach any other conclusion than that accused was guilty.

[Ed. Note.—For other cases, see *Homicide*, Dec. Dig. § 340.*]

Appeal from Circuit Court, Hinds County; W. H. Potter, Judge.

E. L. King was convicted of assault and battery with intent to kill, and appeals. Affirmed.

The record discloses the following state of facts: Appellant's wife owned two residences adjoining one another. One was occupied by appellant and his wife, and one by Ware and wife, in which they ran a boarding house, and at which appellant and his wife took their meals. On the morning of the day of the shooting, after Ware had left the house for work, appellant had some words with Mrs. Ware about taking certain food off of the table for his dog before the other boarders had eaten. About dark on

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that day appellant came home, and saw Ware on his front porch, and mentioned to him the difficulty of that morning with his wife. Hot words ensued, and appellant assaulted Ware, and a fight followed. Finally Ware got on top of appellant and struck him in the face several times, and then got hold of his hands and asked him if he was satisfied; appellant replying that if he did not let him up he would kill him. Ware would not let him up, and appellant drew his pistol and fired three shots, one of which took effect. Appellant says Ware was striking him over the head with a chair rocker at the time he fired. Upon this state of facts the court gave the following instruction for the state: "No. 4. The court instructs the jury, for the state, that if you believe from the evidence beyond all reasonable doubt that King, the defendant, called at Ware's house and provoked a difficulty with Ware by striking Ware with his fist, and that at the same time he carried with him concealed upon his person a deadly weapon, and that the weapon was carried to Ware's house for the purpose to use, if necessary, and that King entered into a combat with Ware, intending to use the deadly weapon if it became necessary to overcome Ware, and during the course of the encounter he did so use the deadly weapon, then King is guilty as charged in the indictment; and this is true, even though the jury believe from the evidence that King shot Ware in self-defense."

W. J. Croom, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

MAYES, J. Instruction No. 4, given for the state, is error; but in view of the facts of this case, which demonstrate guilt beyond all doubt, it does not constitute reversible error, since it is improbable that a jury would ever reach any other conclusion. This is the only error assigned which we deem necessary to discuss in any way. In the light of the record made here, where a man is assaulted and shot in his own home, on his own porch, in the presence of his wife and guests, under circumstances which show neither provocation nor justification, the error would have to be a glaring one to cause the court to reverse.

Affirmed.

(94 Miss. 883)

CUMBERLAND TELEPHONE & TELEGRAPH CO. v. PAINE. (No. 13,660.)

(Supreme Court of Mississippi. Jan. 25, 1909. Suggestion of Error Overruled Feb. 8, 1909.)

TELEGRAPHS AND TELEPHONES (§ 69*)—ACTIONS FOR DAMAGES—PUNITIVE DAMAGES.

Where, the State Railroad Commission having abolished free county telephone service and fixed the charges therefor, a telephone company sent a general circular to the managers of all of its exchanges to discontinue free county

service and to be governed by the rules of the commission, and the manager of an exchange followed the direction without knowing that the franchise of the telephone company in that city required it to extend free county service to its patrons, but as soon as the conflict was called to his attention took the matter up with the home office, after which free county service was properly established, and it did not appear that the operator, in refusing a patron free county service, was otherwise than courteous, the telephone company cannot be held liable for punitive damages for such refusal.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 69.*]

Appeal from Circuit Court, Monroe County; E. O. Sykes, Judge.

Action by Geo. C. Paine against the Cumberland Telephone & Telegraph Company for punitive damages on account of the refusal of the operator in the exchange at Aberdeen, Miss., to give plaintiff connection with a party in Amory, Miss., unless he paid the sum of 10 cents for the service. From a judgment for plaintiff in the sum of \$200, defendant appeals. Reversed and remanded.

Plaintiff based his claim for damages on the terms of a franchise granted by the city of Aberdeen to the telephone company, as set forth in an ordinance of said city, and which provided that "there shall be a free intercommunication between Aberdeen and other subscribers in Monroe county." Aberdeen and Amory were both in Monroe county, and plaintiff was a subscriber of said telephone company, and the party whom he called at Amory was also a subscriber of said telephone company. Plaintiff put in his call, and was told by the girl at the exchange that he would have to pay the sum of 10 cents. He told her that he was entitled to free county service by the terms of the contract with the telephone company, and was advised by her that they had instructions from the home office to discontinue the free county service, and she therefore refused him the connection, and he brought suit for damages.

No actual damages are claimed to have been sustained, and the telephone company defended upon the ground that the charge in this instance was an oversight, and set up the fact that the Mississippi Railroad Commission had made an order abolishing what was known as free county service throughout the state of Mississippi, which had hitherto been established by order of the commission, and fixing the charges which the telephone company could exact for service between exchanges in the same county, and that after this order of the Railroad Commission was made the company sent instructions to all its exchanges to discontinue free county service in accordance with the order of the Railroad Commission. The manager of the exchange at Aberdeen received a copy of these instructions, and as soon as he found out that they were in con-

dict with the franchise granted by the city of Aberdeen he wrote to the manager about it and received instructions to put back into effect the old free county service. However in the meantime plaintiff had been refused this service; it being claimed by defendant that the refusal was the result of ignorance, and no malice or discourtesy having been shown toward plaintiff, the manager and operator at Aberdeen claiming to have acted under instructions from the home office.

Harris & Willing, for appellant. McFarland & McFarland, for appellee.

FLETCHER, J. The sole question presented for decision in this case was the action of the trial court in submitting to the jury the question of punitive damages. While it may be true that the appellant company, under its contract with the city of Aberdeen, was under the legal duty of furnishing to all its local subscribers free connection with all its other telephones in Monroe county, yet there is totally wanting in this case any element of willful, malicious, fraudulent, or oppressive wrongdoing. The general officers of the company did no more than to promulgate, in a general circular addressed to all its Mississippi managers, the then recently adopted order of the Mississippi Railroad Commission authorizing the abolition of free county service, with a direction to all employees that they should be governed by these new rules. The local manager simply followed instructions, in ignorance of the conflict between these rules and the contract which the company had with the city of Aberdeen. As soon as this conflict was called to his attention, he took the matter up with the home office, and the free county service was promptly re-established in Aberdeen. There is no pretense that the operator was otherwise than polite and courteous to Mr. Paine, and we cannot see any ground for the imposition of punitive damages.

It was error to permit the jury to inflict such damages, and for that reason the case is reversed and remanded.

DONALD BROS. MERCANTILE CO. v. MARSH. (No. 13,698.)

(Supreme Court of Mississippi. Feb. 1, 1909.)

APPEAL AND ERROR (§ 635*)—APPEAL FROM JUSTICE'S COURT—DISMISSAL.

Where the transcript on appeal from the circuit court to the Supreme Court fails to show that any judgment was rendered in the justice's court, where the action originated, or that any appeal bond was given, the appeal will be dismissed for want of jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2776-2782; Dec. Dig. § 635.*]

Appeal from Circuit Court, Lawrence County; R. L. Bullard, Judge.

Action between the Donald Bros. Mercantile Company and J. B. Marsh. From the judgment, the company appeals. Appeal dismissed.

J. B. Sullivan, for appellant. G. Wood Magee, for appellee.

FLETCHER, J. The transcript in this case, which originated in the court of a justice of the peace, totally fails to show that any judgment was rendered in the justice's court, or any appeal bond given. In this state of the record, nothing remains but to dismiss the appeal for want of jurisdiction in this court to consider the same.

So ordered.

(94 Miss. 396)

KIMBALL v. LOUISVILLE & N. R. CO.
(No. 13,754.)

(Supreme Court of Mississippi. Feb. 8, 1909.)

JUDGMENT (§ 597*)—CONCLUSIVENESS—SPLITTING CAUSES OF ACTION—INJURY TO PERSON AND PROPERTY.

Where plaintiff sustained injuries both to himself and to his property in a railroad crossing accident by the same tortious act, there was but one cause of action; and hence the satisfaction of a judgment recovered for injuries to plaintiff's horse and wagon, in which no claim for plaintiff's injuries was made, constituted a bar to plaintiff's subsequent action for his own injuries.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1112; Dec. Dig. § 597.*]

Appeal from Circuit Court, Harrison County; W. H. Hardy, Judge.

Action by E. D. Kimball against the Louisville & Nashville Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

J. H. Mize and Doty & Elmer, for appellant. Gregory L. Smith and Harri T. Smith, for appellee.

MAYES, J. In October, 1908, while attempting to drive across the track of the railway at a public crossing in the city of Biloxi, Mr. Kimball claims to have been injured. For this injury he brought suit against the defendant company. On the trial it appeared that Kimball had sued for and recovered a judgment against the railroad company for damage done a horse and wagon by the same wrongful act. This judgment had been fully satisfied. This suit is to recover damages for injuries sustained to his person in the same collision which damaged the horse and wagon. Pleas presenting this issue were filed by the railroad company, and the question of the former recovery in a suit for injury done his property by the same act being beyond dispute, the court gave a peremptory instruction to find for the defendant. From

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

this action of the court an appeal is prosecuted here.

In the case of *Horace Scott v. Southern Railway*, 47 South. 581, miscellaneous opinion, this question was presented, and the court held that, where a person sustained injuries both to himself and his property by the same tortious act, it gave rise to but a single cause of action. There seems to be much conflict of authority on this subject, but the weight of better authority is in keeping with the holding of this court. The case of *King v. Chicago, M. & St. P. R. Co.*, 80 Minn. 88, 82 N. W. 1113, 50 L. R. A. 161, 81 Am. St. Rep. 238, is a very instructive case on this subject, and in the opinion and notes will be found a collation of many authorities. In the *King Case*, above referred to, in discussing the question of whether or not, where one is injured both in his person and property by the same tortious act, it constitutes more than one cause of action, the court held that the different injuries constituted separate items of damage, but only gave rise to one cause of action, and further held that in such a case "that rule of construction should be adopted which will most speedily and economically bring litigation to an end, if at the same time it conserves the ends of justice. There is nothing to be gained in splitting up the rights of an injured party as in this case, and much may be saved if one action is made to cover the subject." We quote the above language with unqualified approval as applied to this case.

Affirmed.

(34 Miss. 351)

MOBILE, J. & K. C. R. CO. v. ROBBINS COTTON CO. (No. 13,433.)

(Supreme Court of Mississippi. Feb. 1, 1909.
Suggestion of Error Overruled Feb. 8, 1909.)

CARRIERS (§ 135*)—CARRIAGE OF FREIGHT—FAILURE TO DELIVER—DAMAGES.

In an action against a carrier for the value of cotton defendant failed to deliver to plaintiffs, plaintiffs are entitled to recover only the market value.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 600; Dec. Dig. § 135.*]

Appeal from Circuit Court, Union County; W. A. Roane, Judge.

Action by the Robbins Cotton Company against the Mobile, Jackson & Kansas City Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed, and cause remanded.

Flowers & Whitfield and Geo. W. May, for appellant. C. Lee Crum, for appellee.

WHITFIELD, C. J. The appellee sued the appellant to recover the value of 17 bales of cotton which it is alleged the appellant had failed to deliver to it according to its contract,

manifested by bills of lading set out in the record. The testimony, we think, establishes sufficiently the failure to deliver the cotton sued for. The plaintiff attached to its declaration an exhibit, which is a bill of particulars, showing the various parties from whom it purchased the 17 bales of cotton, the numbers of the bales of cotton, the places of shipment of the cotton along the line of the appellant's railroad, the weights of the cotton, and the prices paid by the appellee for the cotton per pound, running all the way from 7½ cents to 10¼ cents per pound, and the value of each bale of cotton, making in the aggregate the amount paid by appellee for the 17 bales to be \$798.66. Not a particle of proof was introduced on either side to show what the market value of the cotton was at the time of the purchase and shipment. Not a witness was asked a question in relation to this market value of the cotton.

The plaintiff, whether inadvertently or not, wholly omitted to make this proof, and relies here upon the proposition that, since there is no other evidence in the record than the prices paid by the appellee, that is sufficient evidence of such market value, and the plaintiff obtained from the court the following instruction: "The court instructs the jury, for the plaintiff, that if they believe from the evidence that the plaintiff had delivered to the defendant railroad company, at the different stations named, the 17 bales of cotton alleged to have been delivered for shipment, and that said cotton was not delivered to it, or to the compress company for it, and it did not receive said cotton from the railroad company, nor any other cotton in lieu thereof, the jury must find for the plaintiff, and assess the damage at the price paid by them for said cotton, and for the freight paid the railroad company thereon, and 6 per cent. interest per annum on said amount from the date of said failure to so deliver said cotton."

We cannot concur in the argument of appellee in support of this instruction. It is very easy to imagine a case, which might very readily occur, in which the purchaser of cotton might actually pay two or three times the market value of cotton in order to meet some contract of delivery of cotton, upon the meeting of which contract his credit and business entirely depended. Again, a purchaser might pay, being a bad judge of cotton, very much more for cotton than its market value. Manifestly, all that he could recover of the carrier for the failure to deliver would be, not what he might pay, but what the market value of the cotton was.

It follows that this first instruction is fatally erroneous, and for that reason the judgment must be reversed, and the cause remanded.

(95 Miss. 118)

BARNEY & HINES v. MOORE-HAGGERTY LUMBER CO. (No. 13,505.)

(Supreme Court of Mississippi. Feb. 1, 1909.)

PARTNERSHIP (§ 208*) — ATTACHMENT — GROUNDS—NONRESIDENCE OF PARTNER.

Code 1906, § 131, authorizing an attachment against partners by partnership creditors, contemplates that, where one or more of the partners reside in the state, an attachment cannot be sustained on the ground of nonresidence.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 385; Dec. Dig. § 208.*]

Appeal from Circuit Court, Simpson County; R. L. Bullard, Judge.

Action by the Moore-Haggerty Lumber Company against Barney & Hines. From a judgment for plaintiff, defendants appeal. Reversed and remanded in part, and affirmed in part.

The Moore-Haggerty Lumber Company sued out a writ of attachment, alleging that the defendants, Barney & Hines, were non-residents of the state of Mississippi, and that they fraudulently contracted the debt sued on. The writ of attachment was issued by the clerk of the chancery court, and levied by the sheriff on a car load of lumber in Simpson county, Miss., consigned to Barney & Hines, Memphis, Tenn. The debt sued on is denied by defendants, who claim a set-off because of certain freight charges paid by them. It is also shown by defendants that one member of the firm, Barney, resided in Amite county, Miss., where the partnership had a branch office. The case was presented to the court, and each side asked a peremptory instruction. The court gave a peremptory instruction for plaintiff below. On appeal two questions are presented: (1) Was the peremptory instruction for plaintiff proper, under the evidence, as to the debt in dispute? (2) Was it proper for the court to grant a peremptory instruction for plaintiff against defendants on the attachment issue, it being shown that one member of the firm resides in the state, even though the property levied on is being shipped out of the state to the other member of the firm?

C. M. Whitworth, for appellants. Sullivan & Tally, for appellee.

MAYES, J. No peremptory instruction should have been given on the attachment issue on either of the grounds alleged in the affidavit. The first ground alleged that the defendants were nonresidents of the state, but the facts demonstrate that one of the partners resided in Amite county, in the state of Mississippi, and therefore this ground of attachment necessarily fails, since section 131 of the Code of 1906 contemplates that, where one or more of the partners reside in this state, an attachment cannot be sustained on the ground of nonresidence.

As to the second ground, which is that the debt was fraudulently contracted, etc., the evidence certainly does not warrant a peremptory instruction as to this. It follows that the peremptory instruction given on the attachment issue was error, and for this reason the case is reversed and remanded on this issue.

As to the debt issue, there was a general appearance entered and a trial had, resulting in a verdict for the plaintiff, and we think properly. Therefore, as to this issue, the case is affirmed.

So ordered.

(93 Miss. 286)

MURPHY v. HARRIS et al. (No. 13,404.)

(Supreme Court of Mississippi. Feb. 1, 1909.)

1. EXECUTORS AND ADMINISTRATORS (§ 236*)—ATTORNEY'S FEES—ORDER FOR PAYMENT—VALIDITY.

An order requiring an administrator to pay attorney's fees for services rendered in the settlement of the estate, entered on petition therefor, presented and heard in vacation, without notice to the administrator, is void.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 841; Dec. Dig. § 236.*]

2. EXECUTORS AND ADMINISTRATORS (§§ 423, 485*)—ATTORNEY'S FEES—ORDER FOR PAYMENT—VALIDITY.

Code 1906, § 2131, providing that in annual and final settlements the administrator shall be entitled to credit for reasonable sums paid for services of an attorney in the management of the estate, gives a method by which an administrator may, with the approval of the chancery court, employ and pay an attorney for service rendered without a suit to establish the claim; but it has no reference to a claim which an attorney seeks to enforce over the administrator's protest, and to enforce such a claim resort must be had to an action at law or in equity.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. §§ 423, 485.*]

3. EXECUTORS AND ADMINISTRATORS (§ 236*)—ATTORNEY'S FEES—ORDER FOR PAYMENT—VALIDITY.

Code 1906, § 507, conferring powers on chancellors in vacation, does not authorize the chancellor to hear and determine in vacation an ex parte petition of an attorney for fees for services for an administrator in an action against the administrator; and an order made in vacation, requiring the administrator to pay fees to the attorney, is void, though the administrator filed a petition to set aside the order, which petition was denied after a hearing on notice.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 841; Dec. Dig. § 236.*]

Appeal from Chancery Court, Tallahatchie County; Percy Bell, Chancellor.

Petition by C. E. Harris and another against Bettie Webb Murphy, administratrix of Smith Murphy, deceased, for an order directing administratrix to pay petitioners attorney's fees claimed by them for services rendered in a suit against administratrix. From an order refusing to vacate or modify an order directing the payment of

attorney's fees, the administratrix appeals. Reversed, and order allowing attorney's fees vacated, and petition therefor dismissed.

The appellant was appointed by the chancery court of Tallahatchie county administratrix of the estate of her deceased husband, Smith Murphy. Thereafter the county of Tallahatchie instituted suit in the chancery court of said county against Mrs. Murphy, administratrix, and others, wherein the county sought to hold the parties liable for the breach of a bond on which appellant's intestate was a surety. The appellant employed appellee Harris, an attorney, to represent her in this suit, and afterwards Harris employed J. W. Cutrer, an attorney, as associate counsel. A compromise decree was afterwards entered in this suit, and after the rendition of this decree, without notice to appellant, the appellees, in vacation, filed a petition asking the chancellor to allow them a fee to be paid by the appellant, administratrix, out of the assets of the estate of Smith Murphy, deceased. No process was issued on this petition, and no notice of it was given to appellant. On the next day after the filing of this petition the chancellor heard the same in Coahoma county on the ex parte petition of appellees, and rendered a decree ordering appellant, as administratrix, to pay appellees the attorney's fees claimed by them for services rendered in connection with the suit above mentioned. The appellant afterwards petitioned the chancellor to vacate the said order, or to suspend its application until the matter could be fully heard. The chancellor refused to vacate the order or modify it, but granted an appeal from his decree.

A. H. Stephen and McWillie & Thompson, for appellant. Harris & Willing, for appellees.

FLETCHER, J. The true view of this case is to be gathered from a consideration of the case of Clopton v. Gholson, 53 Miss. 468, and statutes enacted subsequent to this decision. In the Clopton Case, which presents a careful review of the whole subject of attorney's fees incurred at the instance of the administrator and on behalf of the estate, it is stated that an administrator is ordinarily without power to impose upon the estate the primary obligation to pay such fees. That case holds that, when an attorney has been employed by a solvent resident administrator, the attorney must in the first instance look to the administrator personally for payment, and, if the claim is not voluntarily paid, must establish its validity by appropriate action against the administrator. Thereupon, after such voluntary payment or recovery as the case may be, the representative of the estate may apply to the court and receive credit for the payment. It is further shown that in certain cases, such as the insolvency or non-

residence of the administrator, the attorney may look to the estate in the first instance upon the principle of subrogation; but in order to do so he assumes the burden of showing that payment cannot be enforced against the administrator personally. This being the attitude of the law as established by this decision, the Legislature, in 1882, enacted a statute which now appears as section 2131 of the Code of 1906. This statute provides: "In annual and final settlements, the executor or administrator shall be entitled to credit for such reasonable sums as he may have paid for the services of an attorney in the management or in behalf of the estate if the court be of the opinion that the services were proper and rendered in good faith."

It is evident that this statute was intended to afford a ready method by which an administrator could with the approval of the chancery court employ and pay an attorney for services rendered on behalf of the estate without the necessity of resorting to a suit against the administrator to establish his claim. But it is clear that this statute has no reference to a claim contested by the administrator and which the attorney seeks to enforce over the administrator's protest. This statute has no effect to change or modify the rule laid down in the Clopton Case in a case like this, where the administrator denies the contract and disputes the justice of the claim. When that state of case arises, resort must be had to the general rule governing matters of this kind. Now it is perfectly obvious that, in the light of the holding in the Clopton Case, appellees cannot enforce their claim against the estate through the medium of an ex parte petition presented and heard in vacation. This is true entirely independent of the important fact that the petition as first presented was heard without any sort of notice to the administratrix. For the last-mentioned reason alone the first order would be void. But the infirmity lies deeper than the mere failure to notify the administratrix. No such demand as this can be enforced otherwise than by a suit, either at law or in equity, instituted and conducted precisely as other causes are conducted. This is not such a matter in connection with the administration of an estate which the chancellor may hear and determine in vacation under section 507 of the Code of 1906. For this reason the original proceeding was misconceived, and it was not helped by the fact that the administratrix filed a petition to have the former void order set aside, even though notice of the pendency of this latter petition was given and affidavits read on the hearing. Causes in equity cannot be heard on ex parte affidavits. The trouble is that appellees proceeded upon the erroneous theory that the relief they sought could be granted as an incident to and in connection with the administration of the estate.

The cause is reversed, the order allowing the attorney's fee is vacated, and the original petition dismissed, without prejudice to the right of appellees to institute such proper action as they may be advised.

MITCHELL v. McGEE & ALFORD.

(No. 13,434.)

(Supreme Court of Mississippi. Jan. 18, 1909.)

1. APPEAL AND ERROR (§ 1002*)—VERDICT—REVIEW.

A verdict on conflicting evidence, rendered pursuant to instructions fairly presenting the issues, will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

2. MASTER AND SERVANT (§ 293*)—INJURIES—EVIDENCE—INSTRUCTIONS.

Where, in an action by a parent for injuries to his minor son, received while employed by defendant as offbearer of lumber from a rip-saw in a sawmill, the evidence was conflicting on the issues whether the operation of the saw was hazardous to an inexperienced person of the son's age and whether the son was employed in the dangerous occupation without the parent's consent, instructions that if the work was not within itself hazardous for a person of the son's age the jury would find for defendant, that before plaintiff could recover he must prove that defendant employed the son without the knowledge of plaintiff and put the son at work hazardous to a person of his age, and that the injury resulted in consequence of the work, properly gave the jury the right to consider the whole situation as made by the age and experience of the son, the construction of the saw, and the character of the work to be performed by the son.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 293.*]

Appeal from Circuit Court, Choctaw County; J. T. Dunn, Judge.

Action by J. Ben Mitchell against McGee & Alford. From a judgment for defendants, plaintiff appeals. Affirmed.

This was an action for injuries to plaintiff's minor son, Claude Mitchell, who was employed by defendants, owners of a sawmill plant. The declaration alleged that the minor was employed without plaintiff's consent, and placed at work about a rip-saw, and while engaged in the duties assigned him was injured by the saw. Plaintiff relied for recovery on the facts that the operation of the rip-saw was dangerous and hazardous to an inexperienced boy of Claude Mitchell's age, about 16 years, and that he was employed in such dangerous occupation without his father's consent. The case went to the jury on plaintiff's theory of the law under instructions of the court and on the proof offered in evidence, there being a conflict in the testimony. Plaintiff contended that, when he found his son at work at the sawmill, he gave his consent that he remain there only on condition that he be placed at work which was not hazardous. Defendants denied that there was any such

agreement, or that plaintiff made any such request in regard to his son's employment.

Instructions, 3, 4, and 6 are as follows:

"No. 3. The court instructs the jury that although they may believe from the evidence in this case that the defendants, McGee & Alford, employed the said Claude Mitchell, minor, without the knowledge or consent of his father, plaintiff, J. Ben Mitchell, and put the said Claude Mitchell to work off-bearing from the rip-saw, and that while in discharge of the duties required of him under said employment he received the injuries complained of in plaintiff's declaration, and that the said injuries were the direct result and consequence of said work, yet if they further believe from the evidence that the said work which the said Claude Mitchell was employed to do by McGee & Alford, to wit, offbearing lumber from the rip-saw, was not within itself a dangerous and hazardous work for a boy of his age and experience, then the jury will find for the defendants, McGee & Alford.

"No. 4. The court instructs the jury, for the defendants, McGee & Alford, that before the plaintiff can recover in this case he must prove by a preponderance of evidence that the defendants employed Claude Mitchell, son of the plaintiff, J. Ben Mitchell, without the knowledge or consent of the said J. Ben Mitchell, and put the said Claude Mitchell to work at a work which was within itself dangerous and hazardous to a person of his age and experience, and that, while actually doing the work which he was put at, he, the said Claude Mitchell received the injuries complained of in the plaintiff's declaration, and that the injury was the direct result of said work and in consequence thereof; and if the plaintiff fails to prove these facts by a preponderance of evidence then the jury is instructed to return a verdict for the defendants."

"No. 6. The court instructs the jury, for the defendants, McGee & Alford, that if the plaintiff fails to prove to the satisfaction of the jury by a preponderance of evidence that the defendants employed plaintiff's said son, Claude Mitchell, without the knowledge, acquiescence, or consent of plaintiff, or that the defendants put said Claude Mitchell to work at a work which was within itself dangerous and hazardous to a boy of the age and experience of Claude Mitchell, or that the injury complained of was received by Claude Mitchell while in the actual performance of the duties required of him under said employment and as a direct result and in consequence thereof, or if the jury has an equilibrium of mind on any of the above points, then they will find for the defendants, McGee & Alford."

Hughston & Seawright and S. B. Dobbs, for appellant. Alexander & Alexander and Daniel & Adams, for appellees.

FLETCHER, J. We cannot agree with counsel for appellant that the verdict of the jury in this case was without any support in the testimony. As we see it, all the material issues were fairly and fully presented to the jury, and we are not warranted in overthrowing the conclusion reached by that body.

Nor do we think that reversible error can be predicated of the giving of the third, fourth, and sixth instructions for the defendant. It is taking an entirely too narrow view of these charges, when all the instructions are considered, to hold that they limit the jury to the consideration of only such of Claude Mitchell's acts as were strictly necessary in the performance of his duty as an "offbearer" of lumber. Manifestly the charges were intended, and were so understood by the jury, as giving license to consider the whole situation, as made by the age and inexperience of the youth, the construction of the ripsaw, and the character of the work to be performed.

We do not think the Westbrook Case, 121 Ala. 179, 25 South. 914, is at all at war with our conclusion. Had the court given a peremptory instruction for the defendant, a different question would have been presented; but here a jury, properly directed as to the law, finds a verdict on facts sufficient to support the finding.

Affirmed.

(34 Miss. 356)

QUIN v. PIKE COUNTY. (No. 13,740.)
(Supreme Court of Mississippi. Feb. 8, 1909.)

1. HIGHWAYS (§ 113*)—CLASSIFICATION—IMPROVEMENT—CONTRACT—JOINER OF DISTRICTS.

Acts 1900, p. 153, c. 119, § 1, provides that the board of supervisors of the various counties may at a regular meeting after the passage of the act meet and classify the public roads of their counties and divide them into convenient links to be worked by contract. The supervisors of P. county adopted such act, classified the public roads, and divided them into links, after which the board advertised for bids, as required by section 5. *Held*, that a contract, otherwise proper, was not fatally defective because the improvement of two districts or links was joined therein.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 113.*]

2. HIGHWAYS (§ 113*)—IMPROVEMENT—CONTRACT—BONDS.

Acts 1900, p. 153, c. 119, providing for the improvement of highways by contract, requires the contractor to execute a bond in a sum not less than the amount of his bid. *Held* that, where the amount bid by a contractor was \$24,272.50, the fact that his bond was given for \$24,224 was not such a substantial defect as would invalidate the contract.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 350; Dec. Dig. § 113.*]

Appeal from Circuit Court, Pike County;
M. H. Wilkinson, Judge.

"To be officially reported."

Action by L. M. Quin against Pike County. A demurrer was sustained to the complaint, and plaintiff appeals. Reversed and remanded.

Price & Whitfield, for appellant. J. B. Sternberger and E. J. Simmons, for appellee.

MAYES, J. Chapter 119, § 1, p. 153, of the Acts of 1900, provides that the board of supervisors of the various counties of the state of Mississippi may, at the regular April term, or any other regular meeting after the passage of the act, meet and classify the public roads in their respective counties as roads of the first class and roads of the second class, which roads are to be divided into convenient links and worked by contract. By section 11 of the act it is provided that the act shall have no application to any county in the state, except it be so ordered by the board, which order shall be entered on the minutes of the board. At the regular May term in 1902 the board of supervisors of Pike county, by an order duly entered on the minutes, adopted chapter 119 as the road law for that county. Subsequently the board classified the public roads of the county into roads of the first class and roads of the second class, and divided same into convenient links, and inspected same as required. After noting the character and amount of work necessary to make them good and acceptable highways, the board made plans and specifications for the working of the roads and filed same with the clerk of the board of supervisors for the inspection of prospective bidders prior to the letting of the contract. After this was done the board advertised for bids as required by section 5 of the act, and let the contracts for working the public roads of the county.

Appellant, L. M. Quin, appeared and bid for the working of all the roads in the second and third districts at an aggregate value of \$95 per mile for each of the districts. The bid made by Quin was made as a lump bid for the whole work to be done on the roads in the Second and Third supervisors' districts, and was not for each separate link advertised. The contract was duly let to him, and the aggregate amount of his bid for the two districts amounted to \$24,272.50, for the three years for which the contract was let. The other three districts were bid upon by other parties in the same way, and let out to one D. M. Simmons and Smith & Winborn, so that all the roads of the county were let to be worked by contract. Quin duly executed a bond for the sum of \$24,224, which bond was received and approved by the president of the board of supervisors. After being awarded the contract and executing the bond, Quin entered upon the work of the road. The county paid him for services rendered under this contract the sum of \$19,853, leaving a

balance due of \$4,419.50. After full performance of the contract Quin made demand on the board for the balance due him, which they declined to pay, whereupon he brings this suit.

There are two counts in the declaration, one on the contract as made and the other on a quantum meruit. A demurrer was interposed by the county to both counts on the ground, first, that the declaration states no cause of action; second, that the declaration did not show by sufficient averment that the board of supervisors of Pike county put in operation the machinery provided by law for working the public roads by contract, and that the declaration did not show that the roads were divided and classified as provided by law; third, that the contract showed that the working of the roads was a contract for the working of the Second and Third districts of Pike county, and not for working the public roads of the county as an entirety, or by links and sections; fourth, that the contract is null and void, because the board of supervisors had no authority to make any such contract; fifth, that the second count undertakes to recover on a quantum meruit. This demurrer was sustained by the court, and the declaration dismissed.

The declaration shows almost a literal compliance by the board of supervisors with every provision of the law in regard to working the roads by contract under the act above cited; the exception being in approving a bond for a little less than the amount of Quin's bond, the effect of which we will notice later. The board adopted the law in the manner required by chapter 119, and entered the order on the minutes. Afterwards they inspected and classified the roads into roads of the first and roads of the second class, and divided them into convenient links. After this they advertised the letting of the contracts as required by section 5. The contract was made in accordance with the requirements of this section; that is to say, they were let for a period of three years. In the specifications advertising these roads appeared the links as required by law, and there was nothing in law or in fact to prevent any one from bidding on any separate link so advertised, or on the whole or any part of the work to be done in the county. Nothing in the declaration shows that the board of supervisors precluded bids for separate links; but all they did was to accept the bid of L. M. Quin at an aggregate value of \$95 per mile to work all the roads in supervisor's districts 2 and 3. There is nothing in the law forbidding the board of supervisors from accepting or making such a contract; that is to say, for an entire supervisor's district. In order to make this contract valid it was not essential that each link should be contracted for separately. In furtherance of the best interest of the county the board could

have accepted a bid for any link, or for any two or more links, or for all the links, advertised in any supervisor's district, or for all the links advertised in one or more of the districts, at an aggregate value.

The case of *State v. Vice*, 71 Miss. 912, 15 South. 129, has no application to this case. That case was decided under section 3929, Code of 1892, which provided that each road or subdivision should be let under a separate contract, but the board of supervisors in disregard of this provision let the work in a lump contract, and the court held that the contract was void. There is no such provision as this in the act of 1900. Nor is there anything in the act of 1900 which requires a contract to be made for each division or road let. The facts in the case of *State v. Edwards*, 81 Miss. 399, 33 South. 172, make a very different case from the one presented by this record, and that case cannot be used as authority for any of the contentions made on the part of appellee. In the case of *Elmore v. State*, 81 Miss. 422, 33 South. 225, the opinion shows that the indictment did not charge that the board of supervisors had done any of the things which the law required to constitute a valid contract. The court held, on a demurrer to an indictment against a party charged with violating the contract, as a matter of course, that because of the failure on the part of the board to make a valid contract no prosecution could be conducted against a contractor under section 10 of the act for neglect of duty under the contract.

The only other point relied on by appellees is the fact that the amount of the bid made by Quin was for \$24,272.50, and the bond given was only for \$24,224. The bond given was for a little less than the bid, whereas the law provided that it should not be less than the amount of the bid. It is manifest that this was a mere unintentional error on the part of the board, not substantial in nature or an intentional disregard of the statute. We do not think this irregularity is sufficient to invalidate the contract in this case. In the *Edwards Case*, supra, the facts show that the board affirmatively ordered a bond to be executed in violation of the positive requirements of the statute. Such is not the case here, nor is there any substantial discrepancy.

The case is reversed and remanded.

(95 Miss. 657)

SOUTHERN RY. CO. v. STATE ex rel. ATTORNEY GENERAL. (No. 13,151.)

(Supreme Court of Mississippi. Feb. 8, 1909.)

1. CONSTITUTIONAL LAW (§ 297*)—DUE PROCESS OF LAW — COMPELLING RAILROAD TO ERECT DEPOT.

Code 1906, § 4854, providing that every railroad shall establish and maintain a depot in every incorporated village through which the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

road passes, when applied to an incorporated village on a branch line, was not violative of Const. U. S. Amend. 14, § 1, or Const. Miss. 1890, § 14, as depriving the railroad company of property without due process of law, though the branch line was being operated at a loss; the whole system operated in the state creating a profit.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 833; Dec. Dig. § 297.*]

2. CONSTITUTIONAL LAW (§ 241*)—EQUAL PROTECTION OF THE LAW—COMPELLING RAILROAD TO ERECT DEPOT.

The statute was not violative of Const. U. S. Amend. 14, § 1 as depriving the company of the equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 241.*]

Appeal from Circuit Court, Calhoun County; J. D. Dunn, Judge.

"To be officially reported."

Mandamus by the State, on the relation of the Attorney General to compel the Southern Railway Company to erect and maintain a depot. There was a directed verdict for relator, and defendant appeals. Affirmed.

A. T. Stovall, E. L. Russell, and Mayes & Longstreet, for appellant. J. L. Bates, Creekmore & Stone, and R. V. Fletcher, Atty. Gen., for appellee.

MAYES, J. Section 4854 of the Code of 1906 provides that: "Every railroad shall establish and maintain such depots as shall be reasonably necessary for the public convenience, and shall stop such of the passenger and freight trains at any depot as the business and public convenience shall require. And every railroad shall establish and maintain a depot within the corporate limits of every incorporated city, town or village through which said railroad passes; and the commission may cause all passenger trains to permit passengers to get on and off in a city at any place other than at the depot, where it is for the convenience of the traveling public. And it shall be unlawful for any railroad to abolish or disuse any depot when once established, or to fail to keep up the same and to regularly stop the trains thereat, without the consent of the commission."

The Southern Railway Company is a corporation organized and operating a railway under the laws of the state of Mississippi, and, in addition to many more miles of railway owned and operated by it in the state, it has constructed and owns and operates a short branch road extending from Okolona, in Chickasaw county, to Calhoun City, in Calhoun county, and through the incorporated village of Derma, also in Calhoun county, Miss. This branch line of railway lies wholly within the state and is operated between the two points named. The village of Derma had a population of about 300 people, and some time in January, 1907, the residents petitioned the Railroad Commission to require the Southern Railway Company to stop its trains at Derma and to

erect a suitable and adequate depot in the village. After hearing the petition the commission ordered the trains stopped and a depot to be built. The order of the commission was totally disregarded in so far as the building of the depot was concerned. After the railway company refused to build the depot, and in May, 1907, the Attorney General, on behalf of the state and proceeding under section 4854 of the Code of 1906, filed a mandamus petition, praying that the railway company be commanded and directed to erect and maintain a depot in the village of Derma, in conformity with the order of the commission and the provision of the statute, and further praying that the company be required to construct and maintain all necessary switches and side tracks in the village of Derma, etc. While the petition seems to be predicated on the order of the commission, as well as the statute, we treat this proceeding as entirely under the statute, and ignore it in so far as it deals with the order of the commission.

This petition was demurred to by the railway company. The demurrer was overruled, whereupon an answer was filed. The main feature of the answer addressed itself to the constitutionality of the statute in question, and alleged that the statute was void under section 14 of the Constitution of 1890 of the state and the fourteenth amendment of the Constitution of the United States, in that in this case it deprives the railway company of its property without due process of law, and further denies the railway company the equal protection of the law. The answer further claims that this branch road has never earned, does not now earn, or give promise of earning enough to pay its operating expenses, including the expense of maintenance and taxes. These are the substantial questions raised by the answer. On the issue thus made much testimony was taken, the purport of which is that this branch line, on which is located the village of Derma, and which constitutes but a small part of the system owned and operated by the Southern Railway in the state, is being operated at a loss; but the testimony fails to show that the entire system operated and owned within the state is not being operated at a profit. All the testimony in behalf of the railway is addressed to this branch line alone. After the testimony was all in, the court gave a peremptory instruction to the jury to find for the plaintiff, whereupon a judgment was entered by the court, ordering the Southern Railway to commence within 30 days from the date of the judgment to erect a depot and such necessary switches and side tracks within the corporate limits of Derma as would furnish ample and sufficient accommodation for the needs and demands of the town. The court does not undertake to fix the cost of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

this depot in any way, but merely requires the erection of such depot and necessary switches and side tracks as will furnish sufficient accommodation for the needs of the town. It was further ordered that the work should be completed within 90 days. No complaint is made here that the time allowed for the erection of these buildings and switches is not sufficient, and it will be observed that the judgment taken by the court was in accordance with the statute, and not the order of the Railroad Commission. From this judgment an appeal is prosecuted here.

We can see no question in this case which should have been submitted to a jury. The statute requires the railroad to do just what the court said it shall do. All the testimony tending to show that the railroad is being operated at a loss is confined to only this branch of the road, and not to the whole system operated in the state. One of the witnesses for the railroad company states that no branch line ever pays, nor does the railroad company expect it to pay. Its use is simply tributary to the main system. Under the facts of this case there is nothing making the operation of this statute unconstitutional in any respect, either as violating any provision of the Constitution of the state or the United States. This statute is enacted under the police power of the state. Its purpose is to protect the people of the state, located in villages and towns, from any sort of discrimination at the hands of public carriers. It is intended to compel all railways to provide suitable facilities for the conduct of their business when living within incorporated villages. When action is sought to be taken under this statute in a case where the facts show that the whole system of railway owned and operated within the state is operated at a loss, we will then decide that case; but the case as made by this record is not such a one. On the questions involved in this case the cases of *Atlantic Coast Line R. R. v. North Carolina Commission*, 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933, *Gladson v. State of Minnesota*, 166 U. S. 427, 17 Sup. Ct. 627, 41 L. Ed. 1064, and *Wisconsin, M. & P. Ry. Co. v. Jacobson*, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. Ed. 194, will be found very helpful.

Affirmed.

FLETCHER, J., takes no part in this case.

(94 Miss. 893)

LACKEY et al. v. ST. LOUIS & S. F. R. CO.
(No. 13,890.)

(Supreme Court of Mississippi. Jan. 25, 1909.)

RAILROADS (§ 113*) — ROADBED — MAINTENANCE—CONTRACT—CONSTRUCTION.

A railroad company having adjusted a claim for past damages caused by overflowing land

and made alterations in its roadbed, the owner released it from all future damages caused by the operation of the road as "now constructed." The alterations included the cutting into a single ditch of borrow pits along the track. For several years the company kept the ditch open. Held, that the company was required to keep the ditch open to avoid recurrence of overflows.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 113.*]

Appeal from Circuit Court, Lee County; E. O. Sykes, Judge.

Action by Mrs. A. A. Lackey and others against the St. Louis & San Francisco Railroad Company. From a judgment sustaining a demurrer to a replication, plaintiffs appeal. Reversed and remanded.

Action for damages to the property of appellants, alleged to be due to the negligent construction and maintenance of appellee's roadbed, so as to back water upon appellants' lands. There were two counts to the declaration, to which appellee pleaded the general issue and also a special plea, to which special plea appellants replied, and a demurrer to this replication was interposed, which was sustained by the court, and, appellants declining to plead further, judgment final was entered against them. In substance the declaration charged that, when the defendant railroad company built its line of railroad across the land described in the declaration, it was negligently and unskillfully constructed, so as to cause the lands and crops of the plaintiffs' ancestor, W. L. Lackey, to be overflowed by the waters of Town creek; that said W. L. Lackey had brought suit against said defendant and recovered a judgment on that account, and that same had been paid off and discharged; that after this plaintiffs' said ancestor and the defendant railroad company entered into an agreement by which all past damages were settled for a cash consideration and certain work on the roadbed of said defendant, and said defendant was thereby to be absolved from any liability for future damages on account of the overflow of said land, so long as said defendant operated and maintained its railroad as then constructed; that on account of the failure of said railroad to operate and maintain its railroad as constructed at the time of the signing of said release plaintiffs have been damaged, etc.

The defendant railroad company in its plea set up the fact that it was absolved from any further liability to said Lackey, his heirs, assigns, executors, administrators, etc., because of the signing of said release by said W. L. Lackey. The release contains the following provision: "And for the further consideration of the work done by said company at my request, as hereinbefore set forth, which work consists of the following: The closing up of trestle No. 216 on said land, and the cutting into a continuous ditch

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of the borrow pits on each side of the track, over and along said land, which work has been completed in each detail to my satisfaction, and in the manner prescribed and directed by me—for said consideration, and each of them, I do hereby release said Kansas City, Memphis & Birmingham Railroad Company, its successors and assigns, its officers and agents and employes, from all actions, causes of action, suits, and damages of every nature whatsoever that have accrued to me on the said northeast quarter of section 6, township 9, range 5 east, in said Lee county, Mississippi, up to the date of this instrument, and for all that may hereafter accrue to me on said land, on account of damage to the same, all that the same may sustain in any way by reason and during the continuance of the maintenance and operation of said railroad thereover as the same is now constructed. This release and the covenants herein shall be binding, not only upon me, but my heirs, executors, administrators, and assigns, and shall run with and be binding upon the land herein described."

In their replication plaintiffs contend that this release absolved the railroad company from damages only so long as said company continued to operate and maintain its railroad bed as constructed at the time said release was signed, and that the work agreed to be done as part of the consideration for said release included the keeping open of the ditches on each side of the track, and it was the duty of said railroad company to keep said ditches open to carry off water.

The demurrer sets up the fact that there was no obligation upon the defendant to keep open the ditches, and that this was not specified or contemplated by said contract.

See *Railroad Co. v. Lackey*, 72 Miss. 881, 16 South. 909, 48 Am. St. Rep. 589.

Anderson & Long, for appellants. *J. W. Buchanan*, for appellee.

FLETCHER, J. We cannot agree with the learned court below that the contract between the appellee company and *W. L. Lackey* imposed no obligation upon the company to keep open the ditches which the contract mentions. It seems clear to us that, taking into consideration the situation of the parties, the mischief which was sought to be remedied and avoided, and the language of that part of the contract which recites that there is a release of all future damages that may accrue "on account of damage to the same and all that the same may sustain in any way by reason and during the continuance of the maintenance and operation of said railroad thereover as the same is now constructed," the company's duty demanded that the ditches should not be allowed to so fill up as to cause a recur-

rence of the trouble. It may be true, as ingeniously argued by appellee, that the language above quoted from the contract, if used in another connection, would be identical in meaning with the expression "proper construction and maintenance," as that term is employed in judgments rendered in condemnation proceedings; but we must construe the language in the light of this particular contract and the situation of the parties thereto. Certain it is that the contract would avail *Mr. Lackey* nothing, so far as future injuries are concerned, unless the ditches are kept open, and *Lackey* is without authority to go upon the railroad right of way for that purpose. Furthermore, weight must be given to the fact that for many years the company kept these ditches open, thereby giving a practical and contemporaneous construction to the contract in harmony with appellant's contention.

We are forced to conclude that the court erred in sustaining the railroad company's demurrer to the replication filed in answer to the second special plea, and the case is reversed and remanded.

(95 Miss. 43)

YAZOO & M. V. R. CO. v. SCOTT.

(No. 13,583.)

(Supreme Court of Mississippi. Feb. 1, 1909.)

1. MASTER AND SERVANT (§ 228*)—INJURY TO SERVANT — CONTRIBUTORY NEGLIGENCE — STATUTORY PROVISIONS.

Code 1906, § 4056, a rescript of Const. 1890, § 193, except as to improperly loaded cars, providing that a railroad employee's knowledge of defects in ways or appliances shall not be a defense to an action for injury, does not abolish the defense of contributory negligence, but requires something more than mere knowledge of defects; and where a railroad employe is directed by his superior officer to make use of defective appliances, and uses the appliances in a careful manner, with knowledge of the defects, and is injured, he may recover, unless he heedlessly exposed himself to an obvious peril.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 670; Dec. Dig. § 228.*]

2. MASTER AND SERVANT (§ 281*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

Evidence held not to show that a railroad switchman, injured by lumber falling from a defectively loaded car, recklessly exposed himself to a known and imminent peril, when ordered by his superior to couple the car to a switch engine, by walking between the car and a pile of lumber at its side to reach the running board of the engine, which was his proper position, so as to make available the defense of contributory negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 987-996; Dec. Dig. § 281.*]

3. DAMAGES (§ 132*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.

Where a railroad switchman had his leg broken in three places, making him a cripple for life, and received other injuries, which will probably be permanent, or remediable only by a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

very serious operation, \$14,000 damages was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385; Dec. Dig. § 132.*]

Appeal from Circuit Court, Warren County; John W. Bush, Judge.

Action by J. L. Scott against the Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

J. L. Scott, plaintiff below, was a switchman in the employ of the defendant railroad company at Vicksburg, Miss. At the time of the injury complained of the crew to which he belonged was engaged in making up a train of cars in the yards near a large sawmill, from which many car loads of lumber were shipped on flat cars. A flat car had been loaded with green lumber and was ready for shipment. It was necessary for this car to be coupled to the switch engine in order to place it, and Scott was ordered by the conductor in charge to make the coupling. After he had done so, the engine started back with the car, and Scott began to walk in the opposite direction to meet the engine and take his position on the footboard where he belonged, and while so walking by the side of the car of lumber, which was not held in place by standards, several pieces of lumber fell upon him and knocked him down, breaking his leg in three places and otherwise injuring him, making him a cripple for life. He brought this suit under section 4056 of the Code of 1906; his contention being that the car was improperly loaded because of the absence of upright standards on the sides of the cars for the purpose of holding the lumber on, and that the failure on the part of the company to provide such standards was negligence. Said section contains the following clause: "Knowledge by an employé injured of the defective or unsafe character or condition of any machinery, ways, or appliances, or of the improper loading of cars, shall not be a defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them."

Defendant asked an instruction on contributory negligence, on the ground that plaintiff had knowledge of the defect, or unsafe condition, or improper loading of the car, and had assumed the risk incident to his labor with full knowledge of such defects. The court declined such an instruction because of the absence of proof of any carelessness, recklessness, or indifference to danger on the part of plaintiff; it being shown plaintiff was in the discharge of his duty by order of his superior officer, and made every effort to escape the falling timber, but was prevented from doing so by a pile of lumber on the side of the track close

to the moving car from which the lumber fell.

The jury found for plaintiff, and awarded him damages in the sum of \$14,000, and the railroad company appeals.

Mayes & Longstreet, for appellant. S. S. Hudson and Carl Fox, for appellee.

FLETCHER, J. The appellant company chiefly complains because the court declined to submit to the jury the question of contributory negligence. The case arises under section 4056 of the Code, which is for the most part but a rescript of section 193 of the Constitution of 1890, with the important addition as to improperly loaded cars. It is insisted that under the authority of *Buckner v. Richmond & Danville R. R. Co.*, 72 Miss. 873, 18 South. 449, the question of contributory negligence should have gone to the jury. This contention is based on the language employed on page 878 of 72 Miss., and page 450 of 18 South., where it is said: "The Constitution did not have the effect to free employes of railroad companies from the exercise of ordinary caution and prudence. It does not license recklessness or carelessness by them, and give them a claim to compensation for injuries thus suffered. They, like others not employes, must not be guilty of contributory negligence, if they would secure a right of action for injuries. The fact of knowledge of defects shall not be, as heretofore, a defense; but the same rule that applies to others applies to them. They must use the degree of caution applicable to the situation; for the absence of this is negligence, and, if it contributed to the injury, no recovery can be had by an employé, any more than by one not an employé. It was not the purpose of the makers of the Constitution to place employes on a more favorable footing as to this than others, but simply to free them from the bar before held to arise from the fact of knowledge of defective conditions. It is not a defense, but it is a fact or circumstance for consideration, among others, in order to determine the presence or absence of contributory negligence, which is yet a defense, as it was before, but is not to be made out against an employé by the mere fact of his knowledge."

In connection with this holding it is proper to consider the later case of *Railroad Company v. Parker*, 88 Miss. 193, 40 South. 746, in which it is said that the established rule is: "If, knowing the unsafe, defective, or dangerous condition, the complaining employé be proven guilty of reckless negligence in the use of the appliance at the time of the injury, he cannot recover." It is further said in this case that, in case there is a conflict in the testimony, the question of con-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tributory negligence is one for the jury. But surely it must be true that there be some proof of recklessness, or at least imprudence, before the court is warranted in submitting this phase of the case to the jury. In the case under consideration the most painstaking and repeated examination of the record fails to disclose any proven fact or circumstance which even tends to show recklessness, indifference to danger, or carelessness on the part of the appellee. It is true that he testifies to his knowledge of the defective loading of the car; but if such knowledge is to be permitted to defeat a recovery, even at the hands of a jury, the constitutional provision is absolutely worthless. True it is, as announced in the Buckner Case, that section 193 of the Constitution does not abolish the defense of contributory negligence; but the railroad company, in order to avail itself of the defense, or even to go to the jury on the question, must show in some way that something more than mere knowledge of the defects contributes to the injury. One injured cannot contribute to the injury by the usual, prudent, and careful use of such appliances as the railroad furnishes, even when such appliances are known to be defective. The employé must be careful in the use of these defective appliances. It may be that the very fact that they are known to be defective requires a higher degree of care than would be demanded if all the agencies were perfect in construction; but when an employé is directed by his superior officer to make use of defective appliances, and in obedience to such command uses such machinery in a prudent and careful manner, observing such precautions as the nature of the situation demands and permits, and is injured, the railroad cannot be heard to set up the doctrine of contributory negligence, unless the injured person heedlessly exposed himself to a peril so obviously imminent as to render his conduct careless to the point of recklessness. But there is no proof in this case which brings the case under the operation of this rule. The car was loaded in the usual way, in a manner which had long prevailed in the yards. This appellee had never seen lumber so loaded fall from the car. It was his duty to attend to the switching of the car, and catch the running board of the switch engine in order to go with the engine. Had he refused to go between the defectively loaded car and the piles of lumber on the side, he would have been forced to go around these piles of lumber and thereby lose the chance to catch the running board of the engine, and so be negligent in his duty. In short, there was no sort of proof upon which the jury could have upheld a finding that the unfortunate brakeman recklessly or even carelessly exposed himself to a known and imminent peril; and

for this reason we think the instructions on this question were properly refused.

In the light of the testimony as to the serious injuries sustained, and the probability of their being either permanent or remediable only by the successful termination of a very serious operation, we cannot say that the damages are so excessive as to warrant interference by this court. Louisville, N. O. & Tex. R. R. Co. v. Thompson, 64 Miss. 584, 1 South. 840.

Affirmed.

ELLEDDGE et ux. v. POLK. (No. 13,656.)
(Supreme Court of Mississippi. Jan. 18, 1909.)
ARBITRATION AND AWARD (§ 64*)—VALIDITY—FRAUD.

An award of arbitrators, unsanctioned by the court, which was made through fraud, will not be enforced.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 321; Dec. Dig. § 64.*]

Appeal from Chancery Court, Prentiss County; W. J. Lamb, Chancellor.

Suit by Frances M. Polk against J. R. Elledge and wife to set aside a conveyance on the ground of fraud. From a decree for complainant, defendants appealed. Affirmed.

The record discloses the fact that one W. P. Polk died, leaving a will in which he devised to his daughter, Frances M. Polk, and wife, Eliza Polk, all of his property. After his death J. R. Elledge and wife, who was the daughter of W. P. Polk by a former marriage and a half-sister of appellee, came to the Polk home and offered to care for Eliza Polk, who was very old and feeble, in fact, a helpless invalid, and Frances M. Polk, her daughter, who is shown to be weak-minded, as well as feeble in body, on condition that they would convey to Elledge and wife the Polk property. They agreed to this, and executed a deed accordingly, which stipulated that the consideration was that they should be cared for the rest of their lives. The Elledges then moved to the Polk home, but after a short while differences arose between the two families, which resulted in the Polks leaving and going over to live in a store building near by. Afterwards an informal arbitration was agreed upon, which proved unsatisfactory, and upon the advice of an attorney they agreed to let the witnesses to the will of W. P. Polk act as arbitrators of their differences. These arbitrators reported that the Polks were indebted to the Elledges in a certain sum of money, and it was agreed then that they would give their note to the Elledges for this amount, and the Elledges would reconvey the property to them and take a mortgage on the same to secure the note. The note being made payable in 30 days, and the Polks not having the means to pay it promptly, it was there-

after agreed that the property should be re-conveyed to the Elledges, the Polks reserving 40 acres for their own use, on condition that Elledge would erect a house for their use. This house was never built, and the Polks afterwards had to sell their 40 acres of barren land to buy food and clothing. They were afterwards sent to the poorhouse, where Eliza Polk died. Frances M. Polk thereafter brought suit in the chancery court, seeking to set aside the conveyance to the Elledges because of fraud. After hearing the testimony the court entered a decree setting aside the conveyance and ordering an accounting, the amount of which was afterwards agreed upon by counsel. From this decree, Elledge and wife appeal.

Candler & Sawyer, for appellants. Young & Young, for appellee.

FLETCHER, J. It would serve no useful purpose to rehearse the painful history disclosed by this voluminous record. Suffice it to say that it presents a striking instance of a woman, feeble in mind and body, who was completely overreached by her near kindred, and the only ones to whom she could look for protection and guidance. The chancellor was well warranted in finding that the execution of the first deed, its subsequent cancellation, the agreement to submit all controverted matters to arbitration, the deed in trust, and the unconscionable sale to defendants in satisfaction thereof, were all stamped with indelible marks of palpable fraud. The chief reliance of appellant is the award of the arbitrators; but no court has ever held, or will ever hold, that an award, unsanctioned by the court, can prevail, when shown to have been fraudulently conceived, fraudulently conducted, and fraudulently concluded.

There being no question here as to the correctness of the accounting, the decree of the chancellor is affirmed.

(95 Miss. 88)

ADAMS, Revenue Agent, v. CITY OF CLARKSDALE et al. (No. 13,729.)

(Supreme Court of Mississippi. Feb. 8, 1909.)

1. APPEAL AND ERROR (§ 169*)—SCOPE OF REVIEW—QUESTIONS NOT RAISED AT TRIAL.

Where a petition is dismissed on demurrer, and an appeal taken, a question not raised in the trial court cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1018-1034; Dec. Dig. § 169.*]

2. MANDAMUS (§ 66*)—CITY OFFICERS.

Mandamus may be maintained against the officers of a city.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 131; Dec. Dig. § 66.*]

3. TAXATION (§ 362¼*)—BACK TAXES—ASSESSMENT—NOTICE.

Code 1906, § 3421, authorizing a city through its clerk to assess property that has escaped taxation, has no application to a proceeding instituted by the revenue agent for the

same purpose, which proceeding is entirely governed by chapter 131, so that notice of such omitted property was properly given by the revenue agent to the city assessors and collector, and not to the city clerk.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 362¼.*]

4. TAXATION (§ 317*)—BACK TAXES—ASSESSMENT—PROCEEDINGS.

The right of the state revenue agent to assess back taxes is not exclusive; the municipality, acting through its clerk, being authorized by Code 1906, § 3421, of its own motion to assess property that has escaped taxation.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 317.*]

5. TAXATION (§ 363*)—ASSESSMENT OF BACK TAXES—NOTICE TO TAXPAYERS.

At the instance of the state revenue agent the tax assessor and collector of a city made out a back tax assessment and filed the same on March 23, 1907. No notice was given to the parties assessed until February 13, 1908. *Held*, that since, by Code 1906, § 4740, no time limit was fixed within which notice must be served on such owners, the assessment was not void because of such delay, though no taxes accrued or could be collected until notice had been given and the assessment properly approved by the mayor and aldermen at the next regular meeting after notice.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 363.*]

6. TAXATION (§ 491*)—BACK TAXES—ASSESSMENT—CONFIRMATION—SUBSEQUENT VACATION—JURISDICTION.

Code 1906, § 4296, declares that, when an assessment roll has been properly approved, the taxpayer cannot question its validity, and that an approved assessment shall have the effect of a final judgment against the taxpayer, unless subject to be reopened under section 4312. *Held*, that where back taxes were assessed, and after notice to the taxpayers the assessment was confirmed at the next meeting of the mayor and board of aldermen of the city, and the list was duly filed as approved, it was then beyond the power of the mayor and board of aldermen to cancel such approval at a subsequent meeting.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 491.*]

7. MANDAMUS (§ 10*)—VACATION OF VOID ORDER.

Where the action of a board of aldermen attempting to vacate its approval of a back tax assessment was a nullity, mandamus would not lie to compel the board to expunge it from its records, because unnecessary.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 10.*]

8. MANDAMUS (§ 119*)—SUBJECTS OF RELIEF—COLLECTION OF TAXES.

Mandamus will lie to compel a tax collector to collect assessments on property that has escaped taxation, though many of the assessments may be barred; this question being one between the revenue agent and the taxpayer, and the tax collector being unauthorized to interpose any such defense for them.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 251; Dec. Dig. § 119.*]

Appeal from Circuit Court, Coahoma County; Sam O. Cook, Judge.

"To be officially reported."

Petition by Wirt Adams, Revenue Agent, against the City of Clarksdale and others, for mandamus to compel the annulment of an order canceling a back tax assessment and

to compel the collection of the taxes by the city tax collector. Defendant's demurrers were sustained, and the bill dismissed, from which order the petitioner appeals. Affirmed as to the city, and reversed as to defendant F. L. Smith, assessor and collector.

D. A. Scott, for appellant. J. W. Cutrer, for appellees.

MAYES, J. On the 13th day of July, 1908, the revenue agent filed a petition for mandamus against the city of Clarksdale and F. L. Smith, acting both as tax collector and tax assessor for the city. The petition substantially alleges that the revenue agent gave written notice to Smith that certain property located in the city of Clarksdale had escaped taxation for the years 1891 to 1904, inclusive, and in the notice specifically described the property and required Smith to assess same as additional assessments on the rolls or tax list then in his possession. Smith, acting in his official capacity, made the additional assessment required by the notice on the same day that he received it, to wit, on the 23d day of March, 1907. After making the assessments as required, they were filed and remained on file continuously. It is averred that Smith was acting in the dual capacity of tax assessor and tax collector for the city of Clarksdale when all these proceedings were had. After making and filing the additional assessments, no further action was taken until the 18th day of February, 1908, when Smith gave written notice to all of the alleged owners of the property which had been back-assessed by him, and in the notice directed the attention of the taxpayers on whom the notice was served that any objection to the assessment which they might have would be heard by the mayor and board of aldermen at the next regular meeting. This notice was served under section 4740 of the Code of 1906, and seems to have been in strict compliance with the same, except that it is stated in the notice that "the following described property in the county of Coahoma, Mississippi," etc., "has been assessed by me to you," etc., instead of specifying the city of Clarksdale; but the notice requires the parties to appear at the next meeting of the mayor and board of aldermen of the city of Clarksdale for the purpose of making any objection they might have, and we do not think this irregularity is sufficiently grave to invalidate the whole proceeding, as it is manifest that the assessment was in behalf of the city and by a city officer.

On the 3d day of March, 1908, at the next regular meeting of the mayor and board of aldermen of the city of Clarksdale, these back assessments were taken up for consideration and approved. No appeal was ever prosecuted from the order of approval, and directly thereafter Smith, as tax collector, proceeded to collect the amount of taxes due by virtue of the order of approval. Subse-

quently, on the 5th of May, 1908, and after the final adjournment of the regular meeting in March, the mayor and board of aldermen caused to be entered an order rescinding and canceling their order of approval of the tax assessments made at the regular March meeting of the board, and ordered all money heretofore collected thereunder to be refunded to the parties from whom same had been received. After this order was made the tax collector refused to proceed any further with the collection of the taxes above mentioned, but, acting under the order of the board, refunded all amounts previously collected by him. The petition avers that the action of the city of Clarksdale in vacating the order of approval made on March 3, 1908, by the order of May 5, 1908, was void, and that it continued to be the legal duty of Smith to collect all the taxes which had been assessed. The petition prayed for a writ of mandamus against the city of Clarksdale and F. L. Smith, tax assessor and collector, requiring the city, through its proper officers, to cancel and annul the order made at the May meeting, 1908, and further prayed that Smith, as assessor and tax collector of the city, be required to proceed without further delay to collect all taxes assessed as set out in this petition, and that Smith be required to carry out the order made by the mayor and board of aldermen at its March meeting, 1908.

Two separate demurrers were interposed to this petition, one by the city of Clarksdale, and the other by the tax assessor and collector. The city demurs on the ground: First, that the municipal authorities cannot be controlled by mandamus or like process of any court; second, because the assessments were illegal, and not made by officers authorized by law to make the same, and therefore the mayor and board of aldermen had no right to approve the assessments; third, because, as the assessment was not legally made, it was the duty of the defendant to rescind all action taken in the premises. On behalf of the tax assessor and collector a demurrer set up: First, that it was shown by the petition that no legal assessments were ever made as required by law; second, because it appears that the tax assessor and collector was without warrant or authority to make the collections; third, because the court was without authority to direct the collection of taxes illegally assessed. These are substantially the grounds of the demurrer filed by both defendants. On the hearing the court sustained the demurrer and dismissed the bill, from which action the revenue agent appeals.

On behalf of appellees it is urged here for the first time that the action of the lower court must be sustained, for the reason that there is not only a misjoinder of the parties, but, additionally to this, the city of Clarksdale is not subject to mandamus by its corporate name, but, if any such action can be maintained, it must be brought against the

individual members of the municipal board. It is sufficient to say, in answer to this argument, that no such question was raised by the demurrer in the court below, and therefore, following the many decisions of this court on this subject, we decline to pass on these questions here.

It is next argued for appellees that the court held in the case of *Adams v. City of Greenville*, 77 Miss. 881, 27 South. 990, that the mayor and board of aldermen of a city were not subject to mandamus; hence, says counsel, if the mayor and board of aldermen cannot be mandamusd, certainly the city itself cannot be subject to the writ. It would seem, in the opinion above referred to, that the court did so hold; but in the case of *Adams v. Kuykendall*, 83 Miss. 571, 35 South. 830, the case of *Adams v. City of Greenville* was overruled. The two cases are absolutely inconsistent, and cannot be distinguished, and in our judgment the *Kuykendall* Case announces the correct rule of law.

It is further contended by appellee that by section 3421, Code of 1906, the notice required to be given by section 4740 should have been given to the clerk of the municipality. Section 3421 has no application to a proceeding instituted by the revenue agent under chapter 131, Code of 1906. Where the revenue agent is proceeding to back-assess property, the proceedings are to be as provided under chapter 131, and the various sections of the Code under this chapter are applicable alone to him. But the right of the revenue agent to back-assess is not the exclusive power in the law so to do. By section 3421 the municipality, acting through its clerk, may of its own motion assess property which has escaped taxation, and when this is done the back tax assessment must be made by the clerk. But this section has no controlling influence where the proceeding is instituted by the revenue agent.

The petition shows that although the tax assessor and collector made out the back tax assessment on his list, and filed same, yet no notice was given to the parties against whom the assessment was made until February 18, 1908, nearly a year after the assessments were filed. It is contended, therefore, that the assessment was a nullity because of this. We do not think there is anything in this contention. The assessment was made on the 23d day of March, 1907, and the list filed. It is true no notice was given to the taxpayers until the 18th day of February, 1908, and until notice had been given and the assessment approved no taxes became due and none could have been collected; but the notice was given and the assessment properly approved by the mayor and board of aldermen at the next regular meeting after the notice. After assessment is made no particular limit of time is fixed by section 4740, Code of 1906, within which notice must be

served on the owners of the property back-assessed. This being the case, the matter could be heard by the mayor and board of aldermen at any time after notice to the parties assessed within the period of the statute of limitations.

After the meeting of the mayor and board of aldermen at the regular session in March, 1908, with due notice to the taxpayer, and the list as filed by the tax collector had been approved, it was beyond the power of the mayor and board of aldermen to cancel this order of approval at any subsequent time; hence their action on May 5th was a nullity. Under section 4296 of the Code of 1906, where an assessment roll has been properly approved, the taxpayer is precluded from questioning its validity afterwards, and the effect of the approval is to render a final judgment against the taxpayer, unless subject to be reopened under section 4312. A judgment rendered by the mayor and board of aldermen, except in cases provided by statute, is no more open to further action after final judgment than is that by any other tribunal. *Revenue Agent v. Clarke*, 80 Miss. 134, 31 South. 216.

The action of the board on May 5th in passing the order vacating the approval of March 3d was not under section 4312, or claimed to be under this section. The petition shows a strict compliance in every respect with section 4740, Code of 1906, in so far as the back assessment is concerned, and we do not think that the case of *State v. Brennan*, 72 Miss. 894, 18 South. 482, has any application. In this case Smith was both tax collector and tax assessor. The facts of the *Brennan* Case are easily distinguishable from the facts here.

Since the action of the board was a nullity, it would be useless to require the board to expunge from its records that which has no legal force or effect. For this reason alone the demurrer filed by the city should be sustained, and petition dismissed as to it; but the demurrer interposed by the tax collector should be overruled, as the assessment is in all respects valid. It may be that by section 4742 many of these assessments are barred; but we leave this question to be settled between the revenue agent and the taxpayer, since it is of no concern to the tax assessor and collector, and he can interpose no such defense for them.

Let the demurrer be sustained as to the city of Clarksdale, and reversed as to the tax collector and assessor.

So ordered.

(36 Miss. 196)

SULLIVAN v. AMMONS. (No. 13,644.)
(Supreme Court of Mississippi. Feb. 8, 1909.)

CONSTITUTIONAL LAW (§ 105*) — VESTED RIGHTS—CONTRACTS—INVALIDITY.

Acts 1875, p. 10, c. 1, § 5, imposed certain privilege license taxes, and declared that con-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tracts made by persons liable to, but who had not paid, the tax, should be null and void. By Rev. Code 1880, § 589, the law was changed so as to provide that all contracts made in violation thereof should be null and void, so far only as the violator should base any claim on them, and that no suit should be maintainable in favor of such person on any such contract. *Held*, that by such act the Legislature so changed the law that contracts in violation thereof were merely unenforceable as a matter of remedy, as to the continued existence of which a party could not acquire a vested right, so that the Legislature was authorized to enact Code 1906, § 3894, providing a fine and imprisonment only for violation of the act, thus making contracts made in 1905, violative of such act, enforceable.

[Ed. Note.—For other cases, see Constitution-al Law, Cent. Dig. § 223; Dec. Dig. § 105.*]

Appeal from Circuit Court, Tallahatchie County; Sam C. Cook, Judge.

"To be officially reported."

Action by W. E. Ammons against W. C. Sullivan. Judgment for plaintiff, and defendant appeals. Affirmed.

Boatner & May and R. L. Cannon, for appellant. Mayes & Longstreet, A. H. Stephen, and Dinkins, Caldwell & Ward, for appellee.

WHITFIELD, C. J. On December 29, 1906, Ammons, the appellee, filed two suits in the circuit court of Tallahatchie county against Sullivan, the appellant, upon two certain promissory notes executed by Sullivan in favor of Ammons, one dated November 24, 1906, for \$493.44, and one for \$500, dated January 1, 1905, each bearing interest at 8 per cent. per annum until paid; the two suits having been afterwards consolidated. During the year 1904, and prior to and subsequent to that year, Ammons, the appellee, was engaged in the mercantile business at Sumner, Miss., and Sullivan was a planter. During the said period Ammons sold goods and merchandise to Sullivan on account for the purpose of supplying his plantation. The account having run for several years, and Sullivan not being able to pay said account, he executed the two said promissory notes in settlement of said account. The two notes having become past due and unpaid, Ammons brought suit as above stated, when Sullivan filed a plea of the general issue, also a special plea, setting up as a defense to the suit that during the year 1904 Ammons, plaintiff, was a merchant doing a general mercantile business, and that the goods and merchandise constituting the consideration of the said two notes were sold during the year 1904, and that plaintiff, Ammons, had not during the year 1904 procured a proper privilege tax license to carry on said mercantile business for said year 1904. To this special plea a demurrer was interposed, setting up, among other grounds, that the plea stated upon its face no defense, in that there was no law in existence, at the time the suit was filed, precluding said suit because of the fail-

ure to pay privilege tax license to conduct said mercantile business. The demurrer to said plea was sustained, and the suit resulted in a judgment for the plaintiff, from which this appeal is prosecuted.

The cases of *Anding v. Levy*, 57 Miss. 51, 34 Am. Rep. 435, and *Decell v. Lewenthal*, 57 Miss. 331, 34 Am. Rep. 449, are inapplicable to the case made by this record. Those cases construe Acts 1875, p. 10, c. 1, § 5, which was in these words: "And any debts or claims that may accrue to any person on account of the business herein taxed, who shall fail or neglect, within thirty days after such license is due, to pay the same, shall be null and void and no suit shall be maintained in any court of law or equity, in this state, to enforce the payment of such claims, or a compliance with contracts in favor of any person or persons failing to pay the privilege tax required by this act." Let it be carefully noted that the contracts made in violation of this statute were expressly, by the statute itself, declared to be "null and void," and it was because of this express legislative declaration of absolute nullity that the court held in the two cases supra that such contracts were absolutely null and void, not simply unenforceable; that the statute so worded was self-executing; that a defendant, sued upon such contract, had under that statute a vested right, not remedy, in the absolute nullity of the contract so declared by the statute, which vested right could not be taken from him, even by a repeal of such statute; and that such repeal could not, consequently, have the effect of making such contracts, once legislatively declared null and void, valid after such repeal. These two decisions must be strictly confined to the statute which they construe.

Thereafter, in Rev. Code 1880, § 589, the law was most materially changed in this regard, and it was in this last section declared that "all contracts made with any person who shall violate this act, in reference to the business carried on in disregard of this law, shall be null and void, so far only as such person may base any claim upon them, and no suit shall be maintainable in favor of such person on any such contract." Following this up, section 3401, Code 1892, provides: "And all contracts made with any person who shall violate the provisions of this chapter in reference to the business carried on in disregard thereof, shall be null and void so far only as such person may base any claim upon them, and a suit shall not be maintainable in favor of any such person on any such contract." In Laws 1896, p. 50, c. 35, § 2, the same provision is enacted, and in Laws 1898, p. 31, c. 5, § 97, the same provision is again enacted. It will thus be seen, in this review of the statutes on the subject, that beginning with the statute of 1880, and continuing from that date until

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the adoption of the statute of 1898 above referred to, the exceedingly severe penalty denounced by the act of 1875, supra, of absolute nullity against such contracts, has been most materially changed, so that from the Code of 1880, up to and including the act of 1898, such contracts have not been null and void, but the remedy to enforce them has been suspended. The contracts were simply made unenforceable. They were not declared null and void.

Nothing prevented suit upon the contract, except the provision of these statutes. The attitude of the law, as regards such contract, from 1880 until the adoption of the revenue chapter of the Code of 1906 in April, 1906, has been such that such contracts were no longer null and void, but simply unenforceable. In fact, a tremendous change was wrought by this change in legislation, by taking from the defendant, when sued on such contracts, the right to plead a vested right in the nullity of the contracts. From 1880 to April 21, 1906, the defendant has never had such a vested right in the nullity of the contract, which right the Legislature could not take away by the repeal of the statute denouncing such nullity against such contracts. Since the Code of 1880, and up to April 21, 1906, all that the defendant has had is the right, if he so chose, to plead that the contracts could not be enforced against him in any court in this state. In other words, to put it shortly, under the act of 1875, and the decisions construing that act, the contracts were absolute nullities, and the defendant, when sued, had a vested right to plead such nullity, and that vested right could not be taken from him by the repeal of the statute. Since the Code of 1880 the defendant has had no such right. He has had merely the privilege of pleading that the plaintiff was without a remedy to enforce such contract. Under the act of 1875 it was a matter of right in the defendant, which the Legislature could not take away. Subsequently, by legislation since the Code of 1880, it is a mere matter of remedy, which the Legislature might properly take away by the repeal of any such statute. The difference is fundamental, and must be kept strictly in mind, that there may be no misapprehension either of the statutes or the decisions on the statutes in these two periods.

That this is also the true doctrine as generally accepted in other jurisdictions is shown in *Wade on Retroactive Laws*, § 300. After discussing therein the difference between repealing acts which take away vested rights and those which affect the remedy only, and in considering in that discussion the difference in this respect as between contracts mala in se and those only mala prohibita, the author says, in speaking of the cases of *Russell v. De Grand*, 15 Mass. 35, and *Springfield Bank v. Merrick*, 14 Mass. 322, as follows: "In the latter case the application is made to a note which, when executed, was

payable in the bills of banks of other states. This, being in contravention of a statute then in force, was held void, and the subsequent repeal of the prohibitory act would not affect the contract, so as to render it valid. In this case stress is even laid upon the fact that when the note was executed such contracts were prohibited under heavy penalties. The statute was a penal one, and a part of the penalty was the forfeiture occasioned by invalidating the contract. It amounted to a declaration that the right of the maker to repudiate his contract obligation was a right of which he could not be deprived by subsequent legislation. These decisions, however, notwithstanding their unquestioned respectability, will not support this doctrine against the great weight of American authority, which leaves statutory penalties dependent upon the perpetuity of the acts by which they are prescribed. The case of *Roby v. West*, 4 N. H. 285, 17 Am. Dec. 423, was an action for lottery tickets sold at a time when the law imposed a penalty upon such transactions, without any specific forfeiture of the right of recovery. The statute was repealed after the institution of the suit, and the court held that the illegality of the transaction was a good defense to the action when brought, although the act by which the sale of lottery tickets was prohibited did not declare in terms that such contracts would not bind purchasers, and that the imposition of the penalty by statute implied a prohibition. It was also held that a repeal of the statute after the institution of the suit would not make good an act illegal when done. But the decision of this case is more logically supported upon the additional ground which is assigned that, 'the repealing act having been passed since the commencement of this action, to construe it to take away any ground of defense which these defendants may have had under the repealed act would give it the operation of a retrospective law for the decision of a civil cause, which is prohibited by the Constitution.'"

And the author, at pages 300 and 301, further goes on to say: "In disposing of the question, *Peabody, J.*, says: 'The Legislature deeming it wise, as a measure of public policy, to restrain the circulation of notes of denominations less than \$5, made the act unlawful, and prohibited it, under the consequence, among others, of refusing enforcement of any contract based on such consideration. That law had its day, and was repealed when a change in the wants of society, or new light as to its real interests, arose. By that repeal the law is decided to be unwise, for the present, at least, and the contracts made under it, whose consideration was always morally good as between the parties, are now without the legal impediment of being contrary to legally established public policy (contraband of law), and are valid.' Reference is made in the opinion to *Curtis v. Leavitt*, 15 N. Y. 9, and *Lea-*

vitt v. Curtis, 15 N. Y. 9, where the doctrine is laid down that the repeal of usury laws removes the legal impediment to recovery on contracts made contrary to its provisions when in force. There are two courses of reasoning upon this subject, which, when followed out, lead to diametrically opposite conclusions. One of them is by insistence upon the distinction between rights demanded affirmatively and exemptions claimed negatively under a penal statute after its repeal, admitting that affirmative relief cannot be granted against obligations moral in themselves, which were voluntarily assumed, when such relief is sought after the repeal of the invalidating act, but holding that, when such an obligation is sought to be enforced, its original illegality will cling to it, so far as to warrant a denial of the legal remedy. The other course is to view the provision by which contracts contrary to the penal statute are rendered incapable of enforcement as dealing entirely with the remedy, touching the right only by way of denial, and that prospectively. When the act invalidates contracts for reasons of public policy, this is merely a penalty for disobedience, and the repeal of the statute naturally restores the remedy and abrogates the penalty. The latter seems the most consistent with other well-recognized principles of construing legislative acts, is least likely to defeat the legislative intention, and will rarely, if ever, be found to work a hardship by defeating a meritorious defense. In *Bank of Missouri v. Snelling*, 35 Mo. 190, the defendant sought to take advantage of acts working a forfeiture of plaintiff's charter. The act authorizing such a plea had been repealed prior to the suit, though subsequent to the contract sued on. *Bates, J.*, in delivering the opinion, says: "The act, when in force, vested no rights in any person. It only granted the privilege to enforce a penalty, which privilege could be withdrawn at any time."

We come now to the third period. By section 3894, Code of 1906, the entire clause, providing that no suit could be brought to enforce any such contracts where the privilege tax had not been paid, is dropped from the law absolutely, and that section on this subject reads as follows: "Any person or corporate body who shall exercise any of the privileges taxed by law in this state, without first paying the tax and procuring the license as required, shall, on conviction, be fined not less than an amount equal to five times the tax imposed on such privileges, or shall be imprisoned in the county jail not more than six months, or both by such fine and imprisonment." And this section was part of the chapter on privilege taxes, which chapter went into force by the act of adoption of the Code of 1906 (section 11) on April 21, 1906 (*Laws 1906*, p. 82, c. 101), some months before the larger part of the Code of 1906 became operative, to wit, on the 1st day of October, 1906, as held in *Young v. Insur-*

ance Co., 91 Miss. 710, 45 South. 706. From and after the 21st of April, 1906, we have the third period of legislation on this subject, under which suit on such contracts is no longer barred; the obstruction to such suits, the provision which we have been discussing, preventing suits on such contracts being absolutely dropped out of the law by this section 3894, Code of 1906. A very little reflection will disclose the trend of legislative thought on this matter. During the first period, under the act of 1875, the Legislature denounced against such contracts absolute nullity. Not only could no suit be brought on them, but the defendant had a vested right to plead their nullity, which right could not be taken away by the repeal of the statute. During the second period of legislation on the subject, from the Code of 1880 to April 21, 1906, the Legislature mitigated the severity of the penalty by taking away the declaration of nullity against these contracts, and by taking away, consequently, any vested right in the defendant to plead their nullity, and by simply providing that, as to remedy, no suit could be brought to enforce them. During this period of legislation it was a disability to sue, a matter relating to remedy alone, which the Legislature provided. It was, of course, constitutional for the Legislature, by the repeal of such statute, to revive the remedy and allow such suits to be brought. During these first two periods a part of the penalty, in the legislative view, consisted at first in taking away absolutely from the creditor his claim, and destroying it as a nullity. In the second period the Legislature did not destroy his claim, or affect his right otherwise than by denying him a remedy to enforce it. But in this third, and as we think far wiser, period of legislation on this subject, the Legislature has entirely abolished this feature of the law, and made the matter one with which the defendant debtor has nothing to do; one resting absolutely between the state and the delinquent taxpayer. And it has made the penalty quite severe, by imposing a penalty under section 3894, Code of 1906, of five times the amount of the privilege tax. Under this law the creditor is, as he ought to be, allowed to collect his debts, but is at the same time severely, but justly, punished by a quintuple tax for his failure to discharge his duty in the payment of his proper privilege tax.

We held, in the case of *Young v. Insurance Co.*, 91 Miss. 710, 45 South. 706, that the fact of the infliction of this penalty, does not have the effect of making the contract illegal. With this construction, since 1880, the contract has not been null and void, but the remedy to enforce it prohibited; and hence a repeal of such statute revives the remedy. This follows as a necessary consequence from the decisions of this court in *Pollard v. Insurance Co.*, 63 Miss. 244, 56 Am. Rep. 805, and *Insurance Co. v. Edwards*, 85 Miss. 322, 37 South. 748. In the *Pollard* case the court said:

"The statute does not deprive the owner of his property embarked in the business illegally carried on. The title is not in any manner affected. All the incidents of title remain with the rights of owner, in all respects, as to the property, except that no contract made in reference to the business not duly licensed can be enforced by him who has violated the law in carrying on the business." In the *Edwards Case*, we said: "The amnesty act, as held in the *Pollard Insurance Case*, 63 Miss. 244, 56 Am. Rep. 805, simply removes the barrier the state had set up between itself and a delinquent taxpayer." It necessarily results, from these decisions, that the reason why amnesty acts, such as have been passed, under the ban of this legislation, are constitutional, is because they relate alone to the remedy, not to any vested right.

The decisions in *Young v. Insurance Co.*, 91 Miss. 710, 45 South. 706, and *White v. Post & Bowles*, 91 Miss. 685, 45 South. 366, are entirely correct; but there are some inaccurate expressions in those opinions, which we now correct, that they may not mislead in the future. It is said in the case of *White v. Post & Bowles* that all contracts made with any person who violates the provisions of the act of 1898, under which that case was decided (*Laws 1898*, pp. 18-30, c. 5), are null and void; and in the concluding clause of the opinion it is said that even a subsequent repeal of that act, meaning the act of 1898, without a saving clause, would not make the contract under that act valid. As we have pointed out, contracts under the act of 1898 were not null and void, but simply unenforceable; and hence the cases of *Anding v. Levy*, 57 Miss. 51, 34 Am. Rep. 435, and *Decell v. Lewenthall*, 57 Miss. 331, 34 Am. Rep. 449, had no application in the case of *White v. Post & Bowles* to a contract falling under the law of 1898, and these cases were improperly cited. In the case of *Young v. Insurance Co.*, supra, it is said, on page 714, 91 Miss., and page 706, 45 South.: "Since 1880, up to the date of the Code of 1906, the privilege tax statutes contained a clause making all contracts made in this state of case absolutely null and void." The contract in that case was made on May 2, 1906, after the privilege tax chapter of the Code of 1906 went into effect on April 21, 1906, and of course, since there was then no bar to a suit, we properly held that suit could be maintained on that contract, since the remedy had been revived by the adoption of section 3894, Code of 1906. The sentence we have quoted from the opinion erroneously states the law during the period from the Code of 1880 to the Code of 1906. During that period contracts were not null and void, but simply unenforceable, as shown above, and the inapt reference in the *Young Case*, supra, to *Anding v. Levy* and *Decell v. Lewenthall*, supra, should not have been made. In short, the cases of *Anding v. Levy* and *Decell v. Lewenthall*

are limited strictly to the statute which they construed, to wit, the act of 1875, and they are wholly out of place in the consideration of the entirely different statutes since, beginning with the Code of 1880.

The learned counsel for appellant insists that section 4, Code of 1906, preserves to his client the vested right to the nullity declared by the act of 1875 against such contracts; but since, as we trust we have made perfectly clear, no such nullity has ever attended any such contract since the Code of 1880, that line of reasoning is not sound. Section 4 of the Code of 1906 is a saving clause for vested rights theretofore existing, but there is no vested right here involved; and it also preserves all claims of a plaintiff and defenses of a defendant which the law allows in pending suits, but not only was there no pending suit here prior to the Code of 1906, but there was nothing in the way of suit, except the prohibition that no suits should be brought on these contracts and a prohibition as to remedy, and when Code 1906, § 3894, left out this prohibition, there was nothing from and after April 21, 1906, the date when this section went into force, to prevent suit on such contracts, even theretofore made, since the Code of 1880.

Finally, these particular suits were instituted December 29, 1906, months after this section 3894 went into effect. This suit was therefore begun at a time when there was no clause in the statute law of this state prohibiting suits on a contract like this.

There is nothing in the contention of the learned counsel for the appellee, which he bases upon his interpretation of *Insurance Co. v. Bank*, 73 Miss. 478, 18 South. 931. As we have heretofore held, any transmutation in the form of such contracts will not keep this court from looking through all forms, of whatever kind, to the fact that the original contract was made at a time when a privilege tax had not been paid, and the vice of such contract affects all subsequent changes in the mere form of the contract, as held in *Puckett v. Fore*, 77 Miss. 391, 27 South. 381. It may be true in that case that the dealings extended through 10 years or more, and that there was a continuous account through the 10 years, and that the notes closing accounts in these years were charged back in the account. None of these facts make any difference in the paramount principle that wherever it could be shown, under the old law, from 1880 up to April 21, 1906, that the contract was originally made during a period when no proper privilege tax had been paid, such contract would remain unenforceable, no matter how many transmutations of form the original contract might undergo. The case of *Bank v. Frazer*, 63 Miss. 231, as well pointed out by learned counsel for appellee, is a case turning principally upon usury, and is therefore out of place in the consideration of the principle

underlying these merely unenforceable contracts. Money voluntarily paid in liquidation of a contract of this last character certainly never could be recovered; but money voluntarily paid, constituting usury, can be recovered back, and this shows the inapplicability of Bank v. Frazer in this sort of discussion.

We are therefore of the opinion that the action of the learned court below was eminently correct, and the judgment is therefore affirmed.

POLK v. POLK. (No. 13,536.)

(Supreme Court of Mississippi. Feb. 8, 1909.)

Appeal from Circuit Court, Jefferson Davis County; R. L. Bullard, Judge.

Action between R. D. Polk, Sr., and R. D. Polk, Jr. From the judgment, R. D. Polk, Sr., appeals. Affirmed.

Livingston & Cowart, for appellant. J. C. Carlton, for appellee.

PER CURIAM. Affirmed.

HARRIS v. STATE. (No. 13,334.)

(Supreme Court of Mississippi. Feb. 8, 1909.)

Appeal from Circuit Court, Lafayette County; W. A. Roane, Judge.

Miles Harris was convicted of selling diseased meat, and appeals. Affirmed.

W. P. Shinault, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

MATTHEWS v. HARTLEY. (No. 13,828.)

(Supreme Court of Mississippi. Feb. 8, 1909.)

Appeal from Circuit Court, Copiah County; W. H. Potter, Judge.

Action between S. S. Matthews and A. E. Hartley. From the judgment, Matthews appeals. Affirmed.

Webster Millsaps and Harris & Willing, for appellee.

PER CURIAM. Affirmed.

ANDERSON v. GAMBRELL et al.

(No. 13,412½.)

(Supreme Court of Mississippi. Feb. 8, 1909.)

Appeal from Circuit Court, Smith County; R. L. Bullard, Judge.

Action between J. D. Anderson and J. D. Gambrell and others. From the judgment, Anderson appeals. Affirmed.

J. J. Stubbs, for appellant. Mayes & Longstreet and Hughes & Wills, for appellees.

PER CURIAM. Affirmed.

QUEEN v. STATE. (No. 13,456.)

(Supreme Court of Mississippi. Feb. 8, 1909.)

Appeal from Circuit Court, Jefferson County; M. H. Wilkinson, Judge.

Jim Queen was convicted of murder, and appeals. Affirmed.

Martin & Posey, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

WILSON v. STATE. (No. 13,638.)

(Supreme Court of Mississippi. Feb. 8, 1909.)

Appeal from Circuit Court, Holmes County; Sydney Smith, Judge.

Jerry Lee Wilson was convicted of an unlawful sale of intoxicating liquor, and appeals. Affirmed.

Boothe & Pepper, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

PULLEN v. STATE. (No. 13,637.)

(Supreme Court of Mississippi. Feb. 8, 1909.)

Appeal from Circuit Court, Holmes County; Sydney Smith, Judge.

Bryce Pullen was convicted of crime, and appeals. Affirmed.

Boothe & Pepper, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

FARROW v. STATE. (No. 13,440.)

(Supreme Court of Mississippi. Feb. 8, 1909.)

Appeal from Circuit Court, Tate County; W. A. Roane, Judge.

Arthur Farrow was convicted of murder, and appeals. Affirmed.

See, also, 45 South. 619.

J. W. Lauderdale, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

RUFFIN v. CUMBERLAND TELEGRAPH & TELEPHONE CO. (No. 13,454.)

(Supreme Court of Mississippi. Feb. 8, 1909.)

Appeal from Circuit Court, Pike County; M. H. Wilkinson, Judge.

Action by Alice Ruffin against the Cumberland Telegraph & Telephone Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Clem V. Ratcliff and Ethridge & Ethridge, for appellant. Harris & Willing, for appellee.

PER CURIAM. Affirmed.

BANK OF BLOUNTVILLE v. SIMOND MFG. CO. (No. 13,568.)

(Supreme Court of Mississippi. Feb. 8, 1909.)

Appeal from Circuit Court, Lawrence County; R. L. Bullard, Judge.

Action between the Bank of Blountville and the Simond Manufacturing Company. From the judgment, the bank appeals. Affirmed.

J. C. Carlton, for appellant. Touchstone & Salter, for appellee.

PER CURIAM. Affirmed.

BAGGETT v. MISSISSIPPI CENT. R. CO.
(No. 13,377.)

(Supreme Court of Mississippi. Feb. 8, 1909.)

Appeal from Circuit Court, Jefferson Davis County; W. H. Potter, Judge.

Action between Frank Baggett and the Mississippi Central Railroad Company. From the judgment, Baggett appeals. Affirmed.

R. N. & H. B. Miller, for appellant. S. E. Travis, for appellee.

PER CURIAM. Affirmed.**POLESTOCK LUMBER CO. v. FOREST PRODUCT MFG. CO.** (No. 13,504.)

(Supreme Court of Mississippi. Feb. 1, 1909.)

Appeal from Circuit Court, Simpson County; R. J. Bullard, Judge.

Action between Polestock Lumber Company and the Forest Product Manufacturing Company. From the judgment, the lumber company appeals. Affirmed.

Shannon & Street, for appellant. J. S. Sexton, for appellee.

PER CURIAM. Affirmed.**YAZOO & M. V. R. CO. v. CORLEY.**
(No. 13,088.)

(Supreme Court of Mississippi. Feb. 1, 1909.)

Appeal from Circuit Court, Coahoma County; Sam C. Cook, Judge.

Action by S. A. Corley, executor, against the Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Mayes & Longstreet, for appellant. J. W. Cutrer, for appellee.

PER CURIAM. Affirmed.**CONN v. NATCHEZ TRANSP. CO.**
(No. 13,516.)

(Supreme Court of Mississippi. Feb. 1, 1909.)

Appeal from Circuit Court, Adams County; M. H. Wilkinson, Judge.

Action between S. A. Conn and the Natchez Transportation Company. From the judgment, Conn appeals. Affirmed.

E. J. Van Court, for appellant. W. C. Martin, for appellee.

PER CURIAM. Affirmed.**YAZOO & M. V. R. CO. v. CONNER.**
(No. 13,517.)

(Supreme Court of Mississippi. Feb. 1, 1909.)

Appeal from Circuit Court, Adams County; M. H. Wilkinson, Judge.

Action by Mrs. Mary B. Conner against the Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Mayes & Longstreet, for appellant. Lemuel P. Conner, for appellee.

PER CURIAM. Affirmed.**McBRIDE v. CUEVAS et ux.** (No. 13,533.)
(Supreme Court of Mississippi. Feb. 1, 1909.)

Appeal from Circuit Court, Harrison County; W. H. Hardy, Judge.

Action between D. R. McBride and Elmore Cuevas and wife. From the judgment, McBride appeals. Affirmed.

W. G. Evans and Horace Bloomfield, for appellant. Rucks Yerger, for appellee.

PER CURIAM. Affirmed.**LUCKEY v. KING et al.** (No. 13,557.)
(Supreme Court of Mississippi. Feb. 1, 1909.)

Appeal from Chancery Court, Simpson County; J. L. McCaskill, Chancellor.

Action between L. C. Luckey and S. S. King and others. From the judgment, Luckey appeals. Affirmed.

R. C. Russell, for appellant. McIntosh Bros., for appellees.

PER CURIAM. Affirmed.**FAIRFIELD et al. v. NORTHROP.**
(No. 13,546.)

(Supreme Court of Mississippi. Feb. 1, 1909.)

Appeal from Circuit Court, Harrison County; W. H. Hardy, Judge.

Action between George W. and N. C. Fairfield and Elmer Northrop. From the judgment, G. W. and N. C. Fairfield appeal. Dismissed.

W. G. Evans and Horace Bloomfield, for appellants. J. J. Curtis, for appellee.

PER CURIAM. Appeal dismissed.**HARRISON NELSON CO. v. THOMPSON.**
(No. 13,453.)

(Supreme Court of Mississippi. Feb. 1, 1909.)

Appeal from Circuit Court, Smith County; R. L. Bullard, Judge.

Action between the Harrison Nelson Company and S. O. Thompson. From the judgment, the company appeals. Affirmed.

R. C. Russell, for appellant. J. J. Stubbs, for appellee.

PER CURIAM. Affirmed.

(36 Fla. 16)

BARNHILL v. STATE.(Supreme Court of Florida. Dec. 19, 1908.
Headnotes Filed Feb. 3, 1909.)**1. CRIMINAL LAW (§ 1064½*)—GROUNDS OF REVIEW—AUTHENTICATION.**

A fact asserted in a motion for new trial is not self-substantiative before the appellate court, but it must be authenticated otherwise in the transcript of record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2676; Dec. Dig. § 1064½.*]

2. HOMICIDE (§ 300*)—INSTRUCTIONS—SELF-DEFENSE.

In a trial for murder in the first degree, an instruction upon the law of self-defense should be so framed as to inform the jury that the defendant could not justify the killing, unless he had reason to believe, and did believe, that it was necessary to save his own life, or to save himself from great personal injury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 616, 617; Dec. Dig. § 300.*]

3. HOMICIDE (§ 300*)—INSTRUCTIONS—SELF-DEFENSE—IMMINENT DANGER.

An instruction in a trial for murder held properly refused because it failed to hypothesize defendant's imminent danger.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 616, 617; Dec. Dig. § 300.*]

4. HOMICIDE (§ 300*)—INSTRUCTIONS—SELF-DEFENSE—NECESSITY TO TAKE LIFE.

On a prosecution for murder, a requested instruction upon the law of self-defense was properly refused because it ignored the necessity of the defendant to take the life of the deceased in order to save his own life.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 616, 617; Dec. Dig. § 300.*]

5. CRIMINAL LAW (§ 769*)—TRIAL—INSTRUCTIONS.

An instruction is properly refused when the facts postulated therein do not warrant a verdict of not guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1803, 1806; Dec. Dig. § 769.*]

6. CRIMINAL LAW (§ 1160*)—WRIT OF ERROR—QUESTIONS OF FACT.

An appellate court has no original jurisdiction to set aside verdicts and grant new trials because of the insufficient evidence to sustain the verdicts. Such court acts only upon a ruling of the trial court refusing a new trial upon that ground where such ruling is erroneous; and, in determining this question the evidence upon which the verdict of the jury and the ruling of the court below are predicated will be considered. If there is evidence legally sufficient to support the verdict, and the verdict has been approved by the trial judge, the appellate court will not disturb it, though there be conflicts in the evidence, unless the preponderance of the evidence is such that the jury must have been improperly influenced to render the verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3084; Dec. Dig. § 1160.*]

7. HOMICIDE (§ 121*)—DEFENSES—PAST QUARREL.

A past quarrel or encounter, if sufficient time for the cooling of passion has transpired, will not reduce the killing from murder to manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 176; Dec. Dig. § 121.*]

8. HOMICIDE (§ 116*)—SELF-DEFENSE.

When a man has been threatened, he is to judge from the circumstances by which he is

surrounded, and as they appear to him; but, when he acts upon appearances and takes the life of his fellow man, he does it at his peril, and he cannot justify such killing, unless there are circumstances which would induce a reasonably cautious man to believe that it was necessary to save his own life, or to save himself from great personal injury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 161; Dec. Dig. § 116.*]

9. HOMICIDE (§ 112*)—SELF-DEFENSE—AGGRESSION.

When a man has been threatened, he may go wherever his legitimate business calls him, but he has not the right to lie in wait for and slay his adversary. Neither may one who seeks a person who intends to kill him, or otherwise brings the danger upon himself, avail himself of the plea of self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 145, 146; Dec. Dig. § 112.*]

10. HOMICIDE (§ 22*)—PREMEDITATION.

In order that a person may be convicted of murder in the first degree, he must have acted from or in pursuance of a premeditated design to effect the death as alleged. Proof of a mere intent to kill would not be sufficient. Such design must precede the killing by some appreciable space of time, but the time need not be long. It must be sufficient for some reflection or deliberation upon the matter, for choice to kill or not to kill, resulting in the formation of a definite purpose to kill.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 37, 38; Dec. Dig. § 22.*]

11. HOMICIDE (§ 282*)—QUESTIONS FOR JURY—PREMEDITATION.

Whether a premeditated design to kill was formed must be determined by the jury from all the circumstances of the case.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 574; Dec. Dig. § 282.*]

12. HOMICIDE (§ 253*)—EVIDENCE—SUFFICIENCY.

Evidence examined, and found sufficient to sustain a verdict of murder in the first degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 523; Dec. Dig. § 253.*]

Taylor and Hocker, JJ., dissenting in part.

(Syllabus by the Court.)

In Banc. Error to Circuit Court, Wakulla County; John W. Malone, Judge.

Miley G. Barnhill was convicted of murder in the first degree, and he brings error. Affirmed.

Nat R. Walker, for plaintiff in error. W. H. Ellis, Atty. Gen., for the State.

PARKHILL, J. The plaintiff in error was indicted for, tried, and convicted of the crime of murder in the first degree in the circuit court for Wakulla county, and seeks relief here by writ of error from the sentence of death imposed upon him.

The first assignment of error is: "The court erred in not excluding from the jury one J. Edgar Pigott, who was challenged for cause to wit, upon the ground that he, said juror, was a second cousin and the brother-in-law of the deceased."

The record shows that one Edgar Pigott was a member of the jury that tried and convicted the defendant; but it does not ap-

pear anywhere, except in the motion for a new trial, that the defendant objected to or challenged the said juror upon the ground stated. Although the said objection to the juror is made a ground of the motion for a new trial, it is not sustained by affidavit or otherwise. A fact asserted in a motion for new trial is not self-substantiative before this court, but it must be authenticated otherwise in the transcript of record. *Oliver v. State*, 54 Fla. 93, 44 South. 712; *Horne v. Carter*, 20 Fla. 45. Therefore this assignment fails.

The fourth, fifth, and sixth assignments of error are based upon the refusal of the court to give the following instructions requested by the defendant:

"First. If you believe at the time when Noah Pelt left the defendant, and went over to Gwaltney's store immediately after the fight between the defendant and himself, and that the defendant Barnhill had reasonable ground to apprehend or conclude that by Noah Pelt going into said store, knowing that there was a Winchester rifle in said store, that Noah Pelt would do him some great personal injury, and that the defendant, Barnhill, believed that he was in imminent danger that such design would be done by Pelt's entering Gwaltney's store, you should find a verdict of not guilty.

"Second. If you find that the defendant, Miley Barnhill, sought an interview or left his store, believing that Noah Pelt had cursed his wife saying, 'Come out there, you damn bitch,' in order to ask the deceased what he meant by abusing his wife, and that he left his store with no hostile intention, but solely to have the deceased explain his language so used, and a wordy altercation ensued, and Noah Pelt, the deceased, became angry, and during which time the deceased assaulted Miley Barnhill, the defendant, with a deadly weapon, a pocketknife, in such a manner as to create in the defendant's mind a reasonable apprehension of serious bodily injury, and that after an infliction on the defendant by the deadly weapon a pocketknife in the hands of the accused that he went into Gwaltney's store immediately afterwards, saying that he was going after a gun to kill the Miley Barnhill, the defendant, and Miley Barnhill acting under a reasonable apprehension of death or some bodily harm, you should find your verdict not guilty.

"Third. If you believe that Noah Pelt, the deceased, beat Miley Barnhill on the head with a pocketknife, and the defendant received wounds from the beating, and reasonably appeared to the defendant that the fight between Noah Pelt and the defendant was not over, and that though Noah Pelt had left him, going into Gwaltney's store, that he would soon return, and that he would receive additional bodily injury from the Noah Pelt, and Noah Pelt had the ability to inflict the injury, and that the danger was

threatening and imminent, and under such circumstances, and so believing, the defendant shot and killed Noah Pelt, that he was justifiable upon the ground of his necessary self-defense, and you should find him not guilty."

The court ruled correctly when he refused to give all these instructions. We will not attempt to point out all the defects in them. Their inaccuracies will more fully appear when we come to discuss the evidence and the law applicable thereto. Suffice it to say they do not limit the jury to the evidence in determining whether the facts enumerated in the instructions are true; but they instruct the jury to find a verdict of not guilty if they believe certain facts without requiring the jury to believe these facts from the evidence. Care should always be taken to instruct the jury that they must base their verdict upon the evidence adduced before them. *Doggett v. Jordan*, 2 Fla. 541. In the cited case the court said: "There are few points upon which jurors are more apt to mistake than in supposing that they may find their verdict upon their own knowledge of the case acquired before they took their seats in the jury box." Even if charges given require the jury to make their finding only on the evidence, that will not perfect the requested instructions.

The first of these instructions is erroneous in calling for a verdict of not guilty if "the defendant Barnhill believed that he was in imminent danger that such design would be done by Pelt's entering Gwaltney's store." The instruction should have been so framed as to inform the jury that the defendant could not justify the killing, unless he had reason to believe, and did believe, that it was necessary to save his own life or to save himself from great personal injury.

The second of these instructions is erroneous in basing the innocence of the defendant upon his acting under a reasonable apprehension of death or some bodily harm. The danger must be imminent. *Section 3203, Gen. St. 1906*; *Alvarez v. State*, 41 Fla. 532, 27 South. 40; *Sylvester v. State*, 46 Fla. 166, 35 South. 142; *Gladden v. State*, 12 Fla. 562.

The third instruction is erroneous in several respects. If the defendant believed or had reason to believe that he would receive "additional injury" from Pelt, and that the danger (of receiving "additional injury") was threatening and imminent, he would not be justified in taking Pelt's life. As this instruction is framed, the defendant would be justified in killing Pelt, if the additional injury were only a blow with the open hand. The reasonable appearance of additional injury to the defendant from Pelt and the defendant's belief that such danger is threatening and imminent will not alone justify the defendant in taking Pelt's life. He must have had reason to believe and believed that he was in imminent danger of

death or great bodily harm, and that it was necessary for him to so take the life of Pelt in order to save his own life. The facts do not warrant the third instruction, and the facts postulated therein do not warrant a verdict of not guilty. *Hisler v. State*, 52 Fla. 30, 42 South. 692.

The second, third, and seventh assignments of error may be considered together: That the verdict is contrary to the law, the charge of the court, and the evidence.

The substance of the evidence is as follows: C. B. Stephenson, for the state, testified: That he knew the defendant, though he was not personally acquainted with him; that he did not know the deceased. "I was standing on the corner of the depot platform on the day of the tragedy, and saw two men come up with a wagon and team, which they hitched to a tree in a southeast direction from the defendant's store. One of these men I afterwards learned was the deceased, Noah Pelt. They then went to Gwaltney's store. A little while afterwards I saw the deceased coming from Gwaltney's store, going in the direction of his wagon, and passing in front of the defendant's store. A cow was eating from a wagon near the defendant's store, and, when he got directly in front of the store, he said, 'Eat it, you damn bitch,' and passed about ten feet further on, when the defendant came out of his restaurant, the door of which was closed when Pelt spoke to the cow. The defendant came up to Pelt, and they talked a little while, but I could not hear what they said. The wind was blowing hard, and prevented my hearing what they said. They came in front of the store, and quarreled. The defendant was facing me, and I saw him reach out and catch Pelt in the collar, and they then engaged in a fist and skull fight, and Barnhill was worsted. They fought half way across the street towards the depot, and then stopped fighting. Pelt then drew his knife from his pocket, but did not open it. Then Barnhill said, 'You are going to use your knife, are you?' and turned towards his store, and, as he turned, Pelt struck him on the side of the head with his hand closed on the unopened knife. Barnhill staggered a little after the blow, and went to his store, and Pelt said to him, 'Get your gun, and shoot me,' and turned and walked to the depot platform, and then went to Gwaltney's store, and I went around to the other side of the platform to avoid seeing what else might happen, and soon heard the report of a gun." On cross-examination this witness said, in substance: Barnhill's store and restaurant was just across the street (in the village on the railroad called Arran) from the depot—on the east side of the street. The fighting commenced directly in front of the steps to Barnhill's store. They talked a very little while before they commenced to fight. Some negroes were sitting on the depot platform just before the difficulty. "I don't know whether Pelt hurt Barnhill when

he struck him. Presume he did. He struck a quartering blow, and Barnhill dodged his head. Pelt came across the street, and stopped on the depot platform after separating from Barnhill. Barnhill was bleeding after the first blow given him somewhere about the eyes. The difficulty occurred about 11 or 12 o'clock in the day. The doors of Barnhill's store and restaurant were closed as they appeared to me. I saw nothing further after deceased stood on the platform and Barnhill stood at the steps of his restaurant door. Pelt was mad and cursing when I walked around the depot to avoid seeing more. The last I saw of Pelt he was standing on the platform."

J. C. Council, for the state, testified substantially as follows: "I know the defendant, and knew the deceased, Noah Pelt. The latter is now dead. He was shot in the head and killed in Wakulla county, Fla. I was at Arran on December 14, 1907, and saw Noah Pelt and Tomlinson come up there in a wagon, and Pelt hitched the mule and walked to Gwaltney's store. Afterwards I heard fighting outside of depot building. I was in the building at the time. I went out of the depot and saw the defendant, Barnhill, with a gun in his hand go to front of Gwaltney's store and stop, and then put the gun up to his shoulder with the muzzle pointing in the doorway of the store, and sight for some time, and then shoot, and I then heard something fall in the store. The defendant then took the gun down from his shoulder, and turned to go to his store, and said: 'I wound up that little rumpus damn quick.' I saw him going to Gwaltney's store with the gun. It was a breechloader. He broke it, and threw out the shell. Barnhill's restaurant is about 40 yards from Gwaltney's store. He held the gun to his shoulder, and sighted so long that I began to think that he wasn't going to shoot. I went to Gwaltney's store just after the shooting, and saw Pelt lying in the store dead, with blood streaming out of the side of his head. I was standing at the northwest corner of the depot when I saw Barnhill go to Gwaltney's store with a gun and shoot into the doorway."

Drew Vickers, for the state, testified in substance as follows: "I knew Noah Pelt and knew the defendant. Pelt is now dead. I saw him after his death in Gwaltney's store at Arran. Pelt came into Gwaltney's store, and about five minutes afterwards Barnhill came to the door of the store with a gun, and shot Pelt through the doorway; Pelt was doing nothing when he was shot. Pelt fell to the floor, and died. I was standing in the store at the time, and saw Barnhill when he first came up to the store door, and saw him when he shot and killed Pelt." Cross-examination: "Pelt was cursing when he came into Gwaltney's store. I did not hear him ask for a gun. I think he was cursing Barnhill. Pelt had been in the store about five

minutes when Barnhill came to the door and shot him."

Alfred Tucker, for the state, testified in substance as follows: "I know the defendant, and knew Noah Pelt, who is now dead. I was in Gwaltney's store at Arran at the time Pelt was killed. I heard fighting going on on the outside of the store, and went to the door and looked out, and saw Pelt strike Barnhill on the head with his fist, and then go to the depot platform, and say to Barnhill, 'Shoot, you damn cowardly son of a bitch.' I turned from the door, and saw no more until Pelt came into Gwaltney's store. He came into the store and stood by the counter, and asked if there was a gun in there, and I said, 'No.' While Pelt was standing by the counter in the store, Barnhill came to the store door and shot him dead without giving him time to say anything."

Cross-examination: "I saw Pelt strike Barnhill with his fist. I saw no knife in his hand at the time. I don't know whether there was a gun in the store when Pelt asked if there was one there. When Pelt stepped up on the porch he asked if any gun was there, and I said, 'No.'"

Redirect: "Pelt got no gun, and had none when he was shot."

Joe Tucker, for the state, testified, in substance, as follows: "I was in Gwaltney's store at Arran on December 14th last, and saw Noah Pelt come into the store, and about five minutes afterwards Miley Barnhill came to the door of the store, and shot and killed him."

Cross-examination: "I don't know whether Joe Oaks' rifle was in the store that day. He kept it there. I did not hear Pelt call for a gun or make any threat about Barnhill. Pelt was talking loud and cursing, saying what a man he was. He got no gun in the store."

Henry Willis for the state testified, in substance, as follows: "I was present when Noah Pelt was killed. He was killed in Gwaltney's store. Miley Barnhill shot him."

Cross-examination: "I was standing on depot platform, and saw blood on the back of Barnhill's head. Pelt was in Gwaltney's store. I was not present during the fighting. I saw Pelt after he was dead. I saw Barnhill shoot. After Barnhill and Pelt separated, Barnhill went to his restaurant and got his gun. He was not staggering."

Lewis Gwaltney, for the state, testified, in substance, as follows: "I live at Arran, and keep store with Alfred Tucker. I knew Noah Pelt. He is now dead. I saw him dead in my store on the 14th day of last December. I do not know anything about what happened on the outside of the store. Of course, I heard them fighting, and heard Noah Pelt when he came into the store, and asked if a gun was in there, and I said, 'No.' He, Pelt, had his knife unopened in his hand when he entered the store. He seemed to have got quieted down before I saw Barnhill point a gun in the store door and fire; and, when he

fired, Pelt fell, quartering behind the counter, and, when I looked at Pelt, he was dead, and was bleeding badly from his head. I don't know how long it was after Pelt first entered the store before Barnhill came there and shot him, but it seemed to be some time. It was time enough for Pelt to seem to cool down and get quiet. It might have been five or six minutes. I can't say."

Cross-examination: "It is about 30 yards from the north side of the depot platform to my store in Arran. Pelt when he came into my store said, 'Boys give me a gun.' He was mad and cursing, but never cursed at Barnhill, was just cursing, and saying what a man he was. Pelt had an unopened knife in his hand when he entered my store, and had it in his hand when he was shot and after he fell. There was no gun on the counter when Pelt came into the store, but there was a Winchester rifle hanging up in the back part of the store under a coat. That rifle was usually kept in the store when its owner, Joe Oaks, was not using it, and he also kept his trunk and clothes in there, too. Pelt never went where the rifle was, and never knew any rifle was in the store."

Here the state rested its case.

John Laws, a defendant's witness, testified, in substance, as follows: "I know the defendant Barnhill and knew Noah Pelt. I did not see the fight which occurred between them. I was going at the time to my house and was about 200 yards from the northeast side of the depot, and Barnhill's restaurant was between me and where the fight took place. I heard loud cursing and heard the fuss like some persons were fighting. After a short while I saw Pelt go into Gwaltney's store, and hear him cursing loudly. From where I was standing I did not see him until after he had left the place where I judge he was fighting with Barnhill, and, when he got in the open space between Gwaltney's store and Barnhill's store, I could then see him plainly. I then turned again to go home when I heard a gun shoot. It could not have been longer than two minutes after I saw Pelt enter Gwaltney's store before I heard the gun shoot. It might have been longer, but I don't think it possible, for I had just turned round and walked a few paces when I heard the gun shoot." The witness here identified and verified a plat of the scene of the fight and tragedy showing the surrounding buildings mentioned in the evidence of the different witnesses.

E. H. Laws, for the defense, testified substantially as follows: "I was at Arran on the day Noah Pelt was killed. I was standing near the railroad pump, and saw an arm reach out and strike Miley Barnhill. I then saw Barnhill go to his restaurant and Pelt go to Gwaltney's store. It was Pelt who struck Barnhill. I was standing right against the water tank, and the corner of the freight house prevented my seeing the fight. Pelt went over to Gwaltney's store

right after he struck Barnhill, and the latter went to his restaurant. I saw nothing further of the fight. I was some distance from them. Pelt was cursing, and I heard him say: 'You damn son of a bitch, shoot me if you want to.' This occurred after the striking. I heard the report of a gun a short while or a few minutes after Pelt went into Gwaltney's store."

Cross-examination: "A few minutes after I went into the pumphouse I heard the report of a gun."

Hagar Wilson for the defense testified substantially as follows: "I heard Noah Pelt as he came by the door of the house called restaurant in which I was sitting with my back to the door, which was half open, curse, saying: 'Come out there, you damn bitch.' Mrs. Barnhill was fixing dinner on the table, and Mr. Barnhill was behind the counter. When Mrs. Barnhill heard Pelt curse like that, she said: 'My Lord! listen.' Then Mr. Barnhill went out from behind the counter bareheaded, right out to Mr. Pelt, and asked him what he meant, saying: 'Mr. Pelt, I would not curse before your family like that.' Mr. Pelt then said: 'Don't you like it?' Mr. Barnhill said, 'No; I don't.' Then Pelt called Barnhill 'a damn son of a bitch,' and they went to fighting. I don't know who struck the first lick—just went to fighting. When Mr. Barnhill went out to meet Mr. Pelt, Mrs. Barnhill and myself stood in the doorway and saw them fighting. They kept on fighting until they got clear across to depot, when Barnhill pulled loose from Pelt and turned round, and started towards his house, when Pelt ran his hand in his pocket and pulled out his knife, and struck Barnhill twice on his head, which looked like it staggered him, and, when the fight stopped, Barnhill came to his store and Pelt went to Gwaltney's store. I did not see Pelt jump up on the platform, but heard him say, 'Boys, hand me a gun,' and the boys sitting there jumped up and ran away. I saw no gun and heard nothing else, and saw no more. I shut the door. I heard the report of the gun after Pelt went into Gwaltney's store. It was no time hardly after I saw Pelt go into Gwaltney's store before I heard the gun fire."

Cross-examination: "I saw none of the boys with guns, and they all ran away."

Dan Wright for the defense testified, in substance, as follows: "I was sitting over on the depot platform near Thomas Hallman and Arch Miles, and had a gun lying across my lap, and saw Mr. Pelt come out of Gwaltney's store with a sack in his hand, and, when he got in front of Mr. Barnhill's restaurant, I heard him say: 'Get out of there, you damn bitch.' Then Mr. Barnhill came out and told Mr. Pelt not to curse there, and Pelt asked him if he did not like it, when they both went to fighting and fought clear over to the depot platform near where Thomas Hallman, Arch Miles, and myself were

sitting. When they quit fighting and Mr. Barnhill turned to go back to his house, Pelt run his hand in his pocket, and pulled out his pocketknife, and struck Barnhill on his head with the jaws of his knife. Barnhill then turned, and walked off towards his storehouse, and Mr. Pelt then asked me to hand him my gun, but I would not let him have it, and then run over to Mr. Vanse's store back of the depot, and heard no more. Pelt cursed a time or two in the fight. He asked for my gun, but never tried to take it from me. Barnhill first spoke to Pelt in a quiet manner, and did not seem to be mad. I was never in the employ of Barnhill, or ever worked for him at all at no time."

Cross-examination: "I could not tell who struck the first lick, whether it was Barnhill or Pelt. They both seemed to go together at once. When Pelt asked for my gun, I don't remember what he said he wanted with it. I jumped up and ran back of the depot to Vanse's store, and hid my gun. I had just got to Vanse's door from hiding my gun when I heard the report of the gun."

Arch Miles, for the defense, testified, in substance, as follows: "I know the defendant. I am not in his employment. I saw the fight between him and Pelt. I was sitting on the platform near Dan Wright and Tom Hallman. They fought to near the depot, almost up to where I was sitting when they pulled from each other, stopped fighting, and Barnhill turned to go back, when Pelt pulled his knife out of his pocket and struck Barnhill two licks on his head, and then turned to Dan Wright and asked for his gun. Wright did not give him the gun, but jumped up and ran, and then Pelt got on depot platform, pulled off his coat, and said to Barnhill, 'Shoot, damn you,' then went across to Gwaltney's store, and Barnhill went into his store and got his gun, and then went to Gwaltney's store and shot. I am not employed by Barnhill, nor have I ever been in his employ, or not employed by any of his people. I am now employed at Carrabelle with Mr. Revells."

Cross-examination: "I never saw Barnhill come out of his door. He was on the outside when I saw him. I sat on the platform at the same time as the other boys. There were two guns there—mine and Dan Wright's."

Isaac Broward, for the defense, testified, in substance, as follows: "I know the defendant. I was at Arran on the day of the fight between the defendant and Noah Pelt. I was about 75 yards away on an engine and just saw them fighting. I saw them stop fighting and part, and Pelt struck Barnhill when parting. He struck him with his fist. He did not stagger from the blow. I then saw Pelt go towards Gwaltney's store. I never heard a word. The warehouse obstructed my view and kept me from seeing more. I don't know whether Pelt had a knife."

Mrs. Dora Barnhill for the defense testi-

fled, in substance, as follows: "I am the wife of the defendant. When Mr. Pelt came by the restaurant on the day he was killed, between 11 and 12 o'clock, nearly 12, Hagar Wilson was sitting with her back turned to the front door, which was about half open. I was fixing dinner on the table, and Mr. Barnhill was behind the counter. When Mr. Pelt passed by the door and looked in and said, 'You damn bitch, come out there,' I said, 'My Lord! listen.' Mr. Barnhill then came behind the counter, and went to the store steps, where Pelt was standing outside, and said to Pelt in a kind tone: 'Mr. Pelt, I would not curse before your wife, and, furthermore, I would not curse around your family.' Mr. Pelt then said, 'Don't you like it?' Mr. Barnhill said, 'No; I don't like it.' Then Pelt said: 'You God damn son of a bitch, you have not got it to take.' They then went to fighting, and fought until they got over to the warehouse porch, and then Mr. Barnhill tore loose from Pelt, and then Pelt pulled out his pocketknife, and struck Mr. Barnhill over the head twice with the jaws of his knife, which staggered him, and then turned to Dan Wright, who was sitting on the warehouse porch, and asked Dan to give him the gun, that he wanted to 'kill the damn son of a bitch.' Then Pelt jumped up on the platform, and pulled off his coat and vest, and cursed Mr. Barnhill with all sorts of damn son of bitches, and then walked on down very fast to Mr. Gwaltney's store, which was an opposite direction from his wagon, saying, 'You God damn son of a bitch, I will go over to Gwaltney's store and get a gun, and kill you.' He then entered Gwaltney's store, where I knew a Winchester rifle was constantly kept, and which was lying there on the counter about two hours before; for I saw it there. Mr. Barnhill was badly hurt from the wounds made on his head from the blows struck by Pelt's knife. The blood was streaming down from his head. When I saw Pelt going after the rifle and heard him say that he was going to kill Mr. Barnhill, I ran back into the restaurant, and did not see any more. When I heard the gun shoot, I thought that Pelt had shot Mr. Barnhill. I knew that a rifle was kept in Gwaltney's store because the rifle belonged to Mr. Joe Oaks, who was a deputy sheriff, and Mr. Oaks kept all his things there and his trunk. When I last saw Mr. Barnhill on that occasion, he did not have a gun in his hand, but his gun was kept in the storehouse where we sold groceries, and we eat in the restaurant which was almost joining, in which I ran and went to the back part of it when I heard the gun shoot."

G. W. Spears, for the defense, testified, in substance, as follows: "I did not see any of the fighting between Barnhill and Pelt. I saw neither of them, but heard fussing near the depot. I was sitting at the time over at Vanse's store, not 100 yards on the west side of the depot from Gwaltney's store, when

Dan Wright came running over to Vanse's store and passed by me near the door and hid his gun, which he had in his hand, in a barrel behind the end of the counter. He no sooner put his gun in the barrel, when I heard a gun shoot over at Gwaltney's store. The reason I did not see the fighting was because the depot was between me and the place they were fighting. Yes; I am certain I heard the gun shoot. Dan Wright had hardly got his gun hid in the barrel before I heard the gun shoot."

Thomas Hallman, for the defense, testified, in substance, as follows: "I was sitting near Dan Wright and Arch Miles on the end of the depot platform on the north side near the steps which was right across from where Mr. Barnhill kept his restaurant. He also kept a store, but not in the same building, but nearly joining, and I saw Mr. Pelt pass by Barnhill's restaurant before he was shot. The restaurant door was about half shut. When Pelt got opposite Barnhill's door, he stopped, and said, 'You damn bitch' or 'bitches'—I could not understand which—'you come out of there.' Not long after he spoke these words, Mr. Barnhill came out from his restaurant bareheaded, and said like this: 'Mr. Pelt, I would not curse around your family like that.' Then Pelt said: 'If you don't like it, you need not take it, you God damn son of a bitch.' They then went to fighting, and fought across nearly to where Dan Wright, Arch Miles, and myself were sitting. They then stopped fighting, and it seemed that Barnhill jerked loose from Pelt and started back towards his restaurant, when Pelt pulled out his knife and struck Barnhill two licks with it unopened on his head, which staggered him. Barnhill then started to walk off, when Pelt turned to Dan Wright, and said, 'Give me your gun.' Dan would not let him have his gun, and me and Dan ran away from the depot as Pelt started over to Gwaltney's store, and I did not hear the report of the gun. When Pelt tried to get Dan Wright's gun, he said, 'I want the gun to kill the damn son of a bitch.' I never worked for Barnhill in my life, and never had any business with him."

Cross-examination: "Q. Which one struck first when Barnhill went out to meet Pelt? A. They both seemed to run together about the same time."

The defendant on his own behalf testified, in substance, as follows: "About half past 11 o'clock, I was behind my counter with the door about half shut, and Hagar Wilson, a colored woman, was sitting behind it on the north side of the door inside of the restaurant, and my wife was fixing dinner on the table. The door was about half open, wide enough for you to see inside the building, and for any one standing on the outside to see my wife, who was near the door on the inside. Noah Pelt came by the door, and stopped, and said, 'You damn bitch, come out of there.' Then my wife said: 'Oh Lord!

do listen.' I then walked out to where Pelt was standing, and said to him in a friendly manner, for I was not mad: 'Mr. Pelt, I would not curse your wife for that, nor would I curse like that around your family.' Pelt answered, 'Don't you like?' and I replied, 'No; and you certainly would not like it either.' Then Pelt said, 'You God damn son of a bitch, it will take less to do you,' and then we went together. We fought then across the road until we got near the steps on the northeast end of the depot, when I snatched away from him and started back to my place, when Pelt, before I knew it, pulled out his knife, and struck me one blow on the side of my head, and another blow on the back of my head, that came near knocking me down and staggered me, and almost blinding me with the blood running down all over my face and neck from the deep cuts he gave me on my head by the jaws of his knife. He then turned around and went up to where Dan Wright and Thomas Hallman were sitting on the platform near the steps on the northeast side, and tried to get Dan Wright's gun from him, saying at the time: 'Give me your gun. I want to kill the damn son of a bitch.' Dan Wright then ran around the depot. After Pelt failed to get the gun from Dan Wright, he pulled off his coat and vest and started to Gwaltney's store, about 25 or 30 steps from where he pulled off his coat and vest, and said to me, 'You God damn son of a bitch, go and get your gun and shoot, for I am going in Gwaltney's store and get a gun and kill you.' I knew that a Winchester rifle was kept at Gwaltney's store, for I saw it lying on the counter about two hours before the fight, and I was certain that Pelt meant what he said, and, as I had only some small shot shells, I knew that I would not stand any show unless I got to him and shot first, so I got my gun and placed the shells in the gun when I was going. I did not know but what Pelt would certainly get Joe Oak's rifle, which was in the store, and shoot me, was the cause of my getting my gun. It was hardly any time after Pelt left me going to Gwaltney's store before I got my gun. Just as soon as he made for the gun in Gwaltney's store, I ran into my storehouse, which almost joins my restaurant, and got my gun, and did not wait to put any shells in it, but loaded as fast as I could going along."

Cross-examination: "I did not see Pelt when he first passed my door, for I was behind the counter, but I heard him say, 'You damn bitch, come out of there.' The wind had blown the door about half shut, but my wife could see him plainly where she was standing, and I believed he was cursing at my wife. I was not mad when I went out to see Pelt. I went out and asked him about cursing my wife, and he then called me a 'God damn son of a bitch'; and said, if I did not like it, it would take less to do me. Q. It was then you got mad? A. Yes; it was enough

to make any man mad that had any spunk at all. Q. Then you did not get mad when he cursed your wife for a damn bitch, but only got mad when he cursed you? A. No; I did not get mad until he cursed me for a damn son of a bitch, and I thought it was time for any man to get mad at that, and fight, too. Q. Did you strike Pelt first, or did he strike you first? A. I don't remember—we both run together at the same time. I am certain that the fight between us commenced in front of my restaurant—and I was sure he came by my place to pick a fuss with me, for he stopped in front of my place until I went out to him, and he could have gone back of my store to his wagon, which was the nearest way from Gwaltney's store from where it was said he came from to his wagon, and I don't know what else he wanted."

In *Harrison v. State*, 39 Fla. 514, 22 South. 747, this court said: "We have no original jurisdiction to set aside verdicts and grant new trials because of insufficient evidence to sustain such verdicts. We act only upon a ruling of the lower court refusing a new trial upon that ground where such ruling is erroneous, and, in determining this question, we look to the evidence upon which the verdict of the jury and the ruling of the court below are predicated. If there is evidence legally sufficient to support the verdict, and this verdict has been approved by the presiding judge, we have no right to disturb it, though there be conflicts in the evidence, unless the preponderance is such that the jury must have been improperly influenced to render the verdict."

First, it is contended that the verdict is not supported by the evidence, because, in view of the evidence, the jury was not authorized to convict the defendant of any crime—that the defendant acted in self-defense in taking the life of the accused.

It may be that in the beginning of the trouble between the deceased and defendant the deceased was the aggressor, and, if he intended his remarks for the wife of the defendant instead of for the cow, the defendant may have been justly aroused to a defense of his home and his family. The defendant might be said to have very properly resented this insult, though he was worsted in the effort. Then the parties pulled away from each other; the defendant going to his store and the deceased going to the depot across the street. The witnesses for the state do not support the claim made by the defendant that the deceased told the defendant that he was going to Gwaltney's store to get a gun, and return and kill the defendant. On the contrary, the testimony for the state is to the effect that the deceased told the defendant to get his gun and shoot him. Be that as it may, the proof is abundant—it seems to be admitted by all—that the defendant killed the deceased by shooting him at a time when the deceased was making no effort to do the defendant any bodily harm.

He seemed to have quieted down before defendant shot him. (Gwaltney's testimony.) Indeed, the jury might have inferred that the deceased did not know who shot him, unless in his dying moments he supposed the defendant shot him by reason of the difficulty in which both of them had been engaged. The defendant followed the deceased to Gwaltney's store, a distance of 30 or 40 yards. "While Pelt was standing by the counter in the store, Barnhill came to the store door and shot him dead without giving him time to say anything." (Tucker's testimony.) "Barnhill came to the door of the store with a gun, and shot Pelt through the doorway. Pelt was doing nothing when he was shot." (Vichers' testimony.) The deceased had his knife unopened in his hand, but had no gun when he was shot. (Gwaltney's and Tucker's testimony.) The defendant turned to go to his store, and said: "I wound up that little rumpus damn quick."

But it is said the defendant was justified in so shooting and killing deceased because in the beginning he was the aggressor and cursed the defendant and threatened to kill the defendant, saying that he would get a gun from Gwaltney's store and would return and kill the defendant; and it is contended that these circumstances, as they have been detailed by the witnesses, justified the defendant in the belief that he was in imminent danger of death or great bodily harm, and that it was necessary for him to so take the life of the deceased in order to save his own life.

Even if it be true that the deceased had threatened to kill the defendant, it also appears that at the time the deceased was shot and killed he was doing nothing that evinced an immediate design to execute said threats. Johnston v. State, 29 Fla. 558, 10 South. 686. At the time he killed the deceased, the defendant may have had reason to apprehend generally bodily harm from the previous encounter, from feelings then engendered and threats then made. There then could be no justification for the killing unless the deceased was in such a situation at the time of the killing as to endanger defendant's life or place him in danger of great bodily harm. Gladden v. State, 12 Fla. 562.

If a man whose life has been threatened meets and slays his adversary under such circumstances as show that at the time his adversary was making some demonstration indicating an intention to then execute his threats, and that he believed, and had reasonable ground to believe, that his life was then in danger, or that he was in danger of great bodily injury, such homicide is justifiable, although it may turn out that the deceased had no intention at the time to execute his threats. The party threatened is to judge from the circumstances by which he is surrounded and as they appear to him; but, when a man acts upon appearances and takes the life of his fellow man, he does it at his

peril, and he cannot justify such killing unless there are circumstances which would induce a reasonably cautious man to believe that it was necessary to save his own life, or to save himself from great personal injury. When a man has been threatened, he may go wherever his legitimate business calls him, but he has not the right to lie in wait for and slay his adversary. Neither may one who seeks a person who intends to kill him, or otherwise brings the danger upon himself, avail himself of the plea of self-defense. Smith v. State, 25 Fla. 517, 6 South. 482; Clark's Criminal Law, 141.

The jury were authorized to conclude from the testimony that the defendant shot and killed the deceased from a spirit of revenge rather than in lawful self-defense.

Second. It is contended that the evidence is not sufficient to support a finding that the defendant acted from a premeditated design to effect the death of the deceased.

Undoubtedly, in order that the defendant may be convicted of murder in the first degree, he must have acted from or in pursuance of a premeditated design to effect the death of the deceased. A mere intent to kill would not be sufficient. Such design must precede the killing by some appreciable space of time, but the time need not be long. It must be sufficient for some reflection or deliberation by the defendant upon the question of killing the deceased for choice to kill or not to kill resulting in the formation of a definite purpose to kill. Lovett v. State, 30 Fla. 142, 11 South. 550, 17 L. R. A. 705; Garner v. State, 28 Fla. 113, 9 South. 835, 29 Am. St. Rep. 232; Olds v. State, 44 Fla. 452, 33 South. 296. "There must be such an interval of time between the intent and the act as will repel the presumption that it was done upon a sudden impulse, conceived and executed almost instantaneously." Carter v. State, 22 Fla. 553, text 559. The human mind acts with celerity which it is sometimes impossible to measure. Whether a premeditated design to kill was formed must be determined by the jury from all the circumstances of the case. Hicks v. State, 25 Fla. 535, 6 South. 441; Lovett v. State, 30 Fla. 142, 11 South. 550, 17 L. R. A. 705; Blige v. State, 20 Fla. 742, 51 Am. Rep. 623; Adams v. State, 28 Fla. 511, 10 South. 106; Carter v. State, supra.

It may be that the jury could not tell from the evidence the exact number of minutes within which the defendant may have formed a premeditated design to kill the deceased. It is not essential to the formation of a premeditated design that any particular number of minutes elapse between the intent and the act. There was evidence from which the jury could infer that six minutes elapsed while the deceased was in Gwaltney's store before the defendant followed him there and killed him. In addition to this time—these six minutes—there was the time that the defendant walked towards his store after becoming

separated from the deceased, and there was the time that the defendant stood on his steps, while the deceased was at the depot. The defendant had time to go to his store and procure his gun and ammunition, and there was time for the defendant to walk from his store to Gwaltney's store, and there was time for the defendant to present his gun and pause so long that a witness thought the defendant would not shoot. "Pelt came across the street and stopped on the depot platform after separating from Barnhill * * * Deceased stood on the platform, and Barnhill stood at the steps of his restaurant door." (Stephenson.)

"Pelt got on depot platform, pulled off his coat, and said to Barnhill, 'Shoot, damn you,' then went across to Gwaltney's store, and Barnhill went into his store and got his gun, and then went to Gwaltney's store and shot." (Arch Miles, a witness for defendant.) The defendant went to the front of Gwaltney's store, and "put the gun to his shoulder with the muzzle pointing in the doorway of the store and sight for some time, and then shoot. * * * He held the gun to his shoulder, and sighted so long that I began to think that he wasn't going to shoot." (J. C. Council.) The jury could not tell whether there were six or possibly more minutes for the defendant to form a premeditated design to kill the deceased; but the formation of a premeditated design does not depend upon the proof of any particular number of minutes. It depends upon the state of mind of the defendant, and this may be arrived at from his actions in connection with the length of time within which his mind had to act. The jury could infer something of the defendant's state of mind from his statement that he knew that a rifle was kept in Gwaltney's store, and that he would not stand any show unless he got to Pelt and shot first. Although this statement may not justify his actions, it is sufficient to show that the defendant was thinking, deliberating, upon what he was doing. From all the surrounding circumstances the jury could legally infer that, although the defendant may have been under the influence of anger and resentment at the time of the killing, the degree of feeling was not such as to cloud his senses or to impair his reason; that subsequently to his forming the design and before executing it sufficient time elapsed for an ordinarily reasonable man to have regained his self-possession; that there was such an interval of time between the intent and the act as would repel the presumption that it was done upon a sudden impulse, conceived and executed almost instantaneously; that there was sufficient time for deliberation upon the matter, for choice to kill or not to kill, and that the defendant formed a premeditated design to kill

and in pursuance of that design killed the deceased.

The facts and circumstances in the instant case point much more strongly to murder in the first degree than those in *Carter v. State*, 22 Fla. 553, where a policeman ordered the prisoner to move on or get off the sidewalk, the prisoner refused, and the deceased struck or punched him with his club, whereupon the prisoner went into a barroom before which he was standing, making threats, and returned with his hand in his pocket, and a fight ensued in which the deceased was shot and killed.

There is conflict in the testimony, but the verdict of guilty indicates that the jury did not believe the defendant's version of this unfortunate affair. There is sufficient evidence of all the facts essential to the conviction as found by the jury, and it does not appear that there was such a preponderance in favor of the defendant that the jury were not governed by the evidence in their finding.

The jury saw the witnesses and heard the evidence, a learned and conscientious judge who has long graced the bench presided at the trial, and approved the verdict. We cannot set aside the verdict of the jury or overrule the action of the trial court thereon. The verdict is not without evidence to sustain it, and under the well-settled rule the judgment is affirmed.

SHACKLEFORD, C. J., and COCKRELL and WHITFIELD, JJ., concur.

TAYLOR, J. (dissenting.) I cannot agree to the conclusion reached by the majority of the court in this case on the evidence adduced therein. The testimony shows that the deceased was the aggressor who wantonly brought on the difficulty that resulted in his death; and my view is that the testimony makes out a case simply and purely of manslaughter, nothing more. The time elapsing between the time when the deceased and the defendant were engaged in an active fight with each other and the time when the defendant shot and killed the deceased was too short for the defendant to have become so cool as to be able to form that premeditated design to take the life of his assailant that is necessary to a conviction for murder. My view is that the testimony makes out only a case of a killing in the heat of passion aroused by the deceased as the aggressor, and that the judgment of conviction should be reversed on the ground of the insufficiency of the evidence to support the verdict, and a new trial awarded.

HOCKER, J. I concur in the foregoing dissent.

(56 Fla. 749)

ACOSTA et al. v. ANDERSON.

Supreme Court of Florida, Division B. Jan. 8, 1909. Headnotes Filed Feb. 1, 1909.)

1. VENDOR AND PURCHASER (§ 78*)—CONTRACT—CONSTRUCTION—TIME OF PAYMENT.

It is a familiar rule in equity that the time of payment provided for in a contract is not to be considered of its essence, unless it be so expressed by proper language.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 121, 122; Dec. Dig. § 78.*]

2. VENDOR AND PURCHASER (§ 78*)—CONTRACT—CONSTRUCTION—PAYMENT OF TAXES.

When a contract to convey real estate requires the purchaser to pay all taxes that may be legally levied or imposed upon said land subsequent to the year 1904, and the contract does not fix the time when said taxes are to be paid, the time of the payment of the taxes was not made of the essence of the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 121, 122; Dec. Dig. § 78.*]

3. VENDOR AND PURCHASER (§ 101*)—CONTRACT—FORFEITURE.

The mere payment of taxes by the vendor for his own protection is not an election to declare a forfeiture under a contract providing for forfeiture upon the vendee's default in paying the taxes legally levied upon the land that is the subject of the contract of purchase.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 171; Dec. Dig. § 101.*]

4. VENDOR AND PURCHASER (§ 101*)—CONTRACT—FORFEITURE.

When the right to declare a forfeiture is optional with the vendor of real estate upon default by the vendee, the former must indicate his election to forfeit the contract, or it will be considered as still in force, unless the vendee has waived notice of forfeiture.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 170-174; Dec. Dig. § 101.*]

(Syllabus by the Court.)

Appeal from Circuit Court, Duval County; Rhydon M. Call, Judge.

Bill by Granderson C. Anderson against St. Elmo W. Acosta and Walter B. Clarkson. Decree for complainant, and defendants appeal. Affirmed.

John E. Hartridge, for appellants. D. O. Campbell, for appellee.

PARKHILL, J. On the 14th day of September, 1906, Granderson C. Anderson filed his bill against the appellants for the specific performance of an agreement in writing under seal, in words and figures as follows:

"Articles of agreement, made this 5th day of December, in the year of our Lord one thousand nine hundred and four, between St. Elmo W. Acosta, party of the first part, and Neddom Lott, party of the second part.

"Witnesseth: That if the said party of the second part shall first make the payments and perform the covenants hereinafter mentioned on his part to be made and performed

the said party of the first part hereby covenants and agrees to convey and assure to the said party of the second part in fee simple, clear of all incumbrances whatever, by a good and sufficient deed, the lot, piece or parcel of ground situated in the county of Duval, state of Florida, known and described as follows, to-wit: The west 204 feet of lot five (5) in block E, in the Long Branch Tract as per map in book AH, pages 526 and 527, Duval county public records as the same existed prior to the conflagration of May 3rd, A. D. 1901, containing as shown by said map, two (2) acres of land.

"And the said party of the second part hereby covenants and agrees to pay to the said party of the first part the sum of four hundred dollars (\$400.00) in the manner following: Ten and $\frac{40}{100}$ dollars as advance interest to April 1, 1905, and thereafter on the first days respectively of January, April, July and October of each year the sum of eight (8) dollars as advance quarterly interest or lease money, and the said principal sum of four hundred dollars (\$400.00) at any time on or before eight (8) years from date hereof with interest at the rate of eight (8) per centum per annum, payable as above set out, and to pay all taxes, assessments, or impositions that may be legally levied or imposed upon said land subsequent to the year 1904, and in case of the failure of the said party of the second part to make either of the payments or any part thereof, or to perform any of the covenants on his part hereby made and entered into, this contract shall, at the option of the party of the first part be forfeited and terminated and the party of the second part shall forfeit all payments made by him on this contract, and such payments shall be retained by the said party of the first part in full satisfaction and in liquidation of all damages by him sustained, and said party of the first part shall have the right to re-enter and take possession of the premises aforesaid without being liable to action therefor. Insurance on buildings that may be erected on said land shall be kept up at expense of said second party for the protection of this contract.

"It is mutually agreed by and between the parties hereto that the time of payment shall be an essential part of this contract, and that all covenants and agreements herein contained shall extend to and be obligatory upon the heirs, executors, administrators and assigns of the respective parties.

"In witness whereof, the parties to these presents have hereunto set their hands and seals the day and year first above written.

"St. Elmo W. Acosta. [Seal.]

"Nedom Lott. [Seal.]

"Signed, sealed, and delivered in the presence of

"W. B. Clarkson.

"R. W. Sasnett."

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Nedom Lott went into the actual exclusive possession of the property so purchased, and on the 30th day of December, 1905, assigned the said agreement and all his right, title, and interest in said property to the complainant, Anderson, who went into the actual, exclusive, peaceable possession of said property and continued to so hold the same at the time the bill of complaint herein was filed.

On the 1st day of May, 1906, Mr. Acosta sold and conveyed an undivided one-half interest in the said property to W. B. Clarkson, who was a subscribing witness to the agreement already set forth, and who acquired his interest in the property with actual knowledge of all rights, equities, and possession of the complainant.

The respondents filed a general demurrer to the bill of complaint, which was overruled. They then filed a joint and several plea, which was overruled on the 22d day of August, 1908, and respondents appealed. The facts as they appear in the pleadings will be presented in the discussion of the case.

Under the errors assigned, the appellants contend that a deed was to be made only upon the performance of all the covenants mentioned in the agreement, that time was made of the essence of the contract, and that the failure by the complainant to pay the taxes assessed upon the property for the year 1905 worked a forfeiture of the contract and all rights of the complainant thereunder.

The contract requires the complainant "to pay all taxes, assessments, or impositions that may be legally levied or imposed upon said land subsequent to the year 1904," but it entirely fails to fix the time when the taxes are to be paid. It simply binds the complainant to pay the taxes that may become due each year. The time of the payment of the taxes was not made of the essence of the contract, for no definite time was fixed therefor. The contract makes the time of payment an essential part of the contract, but payment here refers evidently to the interest and the principal sum for the payment of which definite dates are prescribed. The contract provides that, in case of the failure to make either of the payments or any part thereof, the contract may be forfeited, and the contract provides that the time of payment shall be an essential part of the contract. The contract provides with reference to the covenant to pay taxes that in case of the failure to perform any of the covenants thereby made and entered into the contract may be forfeited. This language does not make the time of payment of the taxes an essential part of the contract. *Van Vranken v. C. R. & M. R. R. Co.*, 55 Iowa, 135, 5 N. W. 197, 7 N. W. 504. It is a familiar rule in a court of equity that the time of payment provided for by contract is not to be considered of its essence, unless it be so expressed by proper language. *Chabot v. Winter Park Co.*, 34 Fla. 258, 15 South. 756, 43 Am. St. Rep. 192.

It cannot be claimed that the complainant

was bound to pay the taxes before they became due; and although the defendants claim now that the taxes were due and payable in November, 1905, and should have been paid before the advertisement of the land for nonpayment of the taxes in April, 1906, yet they gave to the complainant during that time no notice of any kind in the exercise of their option that they would insist upon a forfeiture of the contract for the nonpayment of the taxes; but, on the contrary, they received and collected from Nedom Lott all payments of interest in advance to April 1, 1906, and on the 20th day of March, 1906, they collected from the complainant in advance the quarterly interest due under the contract for the months of April, May, and June, 1906.

Early in the month of June, A. D. 1906, the complainant saw that lots 1, 2, 3, 4, and 5, in block E, Long Branch, were advertised for nonpayment of taxes for the year 1905 as unknown owner. Lots 1, 2, 3, 4, and part of 5 belonged to the respondents. The two acres of land embraced in this contract form a part of lot 5. The complainant went immediately to the tax collector's office to pay the taxes on his part of lot 5, but the collector informed him that the respondents had paid the amount due on the five lots a day or two before. Thereupon the complainant went immediately from the collector's office to the respondents, and offered and tendered them his pro rata of the taxes and costs, but the respondents thereupon refused to receive the same, and notified the complainant that they considered all his rights and equities forfeited because complainant had not paid said taxes before said property was advertised for sale. On the same day the quarterly interest in advance for the months of July, August, and September, 1906, became due, and were thereupon promptly tendered, together with the taxes and costs, but were refused by respondents. On the same day the complainant tendered to the respondents the principal sum of \$400, together with the taxes and costs, and a deed of conveyance for said property prepared for execution by respondents in due form of law and requested the execution of the same by them. Upon the refusal by the respondents to accept the same, the complainant deposited the same with the Capital Trust & Investment Company, a thoroughly responsible company, subject to the order of respondents. The respondents considered the acceptance of the tenders made by the complainant until the 30th day of July, 1906, when they notified the complainant of their final determination not to accept the tender or to execute the deed. Upon the return of the solicitor for complainant after an absence from the state for nearly a month, the complainant began the preparation of this bill of complaint and filed the same on the 14th day of September, 1906, and caused a subpoena to issue the next day, and to be

served upon the respondents on the 17th day of the same month.

As the defendants were equally bound with the complainant to pay the taxes on lot 5, it would seem that payment of the taxes due thereon by them was in protection of their property rather than in the exercise of their option to forfeit the contract, for the defendants did not pay their own taxes on this property until after the advertisement of the same by the tax collector.

As there was no time fixed for payment of the taxes, either by the terms of the contract or by notice to the complainant from the defendants, we think the complainant could comply with the contract by paying the taxes on or before the time fixed by the tax collector in his notice of sale of the property for nonpayment of the taxes. *McClartey v. Gokey*, 31 Iowa, 505; *Sigler v. Wick*, 45 Iowa, 690; *Barrett v. Dean*, 21 Iowa, 423; *Mathews v. Mulvey*, 38 Minn. 342, 37 N. W. 794.

We think, under the circumstances of this case, the complainant shows a clear right to specific performance, and the decree is affirmed.

TAYLOR and HOCKER, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

(56 Fla. 854)

THOMAS BROS. CO. v. PRICE & WATSON et al.

(Supreme Court of Florida, Division B. Jan. 8, 1909.)

1. APPEAL AND ERROR (§ 751*)—ASSIGNMENTS OF ERROR—RELATION TO RECORD.

Assignments of error that have no basis of fact in the record will not be considered by an appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3040; Dec. Dig. § 751.*]

2. APPEAL AND ERROR (§ 204*)—PRESENTATION AND RESERVATION OF GROUNDS OF REVIEW—ADMISSION OF EVIDENCE.

The admission of evidence without objection and without exception cannot be assigned as error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1258; Dec. Dig. § 204.*]

3. EVIDENCE (§ 246*)—ADMISSIBILITY.

Where the defendant requests his attorney to interview another third attorney, and to find out from him what his fee would be to represent the defendant in a suit pending against him, and his attorney complies with such request, and promptly reports to the defendant the result of such interview, and the defendant acquiesces therein, and agrees to the employment of such third attorney at the fee named in such interview, it is not error in a suit by such third attorney against such defendant for recovery of such fee to permit said two attorneys to testify to the result of the said interview between them.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 945; Dec. Dig. § 246.*]

4. APPEAL AND ERROR (§ 304*)—RECORD—MATTERS PRESENTED FOR REVIEW.

Where a motion for new trial is filed in a cause, but the transcript of record on writ of

error does not affirmatively show that such motion was acted upon by the trial court, the appellate court cannot consider an assignment of error based upon the assertion that the verdict was against the weight of the evidence, and was not supported by the evidence, since such an assault upon a verdict must primarily be made in a motion for new trial, and the trial court must have primarily passed thereon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1757; Dec. Dig. § 304.*]

(Syllabus by the Court.)

Error to Circuit Court, Jackson County; J. Emmet Wolfe, Judge.

Action by Price & Watson and another against the Thomas Bros. Company. Judgment for plaintiffs and defendant brings error. Affirmed.

J. M. Calhoun, for plaintiffs in error. Price & Watson and Francis B. Carter, in pro. per.

TAYLOR, J. The defendants in error as plaintiffs below sued the plaintiffs in error as defendants below in the circuit court of Jackson county in assumpsit on a special contract of employment of the plaintiffs' services as attorneys at law in and about the defense of a suit instituted against them. The trial resulted in a verdict and judgment for the plaintiffs below, and, for review of this judgment, the defendants below bring the case here by writ of error.

The first assignment of error alleges that the court below erred in striking out the defendants' plea to plaintiffs' declaration. We find no such action by the court in the record, and this assignment, therefore, falls to the ground for want of anything to sustain it.

The second, third, and fourth assignments of error complain of the overruling of the defendants' demurrer to various counts in the plaintiffs' declaration. There is no merit in these assignments. The declaration sufficiently alleged the facts that said demurrers criticised it for not alleging.

The fifth, sixth, and seventh assignments of error complain of the court's requiring the defendants to plead instanter, and in refusing to allow defendants a reasonable time within which to plead to plaintiffs' amended declaration. The record before us does not bear out the assertions of these assignments. There is nothing in the record showing that the defendants were required to plead instanter; but, on the contrary, the record shows that ample time was afforded the defendants for pleading.

The eighth assignment of error asserts error in the admission by the court of a letter in evidence offered by the plaintiffs. The record before us shows only one letter to have been offered or received in evidence, and to its introduction in evidence no objection was made by the defendants, and no exception was taken to the ruling of the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

court admitting it. This assignment, therefore, has no merit.

The ninth and tenth assignments of error complain of the court's permitting the plaintiffs Watson and Carter to testify as to a conversation had between them while the defendants were not present. It appeared from the evidence that the defendants first employed the law firm of Price & Watson to represent their defense in a suit instituted against them, and that one of the defendant firm afterwards desired to also employ the plaintiff F. B. Carter, and instructed Watson to interview Carter, and find out at what fee his services could be secured. Watson followed his instructions, and in the interview that resulted it was agreed that the three attorneys, Price and Watson and F. B. Carter, would jointly undertake the defense of the suit for the defendants for a joint fee of \$550, and Watson at once communicated the result of the interview with Carter to the defendants, and they agreed to pay the fee named. The witnesses Watson and Carter were permitted to testify to the result merely of this interview between them as to the fee to be charged, and this is the evidence the admission of which forms the basis of these two assignments. There was no error in the admission of this evidence. The defendants had authorized Watson as their agent to find out from Carter what his charges would be, and the testimony objected to merely rehearsed the fact that he did so find out and reported the result to the defendants, who agreed to that result.

The eleventh assignment of error complains of the alleged refusal of the court to continue the case from the 4th to the 6th of July. There is no basis for this assignment in the record here. The record does not show that any application was either made or refused to continue the case for two days. A general application for continuance was orally made, but was not supported by any affidavit; and the court did not err in its refusal.

The twelfth assignment of error complains of the refusal of the court to give an affirmative charge requested by the defendants instructing the jury to find for the defendants, and the thirteenth assignment of error complains of the giving by the court of an affirmative charge directing the jury to find in favor of the plaintiffs. There was no error in either of these rulings. The plaintiffs made out their case fully, and there was nothing to contradict it, and the trial could not properly have resulted otherwise than it did in the light of the pleadings and evidence.

The fourteenth and fifteenth assignments of error complain that the verdict is against the weight of the evidence, and is not supported by the evidence. These two assign-

ments we cannot consider, since they involve a subject proper to be dealt with by a motion for new trial. Such a motion appears to have been filed in the case, but the record before us does not show that such motion was ever acted upon by the court below. We cannot, therefore, consider such motion or any of its grounds.

The sixteenth assignment of error asserts that the evidence fails to correspond to the allegations of the plaintiffs' declaration. We fail to discover any variance between the *allegata et probata*.

The seventeenth, and last, assignment of error, complains of the asserted ruling of the trial court in permitting plaintiffs to read in evidence the declaration in the case of Alford Bros. against defendants. There is no basis for this assignment in the record before us. From that record it does not appear that any such paper was offered or admitted in evidence, or that any such ruling was excepted to.

Finding no error, the judgment of the court below in said cause is hereby affirmed, at the cost of the plaintiffs in error.

HOCKER AND PARKHILL, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

(122 La. 785)

No. 17,319.

LEHMAN v. ATHLETIC PARK AMUSEMENT CO., Limited.

(Supreme Court of Louisiana. Nov. 16, 1908. Rehearing Denied Feb. 1, 1909.)

1. APPEAL AND ERROR (§ 612*)—DISMISSAL—INSUFFICIENT CERTIFICATE.

The certificate of the clerk of court was in the usual form, showing that the transcript contained copy of all the proceedings had, documents filed, and evidence adduced on the trial. The record thus certified to contained needful documents and papers to maintain the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2698-2700; Dec. Dig. § 612.*]

2. APPEAL AND ERROR (§ 45*)—JURISDICTIONAL AMOUNT—WANT OF JURISDICTION.

The question was one of cost only. An executor was held liable for the costs in a small amount. It was not connected with other proceedings. The matter was entirely separate from all other demands, and presents an independent issue.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 195; Dec. Dig. § 45.*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Fred Durlieve King, Judge.

Action by G. Lehman, Jr., against the Athletic Park Amusement Company, Limited. Judgment for plaintiff, and defendant appeals. Dismissed.

Dinke'spiel, Hart & Davey, for appellant. Benjamin Rice Forman and William Lee Hughes, for appellee.

BREAUX, C. J. The appellee filed a motion to dismiss the appeal on three grounds:

First. That the transcript is not complete, and that the certificate of the clerk of the district court is defective, by reason of the fact that it does not certify that the transcript contains copy of all the proceedings had, documents filed, and evidence adduced on the trial of the petition to remove Arthur Leopold as receiver.

Second. That the amount in dispute is less than \$100.

Third. That the appellant confessed judgment, and precluded himself from the possibility of taking an appeal.

Taking up, in the first place, the objection to the certificate of the clerk of the district court:

It appears that the appeal was taken in suit No. 17,319, *Lehman v. Athletic Park Amusement Company, Limited*.

The certificate unquestionably covers a number of documents in the transcript, refers to all the proceedings, and is in the usual form of such certificates. Sufficient evidence was copied in the transcript, and there is enough of reference before us to determine the issues presented.

In order to obtain an order of dismissal on appeal on the ground of a defective or insufficient certificate, it must appear that the defectiveness will result in prejudice to the appellee in some way.

This the appellee has failed to show in any way.

The issues are before us, and why dismiss the appeal? Certainly not to have copied in the transcript documents that are not of the least moment in matter of this appeal.

Now as to our jurisdiction: We do not think we have jurisdiction. The dispute is all about \$54 costs. There is no main demand, except of the matter of \$54, if this demand for \$54 can be considered such. It is an independent question.

There is no question before us about the bankruptcy proceedings involved in the suit entitled as above, no appeal from any judgment in that suit, and the whole difference relates to costs for the sum just mentioned, which, under no circumstances can be as much as \$100.

The whole matter relating to the bankruptcy is in the district court. There is not the least intimation that anything has arisen or will arise requiring the intervention of this court in proceedings in which costs have been taxed against the appellant personally.

The question is entirely between the appellee and the appellant about a small bill of costs.

The appellant is no longer the receiver. Since some time he is entirely out, and has no authority whatever to act as receiver. The ex-receiver alone is the interested party. He cannot be heard here.

The appellee, also, as to his claim on the grounds he puts up, is here entirely removed from the bankruptcy proceedings.

This being our view, there is no necessity of deciding the question growing out of the asserted confession of judgment of the receiver.

The point decided disposes of the appeal. The appeal is dismissed.

(122 La. 788)

No. 17,366.

STATE v. BARKSDALE.

(Supreme Court of Louisiana. Jan. 18, 1909.)

HOMICIDE (§ 190*) — UNCOMMUNICATED THREATS—ADMISSIBILITY.

In a prosecution for manslaughter, uncommunicated threats, made by the deceased against the accused shortly before the homicide, are admissible in evidence as tending to show who was the aggressor in the fatal encounter and as supporting the plea of self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 405; Dec. Dig. § 190.*]

Breaux, C. J., and Nicholls, J., dissenting.

(Syllabus by the Court.)

Appeal from Twenty-First Judicial District Court. Parish of East Baton Rouge; Harney Félix Brunot, Judge.

Monroe Barksdale was convicted of manslaughter, and appeals. Reversed and remanded.

Edward Elliott Wall and Laycock & Beale, for appellant. Walter Guion, Atty. Gen., and Hubert Nicholls Wax, Dist. Atty. (Isaac Dickson Wall and Ruffin Golsen Pleasant, of counsel), for the State.

Statement of the Case.

MONROE, J. The sole question to be decided in this case is presented by the following bill of exception, to wit:

"Be it remembered that, upon the trial of this cause, the accused, being on trial for manslaughter, charged with killing Lamar Norwood, the defense being self-defense, after introducing evidence tending to show self-defense and the attitude of the deceased at the time of the fatal encounter, the witness Thomas A. Charlton was introduced and sworn on the part of defendant for the purpose of proving the conduct of the deceased and threats made by him on the day of and previous to the homicide; it being stated by counsel that the testimony was not offered for the purpose of showing that defendant's conduct was influenced by the alleged threats and action of the deceased, but only to assist the jury and enable the jury to form its own conclusion as to the attitude of the deceased and as to who was the aggressor in the encounter which resulted in the homicide. * * * Said statement by said witness, together with the minute of said offering, the objection thereto by the state, and the ruling

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of the court, are hereto annexed * * * as parts of this bill," etc.

The note of evidence reads:

"On the trial of this case, witness Thomas A. Charlton, who was offered by defendant and sworn by the clerk—the jury having been retired—made the following statement:

"I was working at Boyle's saloon, in Zachary, La., on the Saturday that the tragedy occurred. Lamar Norwood came in there and asked me to come in the back room—he wanted to see me, he said. He says, 'Tom, I want you to get me a gun.' I told him I had no gun, and, if I had one, I told him I wouldn't give it to him; that it might get us both in trouble. He said he didn't want me to loan him the gun; that he had money to pay for it and would buy it. He said he saw Mr. Barksdale's horse there, and he knew he was there, somewhere. He says: 'He is dodging from me, and, when I meet him, I am going to tackle him.' And I told him: 'Lamar, the town is full of people, and it is a bad day; you had better wait until some other time.' And he asked me, if he got in a fight, if I would see that it was fought to a finish—till one of them got whipped. He said he knew Barksdale had a pistol, because he always carried one."

"The foregoing statement was offered, * * * not for the purpose of showing that the defendant's conduct was influenced by the alleged threat and action of the deceased, but only to assist the jury and to enable it to form its own conclusion as to who was the aggressor in the encounter which resulted in the homicide, the defendant's plea being that of self-defense, and objected to on the ground that, the defendant being charged with manslaughter, no evidence of previous ill will, or hostility on the part of either is relevant as illuminating the offense; that the alleged statement is not a part of the *res gestæ*, having taken place at a different place and time; and that said threats were never communicated to accused. The objection was sustained by the court."

And the bill was reversed.

Opinion.

The statements of the deceased which defendant desired to prove were not offered to show any general ill will of the deceased to the accused, or as part of the *res gestæ*, or as threats communicated to, and influencing the action of, the accused. They were offered as tending to show that the deceased was the aggressor in the difficulty which led to his death, and hence as tending to sustain the plea that the accused, in killing him, acted in defense of his own life. It is clear that, if these facts had been otherwise proved to the satisfaction of the jury, the accused could not have been convicted. It was therefore of the utmost importance to him, as bearing upon the question who made the attack, that the jury should have been informed that on the day of and before the fatal encounter the deceased endeavored to obtain a "gun," saying that he knew that the accused was in town and was dodging him, and that, when he met him, "he was going to tackle him," since, being thus informed from the lips and conduct of the deceased that he intended to attack the accused as soon as he should meet him, and that he was endeavoring to prepare himself with a deadly weapon for that purpose, and the encounter having taken place

on the same day, the jury might have inferred that the intention so expressed was carried into execution, that the deceased did make the attack, and that the accused took his life in lawfully resisting the same. The Supreme Court of the United States, in dealing with the question here presented, have said:

"Although there is some conflict of authority as to the admission of threats of the deceased against the prisoner in a case of homicide, where the threats have not been communicated to him, there is a modification of the doctrine, in more recent cases, established by the decisions of courts of high authority, which is very well stated by Wharton in his work on Criminal Law, § 1027: 'Where the question is as to what was the deceased's attitude at the time of the fatal encounter, recent threats may become relevant to show that this attitude was one hostile to the defendant, even though such threats were not communicated to the defendant. The evidence is not relevant to show the *quo animo* of the defendant, but it may be relevant to show that, at the time of the meeting, the deceased was seeking the defendant's life.' " *Wiggins v. People of Utah*, 93 U. S. 465, 23 L. Ed. 941.

See, also, *State v. Lindsey*, 122 La. 375, 47 South. 687; *Brown v. State*, 55 Ark. 593, 18 S. W. 1051; *Wilson v. State*, 30 Fla. 234, 11 South. 556, 17 L. R. A. 654; *May v. State*, 90 Ga. 793, 17 S. E. 108; *State v. Helm*, 92 Iowa, 540, 61 N. W. 246; *Young v. Com.*, 42 S. W. 1141, 19 Ky. Law Rep. 929; *State v. Hopper*, 142 Mo. 478, 44 S. W. 272; *Hart v. Com.*, 85 Ky. 77, 2 S. W. 673, 7 Am. St. Rep. 576; *Sparks v. Com.*, 89 Ky. 644, 20 S. W. 167; *State v. Lee*, 66 Mo. 165; *Roberts v. State*, 68 Ala. 156; *Bell v. State*, 66 Miss. 192, 5 South. 389; 21 Cyc. 967; Enc. of Ev. vol. 6, p. 787.

The verdict and sentence appealed from are therefore set aside and annulled, and the case remanded to be further proceeded with according to law.

NICHOLLS, J. (dissenting). On the trial of this case, all testimony as to the facts and circumstances which occurred at the time of the homicide was received without objection and submitted to the jury. There is not a single bill of exception in regard to such testimony. That being the condition of things, the jury convicted him of manslaughter, the legal significance of which was that they found the defendant, beyond a reasonable doubt, guilty of manslaughter, or, what is the same thing, found the defendant, beyond a reasonable doubt, not justified.

On application for a new trial, the trial judge refused to grant the application, the legal significance of which was that he also found the defendant, beyond a reasonable doubt, not justified. We are now asked, without any knowledge of the actual facts of the case or of the testimony which was before the jury (for there are no recitals in the bill of exception what that testimony was), not only to set aside the verdict of a jury presumptively correct, and the ruling of the trial judge, also presumptively correct, but

to set aside the ruling of the district judge in regard to the admissibility of evidence, a matter specially submitted to his discretion and judgment, not for the purpose of dispelling a doubt as to defendant's guilt, but for the purpose of creating a presumption in favor of defendant's having been justified in his action. That character of evidence has never before been permitted to be introduced for that purpose. I therefore dissent.

BREAUX, C. J., concurs.

(122 La. 791)

No. 17,229.

MASKREY v. JOHNSON et al.

(Supreme Court of Louisiana. Jan. 4, 1909.
Rehearing Denied Feb. 1, 1909.)

MORTGAGES (§ 32*)—DEED ABSOLUTE IN FORM—RESTORATION OF TITLE.

It is axiomatic in the law and jurisprudence of this state that where the owner of land, uninfluenced by fraud or error, vests the title thereto in another, such title can be devested, as simulated, only upon the production of a counter letter, or upon the basis of answers to interrogatories propounded to the apparent owner, and a fortiori does this rule apply in a case where the property has been sold to a third person, purchasing in good faith.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 32.*]

(Syllabus by the Court.)

Appeal from Third Judicial District Court, Parish of Claiborne; James Edward Moore, Judge.

Action by V. G. Maskrey against W. M. Johnson and others. Reversed, and judgment for defendants.

Enos Howard McClendon, for appellants.
Richardson & Richardson, for appellee.

MONROE, J. This is a suit by a married woman, authorized by the court, for the recovery of a tract of land, in the parish of Claiborne, of which she avers the defendants, W. M. Johnson, B. A. Moody, and G. W. Maskrey, are attempting to defraud her. She alleges that she had several times borrowed money on the land, upon conveyances which, though not so expressed, were intended to operate as mortgages; that having borrowed in that way from H. C. Walker, and being pressed for payment, she induced Maskrey to advance the money for that purpose and take the title in his name; that Johnson knew that she was the real owner of the property, and conspired with Maskrey to defraud her of it by buying it in the name of Moody, who was an employé of his and had no money wherewith to make the purchase. She prays that the property be restored to her, or that it be restored on her paying to Johnson the sum of \$1,080, which she admits is the amount paid by Maskrey to Walker.

The evidence shows that the property was

apparently sold by plaintiff to Walker, with warranty of title, in 1902. On March 10, 1904, being then in Pennsylvania, plaintiff was married to Maskrey, but, for some reason not disclosed, she did not make the fact of the marriage known in the parish of Claiborne. To the contrary, on April 1st, she wrote to the clerk of the court, who appears to have attended to some of her business, saying:

"I send, enclosed, a letter to Mr. H. C. Walker, requesting him to have you make a deed from him to Mr. George W. Maskrey, of Sandy Lake, Pa. Please make out a bona fide deed to secure Mr. George W. Maskrey full possession of the 280 acres of land and the timber included growing thereon," etc.

This letter was signed, "Virginia G. Rawle" (Rawle being the name of a preceding husband), and the request contained in it was complied with; that is to say, on April 25, 1904, Walker conveyed the property to Maskrey, with full warranty of title, by deed executed before the clerk and duly recorded, and for the next two or three years it appeared upon the records as belonging to Maskrey and was assessed in his name. On March 30, 1907, he sold it, with full warranty of title, for \$2,000 cash to Moody, and about a year later this suit was instituted. Defendants plead the exception of "no cause of action" and the general issue. Moody admits that he bought the land (save 40 acres) from Maskrey, and alleges that he purchased in good faith and for a sound price. The evidence fails to show that either Johnson or Moody knew that Maskrey was plaintiff's husband, or that either of them was actuated by any fraudulent purpose in buying the property from him. There is no doubt that Moody paid Maskrey \$2,000 cash as the price, which amount was advanced by Johnson. If, therefore, the judgment in favor of plaintiff is affirmed, she will have the property, and her husband, who appears to live in Ohio, will still have the price. She alleges that she is separated from him, but there is no proof of it.

Premitting the questions, suggested* by counsel for defendant, as to the character of the action, we are of opinion that plaintiff must go out of court, under a rule which is axiomatic in the law and jurisprudence of this state, to wit:

Where the owner of real estate, uninfluenced by fraud or error, vests the title thereto in another, such title can be devested, as simulated, only upon the production of a counter letter, or upon the basis of answers, elicited from the apparent owners, to interrogations on facts and articles. *Delahoussaye's Heirs v. Davis' Wid. Heirs*, 19 La. 409; *Bauduc v. Conrey*, 10 Rob. 466; *Liautaud v. Baptiste*, 3 Rob. 452; *Tutorship of Hacket*, 4 Rob. 295; *Johnson v. Flanner et al.*, 42 La. Ann. 522, 7 South. 455; *Godwin*

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

v. Neustadt, 42 La. Ann. 735, 7 South. 744; Thompson v. Herring, 45 La. Ann. 994, 13 South. 398; Franklin v. Sewall, 110 La. 292, 84 South. 448; Wells v. Wells, 118 La. 1065, 41 South. 316. Applying this rule, we are of opinion that whatever might have been the rights of the plaintiff, as between her husband and herself, she cannot divest the title of the latter's vendee without producing such counter letter or answers.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that there now be judgment in favor of the defendants, rejecting plaintiff's demands at her cost.

(122 La. 794)

No. 16,738.

JUNK et al. v. GOLDEN RANCH SUGAR & CATTLE CO., Limited, et al.

(Supreme Court of Louisiana, March 30, 1908. On Rehearing, Feb. 1, 1909.)

BROKERS (§ 86*)—ACTION FOR COMMISSIONS—EVIDENCE.

Plaintiffs sue the defendant for commissions alleged to be due to them under a brokerage contract for a sale of part of its property. The case was tried by a jury, which returned a verdict for plaintiffs as prayed for, and judgment was rendered in conformity thereto. Defendant appealed.

Held, under the facts of the case, the verdict of the jury and the judgment rendered therein are erroneous, and the same are set aside, annulled, and reversed.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 116-120; Dec. Dig. § 86.*]

(Syllabus by the Court.)

Appeal from Twentieth Judicial District Court, Parish of Lafourche; Thoma A. Badaux, Judge ad hoc.

Action by William H. Junk and others against the Golden Ranch Sugar & Cattle Company, Limited, and others. Judgment for plaintiffs, and defendants appeal. Reversed.

Howell & Caillonet, for appellants. Beattie & Beattie, Foster, Milling & Godchaux, and Alexis Brian, for appellees.

Statement of the Case.

NICHOLLS, J. This suit is brought by the plaintiffs against John R. Gheens, individually, and the Golden Ranch Sugar & Cattle Company, Limited.

Plaintiffs allege that on or about the 15th of April, John R. Gheens, acting for himself, and as president and manager of the Golden Ranch Sugar & Cattle Company, Limited, entered into a definite agreement and contract with your petitioners by which the said Gheens, acting as above set forth, placed in the hands of petitioners for sale, as brokers, the entire holdings of the said Golden

Ranch Sugar & Cattle Company, Limited, located in the parish of Lafourche, consisting of all real and personal property, sugar houses, cane crops, implements, mules, etc.; that petitioners were then and there authorized and directed by the said Gheens, acting as aforesaid, to procure a purchaser of said real and personal property for the price and sum of \$650,000, and it was then and there agreed that, in case petitioners should procure such purchaser at such price, the said Gheens and the said Golden Ranch Sugar & Cattle Company, Limited, would pay to your petitioners as a commission for effecting the said sale the sum of \$50,000. Petitioners further show that the said holdings of the said Golden Ranch Sugar & Cattle Company, Limited, in the parish of Lafourche consisted of, as they claimed, about 45,000 acres of land, part thereof being cultivated as a sugar plantation, with a sugar house, mules, farming implements, and all other accessories of a sugar plantation; partly of large tracts of uncultivated land, and partly of large tracts of cypress timbered lands; and that all the property, real and personal, of whatever nature and description, of the said Golden Ranch Sugar & Cattle Company, Limited, were included in the said agreement as above set out, to be sold for the price and sum of \$650,000. That after a great deal of effort on their part, and after the expenditure by them of considerable amounts of money, they procured a purchaser and had made arrangements for the sale of the said property above referred to for the said sum of \$650,000, and that said sale would have been consummated for the said price but for the fact that the said Gheens and the said Golden Ranch Sugar & Cattle Company, Limited, were not able to prove a good and valid title to only about 23,762 acres of the 45,000 acres which were to be included in the said sale. That when it became apparent that the title to a large portion of the said property of the said Golden Ranch Sugar & Cattle Company, Limited, was imperfect, then another and supplemental agreement was made between petitioners and the said Gheens and the said Golden Ranch Sugar & Cattle Company, Limited, to the effect that if petitioners succeeded in securing a purchaser for that portion of the property of the said Golden Ranch Sugar & Cattle Company, Limited, to which a perfect title could be made, and if the price should be satisfactory to the said Gheens, then and in that event such commission would be paid to your petitioners as would bear the same ratio to the purchase price actually paid to and received by the Golden Ranch Sugar & Cattle Company, Limited, as the originally agreed price of \$650,000.

That, acting upon the said supplemental agreement, petitioners continued to offer said property to different parties until finally

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

they interested one C. R. Ash, of Duluth, Minn., in the said proposition, and after a great deal of work in making abstracts, in locating corners and lines, in making surveys, cruising the timber, and doing and performing all the acts and things required of an agent in making a sale, they finally succeeded about the 1st day of August, 1906, in closing a contract of sale of the said property between the said C. R. Ash and the said John R. Gheens, president and manager of the said Golden Ranch Sugar & Cattle Company, Limited, for the sale of the Derbigny plantation, a part of the property owned by the said Golden Ranch Sugar & Cattle Company, Limited, and also for the sale of the cypress timber or trees on the remainder of the land belonging to the said company in the parish of Lafourche, together with the crop, mules, implements, etc., on the said sugar plantation, for the price and sum of \$525,000.

That, when the said contract of sale was entered into, the said Ash paid the sum of \$10,000 as earnest money, and it was agreed that the said purchaser should have until October 1, 1906, to close the sale; and it was further agreed that the said Gheens should furnish to the said purchaser's attorney abstracts, titles, etc., which would show said company's title to the property contract to be sold.

Petitioners further showed that through no fault of theirs, but owing entirely to the defective title to the said property, they were unable to have the act of sale passed upon by the attorney of the said Ash, and that in consequence thereof the said Ash refused to close the said deal and to take the said property at that date, whereon the said defendants declared the contract off and claimed the said earnest money as forfeited to them. Petitioners further showed that acting upon the express authority of the said Gheens they did not give up hopes of selling the said property, but continued to negotiate during the entire month of October, 1906, with the said Ash, and finally brought the said negotiations to a successful close, and that on October 30, 1906, an act of sale was passed between said defendants and the said Ash, for the price of \$525,000 for the portion of the property of the said Golden Ranch Sugar & Cattle Company, Limited, known as the "Derbigny Plantation," and for the cypress trees and timber on the remainder of the lands belonging to the said company.

Petitioners showed that it was entirely owing to their efforts and industry that the purchaser of the said property was found for the said property and at the said price, and that they were acting in the said transaction under an express contract with the said Gheens, acting for himself and for the said Golden Ranch Sugar & Cattle Company, Limited, of which he was, and, as petitioners aver, still is, the president and manager, and has been for years; and petitioners aver that the said Gheens was also acting under

due authority from the said company and from all the stockholders thereof, he, the said John R. Gheens, being largely interested therein, and holding a very great proportion of the stock of the said company, and being largely interested in the carrying out of the said sale, which petitioners aver was greatly to the advantage of the said stockholders therein.

Petitioners further showed that the agreement between the said Gheens and the said Golden Ranch Sugar & Cattle Company, Limited, was specific and definite: First, that all the holdings of the said company situated in the parish of Lafourche were to be sold for \$650,000, or \$600,000 to the defendants and \$50,000 to petitioners; and that the subsequent and modified agreement made in place of the first was to the extent that if only a portion of the said holdings should be sold, then and in that event the commission to be paid petitioners was to be reduced so as to bear the same proportion to the purchase price as did the originally agreed upon commission of \$50,000 bear to the originally required price of \$650,000; that therefore the commission due to your petitioners is the sum of \$40,384.61, that sum bearing the same proportion to price paid by the said Ash to the Golden Ranch Sugar & Cattle Company, Limited, as did the originally agreed upon commission to the original price asked for all of the property.

Petitioners further show that at all times up to and including October 30, 1906, the date of the said sale, it was well understood and agreed between them and the said defendants as to their commission and what the amount should be, but that since the signing of the said act of sale the said John R. Gheens and the said Golden Ranch Sugar & Cattle Company, Limited, have refused to pay petitioners the amount agreed upon and due to them, though rightfully and legally due to petitioners, as repeatedly admitted by the said defendants, who have repeatedly tentatively admitted the indebtedness and liability by offering a settlement based upon a sum smaller in amount than that called upon by the agreement between petitioners and the said defendants, but which suggestions of a decreased amount to be paid have been refused by your petitioners for the reason that their contract was clear and explicit.

Petitioners further aver that for a long time the property of the said Golden Ranch Sugar & Cattle Company, Limited, was listed by them for sale; that petitioners were earnest and diligent in their attempts to sell the same as requested by the defendants; that petitioners worked on it sedulously, giving it most, if not all, of their attention and energy for the space and term of more than 12 months; that, besides their valuable time and industry, they have devoted to the carrying out of the agreement a large amount of money, amounting to thousands of dollars, in order to accomplish the purposes of the con-

tract and agreement above set forth, and that the action of the defendants in refusing to pay the commissions due, after having got rid of their property at a high price, lacks all the elements of good faith.

In view of the premises, petitioners prayed that the said Golden Ranch Sugar & Cattle Company, Limited, and the said John R. Gheens be cited to answer hereto; that after due delay and legal proceedings had petitioners have judgment against them, in solido, for the sum of \$40,384.61, with legal interest thereon from October 30, 1906, till paid, and all costs of suit, and for all and general relief.

Respondents answered, pleading, first, the general issue. They then specially denied that defendant John R. Gheens personally, and for himself individually, ever had any dealings with plaintiffs or either of them relative to the sale of any property whatever, or that they or either of them ever acted for him individually touching the sale of property as brokers, or otherwise.

Respondents admit that on or about the 15th day of April, 1906, the Golden Ranch Sugar & Cattle Company, Limited, acting through its president, John R. Gheens, arranged with George W. Neal, acting, as he represented, for himself and William H. Junk, for them to sell all of its holdings situated in the parish of Lafourche for \$650,000 cash, and agreed to pay them a commission of \$50,000 if they effected a sale at the price stipulated and on the terms stated. Respondents aver that after much delay, trouble, and annoyance, as well as great expense incurred by your respondent the Golden Ranch Sugar & Cattle Company, Limited, and the advance of considerable sums of money to plaintiffs to enable them to consummate the sale of the said property, which they pretended and represented they could and would sell, the plaintiffs had your respondent the Golden Ranch Sugar & Cattle Company, Limited, to pass a sale to William H. Junk, of its property for \$——, it being understood, however, that the deed was not to be placed of record until the cash stipulated in such deed was actually paid, the said Junk having no money, but claiming to be able to raise the same by a bond issue, which bonds he pretended to be able to sell in Chicago, and, pending such sale, the deed was placed in escrow with Howell & Martin, attorneys.

Respondents aver that after many months the plaintiffs informed them that it was impossible for them to raise the money, and the whole deal was declared off between your respondent the Golden Ranch Sugar & Cattle Company, Limited, and the plaintiffs. Respondents, further answering, say that, a short time after the failure of the plaintiffs to effect such sale, they requested your respondent the Golden Ranch Sugar & Cattle Company, Limited, to give them another trial and further time to make a sale of its property, which it reluctantly did, and to

that end agreed that if they sold the property or any portion thereof for a price less than \$650,000, but for a satisfactory price to the Golden Ranch Sugar & Cattle Company, Limited, upon terms satisfactory, your respondent company would pay to plaintiffs a commission in proportion to the first commission agreed to, to wit, "fifty thousand dollars."

Respondents aver that the Golden Ranch Sugar & Cattle Company has waited patiently for a long time on the plaintiffs to effect a sale under the second arrangement, but they did nothing, and, finally, on the 7th day of August, 1906, your respondent the Golden Ranch Sugar & Cattle Company, Limited, through its president, John R. Gheens, effected an arrangement with Charles Ralph Ash and Edward E. Moberly, whereby the first-named agreed and promised in writing to buy a certain portion of the property of the said corporation for \$525,000, upon certain terms and conditions as set forth in such written agreement, herewith filed and marked "Exhibit A"; and on the same day agreed with Edward E. Moberly in writing to sell to him all of the timber upon the lands described in said written agreement for the price and consideration fully set forth in the said contract, which said contract is filed herewith and marked "Exhibit B"; the said Ash and Moberly binding and obligating themselves by the said agreements to buy the property and pay the price stipulated on or before the 1st day of October, 1906.

Your respondents aver that plaintiffs contributed in no way, as far as they are aware, to the arrangement with Moberly and Ash; in fact, plaintiffs, as far as respondents are aware, figured in no manner in the deal, but in spite of this fact, and with the view of carrying out in good faith both in letter and in spirit its arrangement with the plaintiffs, and with a view of fully compensating them for any trouble or possible expense they may have incurred in behalf of your respondent corporation, the said corporation, acting through its president, John R. Gheens, was perfectly willing and would have paid them the full commission secondly promised them, believing at the time that they had been instrumental in putting respondent the Golden Ranch Sugar & Cattle Company, Limited, in touch with the said Ash and Moberly, but your respondents have been since informed, verily believe, and so aver that such was not the case, had such sales materialized, which, however, they failed to do, through no fault of your respondents.

Respondents, further answering, say that after the 1st day of October, 1906, all dealings between your respondents and plaintiffs ceased, and all efforts to sell property of the respondent corporation ceased and were discontinued by plaintiffs, nor were they authorized or intrusted further with the sale of the property of your respondent corporation or any part or portion thereof, nor did they any

longer pretend to be authorized to sell or negotiate for the sale of the property of your respondent the Golden Ranch Sugar & Cattle Company, Limited's, or part thereof, and from and after that date all relations between plaintiff and respondent the Golden Ranch Sugar & Cattle Company, Limited, relating to the sale or the offering for sale of its property, or any part or portion thereof, ceased; all employment to that end having terminated on the 1st of October, 1906, when the contracts of sale to Moberly and Ash failed to materialize, and from and after that date plaintiffs had nothing more to do with the sale of the property of the Golden Ranch Sugar & Cattle Company, Limited, or any part or portion thereof, nor did they either offer or attempt to sell the same, or any part or portion thereof, nor did they pretend, claim, or hold themselves out to be authorized agents so to do until after the sale to C. R. Ash, by act before P. M. Milner, of date October 25, 1906.

Respondents, further answering, say that, a short time after the 1st day of October, 1906, the Golden Ranch Sugar & Cattle Company, Limited, acting through its president, John R. Gheens, undertook to sell its own property, and after considerable delay and negotiations did succeed in selling a large part of its holdings situated in the parish of Lafourche to Charles R. Ash, by act before P. M. Milner, notary public in and for the city of New Orleans, on the 25th of October, 1906, on the terms therein stated, for the price of \$25,000; but your respondents specially deny that plaintiffs had anything whatever to do with the said sale, or contributed in any way to bring it about, or represented your respondents or were authorized to represent them therein, either directly or indirectly; and respondents further specially deny that plaintiffs are entitled to any commission thereon or compensation whatever.

If, however, the court should hold that your respondents, or either of them, are indebted to the plaintiffs for the commission claimed by them, or any part or portion thereof, then your respondent corporation, the Golden Ranch Sugar & Cattle Company, Limited, alleges that it advanced to the said Junk and Neal, plaintiffs herein, on account of such commission as they might have earned if the first or second arrangement herein detailed had resulted in a sale, at various times, beginning with the 6th of January, 1906, up to and inclusive of the 28th of July of the same year, \$1,858.95, which respondent is entitled to recover in reconvention against the said plaintiffs, and so alternatively pray. Respondents aver that they are entitled to a trial by jury herein, and so pray, and herewith make the deposit required by law, and tender to the court their bond, with approved security, for such an amount as the court may fix.

In view of the premises, respondents pray that plaintiffs' demand be rejected at their

costs, or, if they are given judgment for any amount, that respondent the Golden Ranch Sugar & Cattle Company, Limited, do have and recover judgment in reconvention against them in solido for \$1,850.95, with 5 per cent. per annum interest from judicial demand until paid, for all costs, for trial by jury, and for all and general relief.

On May 4, 1907, Charles R. Ash, with leave of court, intervened in the case. In his petition of intervention he alleged that this is a suit of plaintiffs against defendant upon an allegation that said plaintiffs have secured petitioner as a purchaser for the plantation formerly known as the "Derbigny and De Le Breton Plantation," and plaintiffs are claiming a commission as brokers for said transaction.

Petitioner avers that he had no transaction with either of the plaintiffs in this case in reference to the purchase of said plantation; that a party by the name of John G. Taylor first approached petitioner and spoke to him about said plantation, and stated to him that plaintiffs had been endeavoring to effect the sale of said plantation, but their plans had fallen through and they had abandoned same, and he was induced to take the matter up with a view of securing a purchaser for same; that said Taylor knew that your petitioner was not financially able to buy a plantation and timber worth a half million dollars; that said Taylor informed petitioner that he would divide his commission with him if he secured a purchaser.

Petitioner represents that he went to visit the plantation, and said Taylor arranged to have the plaintiffs accompany them to the plantation, and said Taylor introduced your petitioner to Mr. Jno. R. Gheens, president of defendant company. Petitioner represents that, being unable to buy the plantation for himself, he was compelled to finance the deal, and he arranged with Mr. Edward E. Moberly, of Chicago, Ill., to purchase the timber which was to go with the sale, and on August 7, 1906, he and said E. E. Moberly entered into two written agreements of sale for the purchase of said plantation and the timber, the whole as will more fully appear by said agreements marked "Exhibit A" and "Exhibit B" hereto annexed and made part hereof.

"Petitioner represents that said Golden Ranch Sugar & Cattle Company, Limited, through its president, Mr. Jno. R. Gheens, agreed to deliver abstracts of title to the property in question to his attorney for the purpose of examining the title thereto; that said abstracts were not delivered to his attorney within time to complete the examination, and on October 1, 1906, when their options to buy the plantation and timber expired, they were unable to get an extension of time from said Jno. R. Gheens, president, and the deal fell through.

"Petitioner further represents that thereafter he undertook, without the assistance of either Taylor, Junk, or Neal, to again finance a deal by which he would be enabled to buy this plantation, and that he succeeded in so doing by making arrangements with the Hibernia Bank & Trust Company, of New Orleans, La.;

that at the last minute the bank withdrew its assistance, and the deal again fell through; that thereafter petitioner, again without the assistance or help of said Junk and Neal or said Taylor, was compelled to find new financial backing, which he was enabled to do, and on October 30, 1903, with the assistance of the Commercial Germania Savings Bank & Trust Company of New Orleans, La., he acquired the plantation in question and sold the timber, the whole as will appear by the notarial acts of sale of record in this parish.

"Now petitioner represents that no commission is due by said defendant to the plaintiffs in this case, and for the reasons aforesaid he joins with said defendant in resisting their demand, but petitioner and intervener avers that if said Taylor was acting for Junk and Neal, and said Junk and Neal are held in law to be entitled to a commission or brokerage for the sale of the plantation and timber in question, under the circumstances herein set forth, then and in that case petitioner claims and avers that he is entitled to one-half of such commission as they shall recover of the defendant herein, upon the ground that said Taylor, in inducing petitioner and intervener to endeavor to sell said plantation and timber, agreed to divide the commission he would obtain with your petitioner.

"Petitioner avers that it was entirely through his own extraordinary exertions and financial operations, with repeated failure, that he was enabled, by the sale of the timber on the property in question, to carry the deal and himself acquire the plantation, and that he received no assistance in this respect from either Junk, Neal, or Taylor, and that if said Junk and Neal can in law through his exertion establish a right to a commission on the sale of this land to him by and from the fact that Taylor presented the deal to him, then and in that case he is entitled to a division of the commission that these plaintiffs shall receive.

"In view of the premises, petitioner and intervener prays that this petition of intervention may be filed, that plaintiffs and defendant be cited to appear and answer herein, and that, after due proceedings had, petitioner's demand be rejected, or, in the alternative, if petitioner's demand is maintained, then and in that case that petitioner and intervener have judgment over and against said Wm. H. Junk and Geo. W. Neal for one-half of such amount as they may recover against defendant.

"And for all general and equitable relief."

On May 7th, plaintiffs answered the intervention of Ash, pleading first the general issue. They denied specially there was any privity existing between the intervener and plaintiffs, and especially that he is entitled to any relief as against any of the parties to this suit. In view of the premises, they pray that the intervention be rejected at costs of the intervener, and for all and general relief.

Defendants answered the intervention of Ash, pleading first the general issue. They prayed that the demands of the intervener be rejected.

The case was tried before a jury, which returned a verdict in favor of the plaintiffs against the Golden Ranch Sugar & Cattle Company, Limited, for the amount sued for, and a verdict for the defendants on reconventional demand for \$250, and dismissed the intervention.

The plaintiffs had claimed a judgment against Jno. R. Gheens, but the verdict was

rendered merely against the company and judgment was rendered accordingly.

Defendant company appealed.

The issues between the parties are shown by the statement of the case which accompanied this opinion.

The transcript consists of three large volumes containing a mass of irrelevant documentary and parol evidence which has no bearing upon the case, and has made it difficult for us to dispose of them. We have given the record careful consideration, but it is possible that some particular part bearing upon the case may have escaped our notice.

The plaintiffs, as we have seen, allege that on or about the 15th of April the defendant company entered into a definite agreement and contract with them, placing in their hands for sale its entire holdings in the parish of Lafourche for the price of \$850,000, and that it authorized and directed them "to procure a purchaser," and in case they should "procure a purchaser" for such a price it would pay them as a commission for effecting the said sale the sum of \$50,000. Defendant admits that on or about the date mentioned it, through its president, arranged with the plaintiffs that they should "sell" all of its holdings for \$850,000, and agreed to pay them a commission of \$50,000 if they effected a sale at the price stipulated and in the terms stated.

In plaintiffs' brief it is contended that the defendant has by its pleadings admitted the agreement which they set up as the basis of their demand, but it has not done so. Plaintiffs place their right to demand commissions, not upon the fact that under the original contract a "sale" of the property has been actually effectuated by them, but upon the fact that another and supplemental agreement was made to the effect that if they should "succeed in procuring a purchaser" for that portion of the property to which a perfect title could be made, and if the price should be satisfactory to the defendant's president, then and in that event such a commission would be paid to them as would bear the same ratio as the price actually paid to and received by the defendant as the price originally agreed of \$650,000.

Defendant denies that such a supplemental agreement was ever entered into between the parties. The evidence shows that the plaintiffs made several ineffectual attempts to procure a sale of the property of the defendant company under the terms of the agreement of the 15th of April, 1905, and that the proposed selling of the entire holdings of the defendant company by the plaintiffs for the sum of \$650,000 cash was never effected. The evidence shows that the plaintiffs continued to offer up to the 7th of August, 1907, the property for sale to different parties. That through the instrumentality of a Mr. Taylor the attention of one C. R. Ash was called to the subject of a sale by the defendant company of its property, and becom-

ing interested in the matter, he, through Taylor, became introduced to the president of the defendant company. That after several visits to the defendant's property on Lafourche, accompanied by Mr. Neal and Mr. Taylor, whom plaintiffs (Junk and Neal) had associated with themselves in this matter, he returned to New Orleans and succeeded in causing a Mr. Moberly, who was desirous of making timber purchases in Louisiana, to join him in attempting to together make a purchase of part of the defendant's property. The evidence shows that the plaintiffs had no connection with Moberly, and knew nothing of the plans or arrangements between him and Ash.

Ash and Moberly entered into negotiations with John R. Gheens, as the president of defendant company, with respect to a purchase by them of defendant's property. These negotiations resulted in two agreements. The first is an act signed by defendant company through its president, on the 7th of August, 1907, wherein that company agrees to sell to Charles R. Ash the tract of land described in the act, together with the buildings and improvements, machinery, etc., referred to in the act for the sum of \$525,000, whereof \$225,000 shall be paid in cash, and the balance of \$300,000 shall be represented by five notes, each for the sum of \$60,000, bearing 5 per cent. interest from August 6, 1906, the first note payable on February 1, 1908, the remaining four notes to be payable the 1st day of February, 1909, 1910, 1911, and 1912, respectively. The credit portion shall be secured by the usual clauses of mortgage and insurance in an authentic act.

It was declared in this act to be understood and agreed that this sale is conditioned upon the carrying out of a certain agreement made the same day between John R. Gheens, as president of the defendant company, and Edward E. Moberly, of Chicago, Ill., and if the said Edward E. Moberly, his successors and assigns, fail to carry out said agreement, which was made part of the act then being signed, then this agreement of sale to Ash is to become null and void and inoperative. The parties agreed, in order to carry out the agreements that day signed, that on the day upon which the sales should be executed the said John R. Gheens, president of the Golden Ranch Sugar & Cattle Company, Limited, shall first execute the deed to Edward E. Moberly, his successors or assigns, for the timber described in his agreement, for a cash consideration of \$150,000, subject to the credit of \$10,000 that day paid; and that, immediately following the execution of said deed, the deed to said Charles R. Ash shall be made of the plantation property covered by the agreement then being signed, excluding and excepting, however, the timber sold Moberly; and that in view of the payment made to the Golden Ranch Sugar & Cattle Company, Limited, of the \$150,000, the consideration of the sale to said Ash, his suc-

cessors or assigns, shall be \$375,000, of which \$75,000 shall be in cash and the balance shall be represented by the aforesaid five promissory notes, each for the \$60,000, bearing 5 per cent. interest per annum as before set forth, this making the total price received by the Golden Ranch Sugar & Cattle Company, Limited, for said plantation property described in the act, the sum of \$525,000. It was agreed that this sale should take place not later than October 1, 1906.

The second of the two acts agreed upon was one executed by the Golden Ranch Sugar & Cattle Company, Limited, through its president, wherein it was declared and recited that, for and in consideration of the sum of \$10,000 cash in hand paid, said corporation agreed to sell, bargain, convey, and deliver to Edward E. Moberly certain described timber described in the act then executed on certain described lands.

It was declared in the act that it was agreed and understood that Edward E. Moberly should accept title by regular authentic act of sale, to be executed on or not later than October 1, 1906, the said John R. Gheens binding himself and the company to make title to said Moberly to the described timber upon the described lands upon demand, and not later than October 1, 1906.

In the event that the said Edward E. Moberly, his successors or assigns, fail to accept title to said timber on or before October 1, 1906, the \$10,000 then paid should be forfeited to the Golden Ranch Sugar & Cattle Company, Limited, without recourse. In the event that the said Edward E. Moberly accepts title to the timber described, he shall pay, in addition to the \$10,000 then paid, the sum of \$140,000, which shall be the purchase price for said timber as described. In the event that Moberly purchased said timber, the Golden Ranch Sugar & Cattle Company, Limited, will allow him, his successors or assigns, a right of way over and through the lands described for the purpose of logging same.

It was further agreed and understood that this agreement shall be null and void; and the \$10,000 then paid should be forfeited, if Charles R. Ash fails to carry out his agreement that day made, a copy of which was annexed for reference, to buy the property firstly described in the act known as the Derbigny or Le Breton plantations, unless the said Edward E. Moberly shall find a purchaser in lieu of the said Ash upon the terms and conditions of the agreed sale to Ash.

On October 1st, the day fixed as the limit for carrying out the agreement to sell, the parties met at the office of Mr. Milner, the attorney of Mr. Moberly, when the latter demanded an extension of time, as he stated that he had not had time to examine the title.

Gheens refusing to grant the full extension asked and Moberly insisting upon it, the agreements were not carried out, and the property was not sold under them.

On the day the parties disagreed as stated,

Gheens, as president of the company, wrote a letter to Moberly (and a like one to Ash), which was then served upon them, declaring that the company stood prepared to carry out that day in every particular the contract between the said company and himself on the 7th of August, and thereby formally tendered to him title to the property described in the contract, upon the terms and conditions therein stipulated, and offered to execute to him that day warranty deed to the said property under all the terms and conditions stipulated in the said contract before Andrew Hero, notary public, duly qualified in and for the city of New Orleans, or before such notary as he might select, at any hour that—

"may suit your convenience, and the said company formally calls on you to comply with the said contract. In default of your doing so, the penalty fixed by the contract will be exacted."

During the period of the negotiations between Ash and Moberly, the former, anticipating that the purchases which were contemplated by himself and Moberly might fail, had in anticipation of such failure placed himself in communication with the Bowle Lumber Company, of which Mr. Downman was president, with a view of getting that company (in that contingency) to act in conjunction with him in dealing with the defendant corporation. Negotiations with it had taken no definite shape, when what is termed herein the "Ash-Moberly deal" failed. Negotiations were afterwards resumed, and resulted in what may be termed the "Ash-Downman deal," whereby on the 25th of October, 1906, the defendant first sold by authentic act to Charles R. Ash the land belonging to that company described in that act, together with the building and improvements, machinery, farming utensils, etc., therein described, for the price of \$375,000, in part payment and deduction whereof the vendee was acknowledged to have paid the sum of \$25,000, and for the balance of the price of \$350,000 the purchaser furnished his six promissory notes to the order of himself, so indorsed and dated that day, payable at 90 days, for \$40,000, and five notes, each for \$62,000, payable respectively on February 1, 1908, 1909, 1910, 1911, and 1912, payable at the Commercial Germania Trust & Savings Bank with interest at the rate of 5 per cent. per annum from date until paid; and whereby on the same day Charles R. Ash sold to Robert H. Downman all the ties or timber of whatever kind on the same property for the price of \$175,000 in cash payment, in deduction whereof it was acknowledged that purchaser had paid the sum of \$12,500, and for the balance of the price the purchaser furnished his four promissory notes each for the sum of \$40,675, to his own order and by him indorsed, dated October 25, 1906, and payable in two, three, or four years after date at the Commercial Germania Trust & Banking Company, to bear interest at the rate of 6 per cent. per annum from date payable semiannually.

The evidence shows that, some few days after the Ash-Moberly deal failed, Ash, who was in New Orleans, telephoned to Mr. Gheens, in Lafourche, that he wished to see him in New Orleans. Gheens went to that city on the 10th of October and met Ash in the lobby of the St. Charles Hotel, and the latter saying to him:

"Colonel, if you will give me some more time, I think I can make a trade with you."

The two repaired to Mr. Ash's room and discussed certain propositions made by Ash. The negotiations between them then commenced continued from time to time until they culminated on or about the 25th of October in the agreement which was consummated on the 25th of October. There is nothing going to show that Gheens anticipated when the Ash-Moberly deal fell through, that new negotiations would be resumed between Ash and himself, and nothing to cause us to question his utter good faith in respect to the breaking up of that arrangement. We do not think that the plaintiffs had anything to do after the 1st of October with the later negotiations between Ash and Gheens.

It is proper to state here that the visits of Ash to the defendant's property in company with Neal and Taylor were in view of his associating himself with Taylor and plaintiffs in seeking to bring about a sale of the whole of defendant's property at the original price. Gheens knew nothing of the relations between the parties, or the purpose Ash had in view in going upon the plantation. Junk led him to believe that he was a prospective purchaser, and asked Gheens to handle him himself (Ash having expressed to Taylor an unwillingness to deal with Gheens through a broker). After informing himself of the situation of affairs, Ash became convinced that it was impossible to carry out the original plan of the defendant to sell all its holdings at the price of \$650,000, and entered into direct negotiations with Gheens for a purchase by himself of its property in conjunction with Moberly. These negotiations culminated in the option to Moberly, conditioned upon the forfeit by him of \$10,000 should he not avail himself of the option, and the contingent promise of sale by the defendant company to Ash and contingent promise of purchase by Ash, conditioned upon Moberly's acceptance and execution of the option.

The proposed purchases to be made by Ash and Moberly fell through, as has been stated. After the breaking up of the Ash-Moberly deal, the latter threatened to sue the defendant for the return of the \$10,000 which had been received by it, but the matter was compromised by the return of \$5,000.

In the brief on behalf of the plaintiffs, counsel declare:

"Without fear of contradiction, throughout the periods we have been discussing, plaintiffs were proceeding under the original contract of brokerage on the basis of the whole of the de-

defendant's holdings for \$650,000, and \$50,000 commission, with the single modification perhaps, that the plaintiffs were no longer vested with the exclusive agency. The next modification of this contract of brokerage occurred on the 27th of July, 1906."

The modification in the contract referred to in the plaintiffs' petition must be the modification claimed to have been made on the 27th of July. If there were any other, we have failed to find it. The testimony on that subject is found in Neal's testimony, and that of Junk and Gheens. Neal was asked by counsel:

"Now, what was your agreement with Mr. Gheens in reference to commissions on July 27, 1906?"

"We had quite a conversation on that date, and he said he did not think they were going to—

"Defendant's counsel objects on the ground that there was no allegation on the petition for such proof. We object unless it is the contract we have admitted, otherwise proof cannot be admitted under the pleadings.

"By the Court: I think the evidence is admissible, and I overrule the objection.

"Counsel excepts, and reserves this note in lieu of a bill of exceptions.

"A. Mr. Gheens informed us at that time that he did not think Mr. Ash would buy the entire property, so the question came up, and I asked, 'Colonel, in that case, suppose he does not buy it, where do we stand in the matter?' and he said, 'Well, I propose to treat you right.' I said, 'What do you mean by "treating us right"?' Do you mean that you agree to prorate this commission in proportion to the number of acres and in regard to the amount of the sale with the commission on the whole?' and he said 'Yes, that is the agreement.'

"Q. You mean prorate in proportion to the price?

"A. Yes, sir; you see, before this there was nothing definite, but we had thought that Mr. Ash would purchase the entire property. Mr. Ash was the man that we had to take up the sale of this property with, immediately after the bond issue with Shadburne & Co. had fallen through, and up to this time we had been trying to convince him that it was a wise thing for him to buy all the property; and it was only after he had made a careful survey of the property, and had made the proposition, that this conversation came up about prorating.

"Q. Who told you he had made a proposition to Mr. Gheens?

"A. Mr. Gheens himself.

"Q. When did he tell you that?

"A. That night—the night of July 27th.

"Q. Now, with reference to Mr. Moberly, how long had he been figuring on this transaction prior to July 27th?

"A. That I can't say. I did not know that Mr. Moberly was in the deal until July 10th, when Mr. Gheens showed me a telegram from Mr. Brayton that he and Mr. Gilchrist and Mr. Moberly would be ready.

"Q. Who induced Mr. Moberly to go on the property?

"A. I suppose Mr. Ash did; we never knew anything about Moberly.

"Q. Who introduced Mr. Moberly to Mr. Gheens?

"A. That I cannot say.

"Q. Did you?

"A. No, sir, I did not.

"Q. Did Mr. Junk?

"A. Not that I know of.

"Q. Did Mr. Taylor?

"A. Not that I know of.

"Q. Did Mr. Gheens know when he made that agreement with you that you had no agreement with Mr. Moberly?

"A. I know I did not know anything about it. I don't know how he could know; I knew nothing about it.

"Q. In so far as Mr. Gheens is concerned, did you ever tell or lead Mr. Gheens to believe by word or action that you had procured Mr. Moberly?

"A. None whatever in any way. We had nothing to do with Mr. Moberly—nothing at all.

"Q. Did Mr. Gheens ever say anything to you about Moberly's connection with the deal?

"A. Not until the night of August 7th, I believe."

Mr. Junk gave substantially the same testimony as to the conversation between Gheens and Neal as the latter gave.

In reference to this conversation, Gheens testified that he told Neal that if the sale went through (the Ash-Moberly sale) he supposed his company would have to settle with him pro rata to the amount of the commissions; that Neal said: "Colonel, what about our commissions?" and he said:

"Well, Mr. Neal, I suppose we will have to prorate your commission if this deal goes through."

On cross-examination plaintiffs' counsel asked Mr. Gheens:

"Did I understand you to say that between the 1st day of May, 1906, and the 7th of August, 1906, Junk and Neal and neither of them had any authority whatever to negotiate the sale of your property? * * *

"A. I said after that 1st of October.

"Q. They had authority between the 1st day of May and the 7th day of August, 1906?

"A. I can't deny that.

"Q. And up to the 1st of October did they not have authority up to the Moberly deal?

"A. Yes, sir.

"Q. They did have authority?

"A. Yes, sir.

"Q. And they were entitled, if they had made a sale, to prorate part of the commission?

"A. I said that I made that statement a while ago."

Defendant's contention as to this is that this conversation constituted no contract or agreement, that it was a mere promise, and that promise was one made in reference to the Ash-Moberly deal which was at that time apparently about to be consummated; that the promise was made upon the belief that he then entertained, which belief was not founded on facts, that plaintiffs had been connected with Moberly and contributed to his entering into the arrangements with Ash.

Plaintiffs' contention is that the brokerage contract, either in its original or as finally amended on July 27, 1906, did not provide or contemplate that these plaintiffs were to secure their commissions only in the event that the special agreements entered into with the two particular individuals, Ash and Moberly, should be carried into actual and final effect by formal transfer of the property. They contend that they were entitled to their commission if the vendee presented by them entered into a valid, binding, and enforceable contract; that, if, after the making of such a contract, even

though executory in form, the purchaser declined to complete the sale and seller refuses to compel performance, the broker was entitled to his brokerage; that the broker was also entitled to his commissions when he produced a customer who was able, ready, and willing to purchase on the terms proposed, and enter into a valid, binding, and enforceable contract to that effect, even though the owner declined the offer, or if at the owner's solicitation the contract of purchase entered into was designedly so framed as to be specifically nonenforceable.

They contend that they produced in this instance to the defendant a purchaser able, willing, and ready to enter into a valid, binding, and enforceable contract on the terms proposed by the owner; that the parties did enter into such a contract; that it was enforceable, and defendant failed to enforce it when Moberly withdrew from it, as it could and should have been done; and that they at once earned the commission when this occurred; that if this were not true, they earned their commission when later the purchaser whom they had produced entered into a contract of sale with the owner.

There is another circumstance in the case which has been omitted from mention so far upon which plaintiffs lay some stress. They urge that, since the sale made to Ash, defendant has repeatedly "tentatively admitted" the indebtedness claimed by them by offering settlement upon a sum smaller in amount than that called for by the agreement.

Opinion.

Plaintiffs sue upon a "contract" alleged to have been made between themselves and the defendant company on the 27th day of July, 1906. That contract has not been established. Plaintiffs refer to it as a modification of the original contract between the parties, but it is so radically different from that one as to constitute it a "new" contract, rather than a modification. The contract sued upon is a verbal one, involving in it thousands of dollars, and rests upon conflicting evidence. We are satisfied of the correctness of Mr. Gheens' version of the conversation between the parties on the 27th of July, 1897. That of the plaintiffs is highly unreasonable and improbable. The plaintiffs claim, and the defendant does not deny, that the former were, up to that conversation, acting under the terms of the original agreement, which was not "to procure a purchaser for a portion of the property and on uncertain terms," but to effect themselves a sale of the entire holdings of the defendant company, and for the fixed sum of \$800,000, and fixing the commissions at \$30,000 if that sale was effectuated by themselves. Plaintiffs admit that they knew nothing of the negotiations which had taken place between Ash and the defendant company until they were told of them by Gheens on the 27th of July, and that they had noth-

ing to do with Moberly at that or at any other date with those negotiations. It is perfectly clear what the result of the failure of the consummation of those negotiations would have been upon the right of the plaintiffs to commissions. Matters standing admittedly at that time on the basis of the original contract, there was no possible doubt as to what plaintiffs' position was as to what their right to commissions would be under such conditions. It was a useless and senseless question for Neal to ask Gheens what their rights would be had the negotiations failed. On the other hand, plaintiffs, ascertaining at that time that Ash and Moberly had come to a definite arrangement as to a sale of part of defendant's property, on terms entirely different from those fixed in the agreement of the 15th of April, and recognizing, as Neal himself testified to, that nothing had been said as to what their status would be under this new state of facts, very naturally inquired of Gheens what their status would be as to commission in the event of the existing arrangement being carried through, and it was perfectly natural that Gheens should have been willing to say what he would do if in point of fact they should be carried out, and declare that should that arrangement be carried out he would pay them commissions pro rata. The question was evidently directed to the conditions which would arise in the event the proposed purchase by Ash and Moberly went through, and not to what would be the result of the failure of those negotiations. Gheens evidently answered the questions from the standpoint of a successful carrying out of the particular plan which had been reached between Ash and Moberly and defendant. It is unreasonable to believe that Gheens should under existing conditions have consented to make an arrangement with plaintiffs which would cut him off from making new and independent arrangements with Ash and Moberly, without such new and independent arrangements carrying with them as a necessary legal result the payment to plaintiffs of the large pro rata commissions which plaintiffs claim they would be entitled to from the successful accomplishment by themselves of a sale of the whole property of the defendant for the fixed price of \$850,000.

Plaintiffs' claim that the negotiations between Ash and Moberly and the defendant company were an accepted promise of sale, which admitted of a successful suit against Moberly for a specific performance of the agreement by him, is without force. Moberly never came under an obligation to purchase the property. So far from this, he exercised the greatest care and caution to avoid any liability beyond that which he consented to come under if he did not consent to buy. The defendant could not force him to buy; the utmost it could exact was to claim the \$10,000 forfeit. Ash never came under an obligation to buy; everything consented to

by Ash was contingent upon Moberly's making the purchase which he contemplated making, Ash recognizes his financial inability to make his contemplated purchase independently of the co-operation of Moberly.

Obviously, the defendant would not have entertained any proposition made by Ash to purchase, disconnected with Moberly's co-operation. When Moberly withdrew, the whole plan of purchase collapsed, and the relations between the parties in respect to that purchase ceased. All parties were finally released from obligations.

The defendant had no reason to know or to suspect that Ash would make a new and independent proposition to buy based upon the co-operation with him of Downman. The good faith of the defendant in this matter is beyond question. The defendant had the legal right to entertain this new and independent proposition from Ash and Downman freed from any liability to plaintiffs for commission. They had no connection whatever with the ultimate purchases made by Ash and Downman. The negotiations which led to that purchase were made by Ash and Moberly without consultation with the plaintiffs.

We do not find in the willingness of the defendant to pay the plaintiffs any "tentative admission" by the defendant of any obligation on its part. The defendant specially denied the existence of an obligation towards the plaintiffs, and placed its willingness to pay the sum to good feeling towards them and to a recognition of the fact that they had given a good deal of their time and had expended a good deal of money in attempting to bring about a sale under the contract of 15th of April, 1905. What was intended as a favor is now construed into an acknowledgment of a right.

We are not dealing in this case with any right to remuneration for services rendered upon a quantum meruit, but with a claim to remuneration brought forward upon a contract which we do not think has been established.

For the reasons herein assigned, it is hereby ordered, adjudged, and decreed that the verdict of the jury, and the judgment of the court therein, herein appealed from, be, and the same are hereby, set aside, avoided, and reversed, and that plaintiffs' demand herein be, and the same is hereby, rejected, and its suit dismissed.

On Rehearing.

LAND, J. The record in this case consists of three voluminous transcripts filled with conflicting testimony, which it is impossible to reconcile. If the testimony of Mr. Ash be true, the plaintiffs were not the procuring cause of the Ash-Moberly agreement of sale, and had nothing whatever to do with the final sale to Ash. Defendant, however, admits in his answer that plaintiffs would have been entitled to a commission if the Ash-Moberly sale had been consummat-

ed. The pivotal question of fact is whether the agreement to pay commissions terminated on the failure of the Ash-Moberly deal, or continued in force down to the date of the final sale. There is testimony pro and con on this question, as is always the case when agreements of moment are not reduced to writing.

According to the testimony of Gheens and Ash, the plaintiffs had nothing to do with the negotiations after October 1, 1906. Mr. Howell, of counsel for defendant, testified that on October 1st he met the plaintiffs, and that they informed him that the Ash-Moberly deal was off, and urged him to see the defendant and persuade him to give them another chance to sell the property. It is true that the plaintiffs give a different version of the conversation, stating that it was a request for more time on the Ash-Moberly deal.

The testimony of Gheens, that the agreement to pay reduced commissions was conditioned on the Ash-Moberly deal going through, is confirmed by Mr. Junk in one of his answers on cross-examination. The action of all the parties after October 1, 1906, confirms this conclusion. Plaintiffs were inactive, and Ash about October 10th began new negotiations on his own account, and finally induced a large sawmill concern to advance the necessary money to make a new deal.

Plaintiffs contributed nothing to this result. Ash was a mere promoter without means, and was not a prospective purchaser willing and able to buy.

In the Ash-Moberly agreement of August 7, 1906, Ash bound himself conditionally on Moberly's purchase of the timber, and the latter's obligation to buy was secured by a deposit of \$10,000 with the defendant, to be forfeited in case of Moberly's failure to comply with his agreement to purchase.

It is obvious that this agreement could not be enforced against Ash, and that Moberly only risked his deposit.

Defendant exacted the forfeiture, and on November 2, 1906, offered to make plaintiffs a present of \$10,000.

The judge below considered Ash as a purchaser procured by the plaintiffs, and the Ash-Moberly agreement as a sale which could be specifically enforced.

We excerpt from his charge the following passages:

"The demand and acceptance by the principal of any amount fixed as a forfeit in the contract made by him with the purchaser is an admission by the party demanding and accepting the forfeit or any part of it that the contingency had happened upon which he had the right to enforce the contract.

"If you find that on August 7, 1906, the defendants or either of them made a valid contract or agreement to sell or buy the land which could have been specifically enforced with a purchaser secured by the plaintiff or their agent, then the plaintiffs are entitled to recover their commissions, having in the eyes of the law earned them."

These instructions were erroneous and misleading. The Ash-Moberly agreement was

one to purchase the timber or to pay a stipulated penalty of \$10,000. On his failure to comply with his agreement to purchase, the only claim that defendant could have enforced was the exaction of the stipulated penalty.

It is preposterous to contend that defendant is bound either in law or in equity to pay over \$48,000 as commissions on a transaction involving only \$10,000.

The verbal agreement to pay commissions on the sale of a part of the property was made in July or August, 1906, in view of the prospective purchase by Moberly. Plaintiffs' contract was to sell or procure the sale of the whole property for \$600,000. They had failed to do so, and defendant had the legal right to dispose of the property in whole or in part as it deemed best. The president of the defendant company was, however, disposed to do what was right, and agreed to prorate the commissions if the Ash-Moberly deal went through. According to Mr. Neal, this verbal agreement was made July 27, 1906, after he had been informed that Mr. Moberly was in the deal. This agreement was a concession, which the plaintiffs had no legal right to demand, and was made in view of a particular sale then in contemplation. It is hardly reasonable to suppose that this loose verbal agreement was intended as a continuing contract. Plaintiffs had no authority to sell a part of the property, and had no legal right to commissions on any such sale made by the owner. All the facts and circumstances of the case point to the conclusion that the agreement of July, 1906, was intended only to cover the Ash-Moberly deal.

The original contract was made with Junk and Neal, who took in Taylor and agreed to give him 50 per cent. of the commissions. Taylor found Ash, and agreed to divide commissions with him. Ash, therefore, was one of the four promoters, and was entitled to one-fourth of the commissions.

The whole theory of plaintiffs' case rests on the untenable premise that they procured Ash as a prospective purchaser, and that defendant finally sold to Ash, thereby reaping the benefits of their services. The facts are that the final purchase was the independent work of Ash, after plaintiffs had utterly failed to find a purchaser.

It is therefore ordered that our former decree herein be reinstated as the judgment of the court.

(122 La. 324)

No. 17,018.

Succession of GABISSO.

(Supreme Court of Louisiana. Jan. 18, 1909.)

1. APPEAL AND ERROR (§ 1008*)—REVIEW.

With the burden of proof and the judgment below against the appellant, the decree

will be affirmed on issues of fact, unless manifestly erroneous on the face of the record. Citing *Webster v. Howcott*, 47 South. 683.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3955; Dec. Dig. § 1008.*]

2. EVIDENCE (§ 283*)—ADMISSIONS OF DECEDENT—WEIGHT.

Testimony as to the extrajudicial admissions of a dead person is the weakest of all evidence, and in most instances scarcely worthy of consideration. *Bodenheimer v. Bodenheimer*, 35 La. Ann. 1007.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1050; Dec. Dig. § 283.*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Walter Byers Sommerville, Judge.

In the matter of the succession of Catherine Gabisso, widow of Louis Frigerio, Jr. Andrew Murphy filed an opposition. Judgment for the succession, and opponent appeals. Affirmed.

Thilborger & Duffy and Solomon Wolff, for appellant. Hall & Monroe, for appellee.

LAND, J. Andrew Murphy, by opposition filed to the final account of the testamentary executrices of Widow Frigerio, deceased, claimed to be a creditor of the succession in the sum of \$1,185, of which \$1,100 was evidenced by a lost note signed by the decedent and dated about March 3, 1905, and \$85 was for work done during the same year.

Opponent alleged that about April 15, 1899, the decedent made a verbal contract with him to fill a certain square (including the ponds and ditches therein belonging to her in the city of New Orleans, for the lump price of \$1,000, which verbal contract was confirmed by a letter from the decedent dated April 15, 1899, filed as a part of the opposition; that the decedent subsequently made a verbal contract with the opponent for sundry work of carpentering and painting the residence in said square for the price of \$100; that for the work of filling said square, and the work on said residence, decedent did, by letter of date March 3, 1905, filed as a part of the opposition, promise to pay the opponent the sum of \$1,100, and did furnish and give to him a note for this amount, signed by decedent, which said note the opponent is unable to produce, having lost the same, and having used due diligence to find or recover said note by search and public advertisement; that said note was dated within a few days of the date of said letter of March 8, 1905; that the decedent was indebted unto opponent, pursuant to verbal contracts, in the further sum of \$60 for rebuilding the fence around said square of ground, and in the further sum of \$25 for painting a store-room at her residence, corner of Claiborne and Bayou road.

The answer of the executrices, commen-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

cing with a general denial of all the allegations contained in the opposition of Andrew Murphy, specially denied the several contracts therein set forth, also the genuineness of the two letters annexed to the petition of opponent, and that the decedent ever gave to said Murphy a note for the sum of \$1,100 or any other sum, and averred that if any such note, purporting to have been given by her, was ever made, it was a forgery. The answer further represents that the opponent was the tenant of the square of ground and residence thereon at the low rental of \$12 per month; that the filling done on the premises was for the benefit of the tenant and at his own expense, including the replacing of the fences; that the repairs to the residence were at the expense of the tenant, the decedent to furnish the materials; and that the painting of the storehouse was done under a verbal contract for the price of \$4, which was paid.

The case was tried, and there was judgment rejecting the opposition with costs. Andrew Murphy, the opponent, has appealed.

The issues before us are purely of fact, and the burden of proof is on the opponent. The question to be solved, on the voluminous record before us, is whether the appellant has made out his case by a clear preponderance of the evidence.

In the year 1899 Andrew Murphy leased by the month from the Widow Frigerio a square of ground, with a small residence thereon, situated in the rear of the city of New Orleans. The rental price was \$12 per month. Opponent alleges that about April 15, 1899, Mrs. Frigerio made a verbal contract with him to fill said square, and all the ponds and ditches therein, for the lump price of \$1,000, and that this contract was confirmed by a letter dated April 15, 1899. This letter was proved by direct and circumstantial evidence adduced in the court below to be a clumsy forgery.

Opponent alleges that by letter of date March 3, 1905, Mrs. Frigerio acknowledged that she owed him \$1,100 for filling the square and other work, and promised to bring him a note in a few days. The evidence shows that this letter was also a forgery of the crudest kind.

Opponent testified that he received both these letters by mail, but he did not swear that either is in the handwriting of Mrs. Frigerio. According to his testimony, the opponent kept the letters but destroyed the envelopes.

Opponent alleges that on or about March 3, 1905, Mrs. Frigerio gave him a note for \$1,100, which was subsequently lost. The opponent and his brother testified that about said date Mrs. Frigerio visited the leased premises, and saying, "I have brought you the note," presented to him a sheet of paper on which was written:

"I recognize to owe to Mr. Andrew Murphy the amount of eleven hundred dollars for work done for me."

Mrs. Frigerio died in March, 1906. Opponent testified that he lost the note shortly after the death of Mrs. Frigerio. The loss was not advertised until a year later.

The opponent paid \$12 per month rent until April, 1905, and thereafter \$15 per month. After the death of Mrs. Frigerio, opponent at one time paid \$90 in advance for six months' rent, and continued to pay rent until the premises were sold at public auction.

Mrs. Frigerio died at the age of 68, leaving an estate exceeding \$100,000 in value. She was well educated, and was a good business woman. Her husband was a dealer in optical instruments. When he died, many years ago, his widow took charge of the business and conducted it successfully. A daughter and a son assisted her, and were familiar with all her business affairs. Both testified that they were present when the alleged contract for filling the square was made, and that the only agreement or understanding on the subject was that the lessee would be permitted to fill with mud excavated from the Claiborne street canal, at his own expense, for his own purposes, and Mrs. Frigerio was to obtain a permit to use the dirt. Such a permit was obtained on April 14, 1899. The opponent desired to cultivate the square, and the excavated soil was useful as a fertilizer as well as a filling for low places. The square had already been ditched for drainage purposes. According to opponent's testimony, he commenced the work of filling in 1899, and completed it in March, 1905. He was a carpenter and painter by trade, and could devote only his spare time to the work of filling. His version is that the work was to be done to suit his convenience, and the owner waited patiently for six years for the contractor to complete the job. According to the opponent's testimony, Mrs. Frigerio not only made such a foolish contract, but also agreed to sell him the place for \$3,000 when all the work done by him for her should amount to \$2,000, the balance of \$1,000 to bear 15 per cent. per annum interest. This very extraordinary and improbable agreement was not evidenced by any written instrument or memorandum. The letter of April 15, 1899, was forged for the purpose of evidencing the alleged original agreement of Mrs. Frigerio to pay \$1,000 for filling the square. The letter of March 3, 1905, was forged for the purpose of evidencing that Mrs. Frigerio owed the opponent \$1,100 and had promised to give him a note for the said amount. These letters read as follows:

"New Orleans April 15, 1899.

"Mr. Andrew Murphy: I have gotten the Permission to haul the ground from the Claiborne hill you can Start the work has you have Proimmis me the contract is to fill up all Pounds and ditches and all over the square and the banquet you have Proimmis me to do the work first class for the amount of one thousand dollars.
Cath. Frigerio."

"New Orleans March 3, 1905.

"Mr. Andrew Murphy: I have ordered the lumber for the fence Please be very careful to

Put it on the Severe line on Roberson St. I'll be at your house in a few days to see if the work is well done at the same time I'll bring the note that I have promised you I have made the account of eleven hundred dollars that have owe you until now you have promised me if I would give you a lease for seven years that you was willing to Pay \$15.00 your lease starts in April 1905. Cath. Frigerio."

The lumber referred to was purchased on July 14, 1904, as shown by the bill rendered at the time.

By whom these crude forgeries were perpetrated is not shown by the evidence. They were, however, produced by the opponent, and his case rests on them as confirming verbal contracts made with a dead woman. Discarding these documents, the preponderance of the evidence, and the probabilities of the case, are against the theory that any such contract was made. Even against a living person, the testimony of a single credible witness is per se insufficient to show a verbal contract involving more than \$500 in value. Rev. Civ. Code, art. 2277. Moreover, it has been repeatedly held by this court that the extrajudicial admissions of a dead person are the weakest of all evidence, and in most instances such testimony is scarcely worthy of consideration. *Bodenheimer v. Bodenheimer*, 35 La. Ann. 1007. The opponent was contradicted on a number of material points by the son and daughters of Mrs. Frigerio. His story is highly improbable in itself, and abounds in inconsistencies and contradictions. His credit is necessarily affected by the fact that he relies on forged documents, which must have been manufactured in his interest. The existence of the alleged lost note as the work of Mrs. Frigerio rests on the testimony of opponent and his brother. The latter never read the alleged note, but testified that Mrs. Frigerio about March, 1905, came into his brother's kitchen and said:

"Well, Mr. Murphy, I have brought you what you asked me for, and I suppose you will be satisfied."

Then she opened a paper and read it:

"I recognize that I owe to Mr. Murphy the sum of eleven hundred dollars for work done for me."

His brother said:

"I am much obliged to you, and I will call the man in the yard to sign it."

Then Mrs. Frigerio said:

"Isn't this satisfactory to you?"

And so his brother took the note and said no more. The memory of this witness was phonographic in accuracy and retentiveness.

The district judge, in rejecting the demand of the opponent, necessarily refused to give credit to the story just related. In addition to the evidence, both direct and circumstantial, tending to show that Mrs. Frigerio never made the alleged contracts on

which the alleged note was supposed to be based, there is direct and positive evidence that Mrs. Frigerio in March, 1905, was in feeble health and physically unable, without assistance, to visit the leased premises, some eight squares distant from the nearest street car line.

We have read with care the voluminous evidence adduced on the trial below, and are not prepared to say that the trial judge erred in his conclusions. The three minor items claimed by opponent rest on his unsupported testimony. As to the item of \$25 for painting, it is shown that opponent agreed to do the job for \$4, which was paid. As for the fence item of \$60, it is shown that deceased agreed to furnish the lumber and the opponent to do the work. As to the item of \$100 for painting and carpenter work, it is shown that a part is for repairs which the opponent, as tenant, agreed to make, and the balance was for work on the house of a third person. No claim was made on any of the items sued for while Mrs. Frigerio was living. The pretended agreement to sell the premises is the only excuse offered for the failure of the opponent to demand payment or a settlement during the lifetime of Mrs. Frigerio.

Judgment affirmed.

(122 La. 831)

No. 17,091.

GOLDSMITH v. VIRGIN.

(Supreme Court of Louisiana. Jan. 18, 1909.)

1. PLEADING (§ 228*)—EXCEPTIONS—NO CAUSE OF ACTION.

An exception of "no cause of action" is separate and distinct from an exception of "vagueness and insufficiency of allegations." An exception of "no cause of action," if sustained, will bring about a dismissal of the suit; while an exception of "vagueness and insufficiency of allegation" will, if sustained, result in an order to the plaintiff to amend his pleadings and make them more definite.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 228.*]

2. PLEADING (§ 228*)—EXCEPTION—NO CAUSE OF ACTION.

On an exception of no cause of action, the allegations of the petition are to be taken as true. If, on the assumption that on trial of the case plaintiff has established all the allegations of his petition by proof, an application of the law invoked by him to those facts would entitle him to a judgment, it cannot be said that his petition discloses "no cause of action," though it be faulty for vagueness.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 586, 590; Dec. Dig. § 228.*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; John St. Paul, Judge.

Action by Mary Goldsmith against U. J. Virgin. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Benjamin Rice Forman, for appellant. Merri-
rick & Lewis, for appellee.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

NICHOLLS, J. The plaintiff appeals from a judgment dismissing her demand upon an exception of no cause of action. The petition filed by her contained the following allegations:

"That U. J. Virgin owes to her \$2,162, because, on the 17th of August, 1906, the said U. J. Virgin leased to petitioner the premises No. 135 South Rampart street, between Canal and Tulane avenue, from the 1st of September, 1906, to the 31st of August, 1907, as appears by the written instrument filed in No. 83,676, civil district court.

"That it was well known to the said U. J. Virgin that the said property was leased for the purpose of keeping a boarding house and furnished rooms. Both the situation of the property and the use to which it had been previously put was for that purpose, and the fact was well known to U. J. Virgin. That U. J. Virgin guaranteed petitioner against all the vices and defects of the thing, to wit, the property aforesaid, which might prevent its being used, not only against those vices and defects which existed at the time when the lease was made, but those which have arisen since, and was bound, if any loss should result to petitioner from the vices and defects, to indemnify petitioner for the same under article 2695 of the Revised Civil Code.

"That from the 1st of December, 1906, the said leased premises, through vices and defects which arose through no fault of petitioner, or from any cause through which she was responsible, became totally unfit for the purpose for which the property was leased, and entirely uninhabitable, and she was obliged, for fear of the property falling down on her and for fear of her life, to move out, as it became dangerous, and she was realizing at the time a gross revenue of \$539 per month, and her total expenses were \$326 per month, and her net revenue from the business aforesaid for which she leased the premises was \$213 per month, so that her total loss of profits of her business for which U. J. Virgin is bound to indemnify her amounts to \$2,162.

"That, besides such loss of profits, her property and furniture in the said building were ruined as follows:

One oil painting worth.....	\$100 00
Her iron beds were damaged.....	5 00
Her carpets were damaged amounting to	15 00
One room of matting was damaged to amount of	5 00
	<hr/>
	\$125 00

—and that petitioner has made demand for said damages in vain.

"In view of the premises, petitioner prays that U. J. Virgin be cited to appear and make an answer hereto, and be condemned to pay petitioner the sum of \$2,162, with 5 per cent. interest from judicial demand until paid, and for costs and for general relief."

The decisions upon which defendant relies were not rendered on sustaining an exception of "no cause of action," but in cases which were tried on the merits upon their special facts as disclosed by evidence received on the trial.

On an exception of no cause of action, the allegations of the petition are to be taken for true, and, if taken as true, plaintiff could legally recover a judgment on them as prayed for, the exception should be overruled and the parties referred to a trial on the merits for the determination of their re-

spective rights and obligations. The plaintiff in her petition declares upon a contract of lease between herself and the defendant, the time of commencement of the lease is given, also the date of its expiration, and from plaintiff's petition it appears that, when her demand was made, the lease had ended. The thing leased is described. The purpose for which the building was leased is declared to have been known to the lessor. The lessor's warranty obligations under the law are set out. It is declared that during the lease the leased premises, through vices and defects which arose through no fault of the lessee, became totally unfit for the purpose for which the property was leased, and entirely uninhabitable, and she was obliged, for fear of her life, to move out, as it became dangerous. Plaintiff then set out that she was realizing at the time from her business a gross revenue of \$539 per month, and her net revenues per month were \$213 per month, so that her total loss of profits from her business was \$2,162.

In addition to stating her loss from deprivation of profits, she set out her loss from specific articles belonging to her having been ruined, and she states their value, and how much. She likewise declares that she had made amicable demand in vain. If those allegations were true, plaintiff, on proving them to the court, was entitled to a judgment.

Defendant objects that the damages claimed were consequential damages, and the profits demanded are unearned profits; but while consequential damages cannot always be recovered, plaintiff may legally demand that that character of damages "is justly due to her." Code Prac. art. 1. They are legally demandable against the lessee when they, to his knowledge, would be the natural and proximate result of the cause of injury set out, and when in point of fact they have been suffered from that cause. Article 1934, Rev. Civ. Code, par. 1, and article 1943.

Whether, in this particular case, plaintiff on the trial can make good her claim on that score, will depend upon the evidence adduced, but for the purposes of an exception of "no cause of action" we must assume that, under the evidence which she will introduce, plaintiff can make the necessary showing. Defendant objects additionally that unearned profits are not legally demandable. That contention is one not sustainable in law, for article 1934 of the Revised Civil Code expressly declares that damages resulting from a breach of contract are the loss which "he has sustained" and "the profit of which he has been deprived." It may happen in some particular case, on the evidence introduced on the trial, that the profits claimed are too remote, too uncertain or speculative, to furnish the basis for a judgment; but a conclusion to that effect is one to be reached, not by disposing of an exception, but after a trial on the merits and after evidence adduced by the plaintiff in support of her claim.

But, says defendant, plaintiff cannot reach the point of introducing evidence in support of her demands, for the reason that defendant can successfully oppose the introduction in support of the same, for the reason that plaintiff in her petition does not specify how her rights accrued, nor set out specifically the time, place, and circumstances under which the damages claimed, arose; in other words, "show" that she has a cause of action.

It may be that on the trial of this case the plaintiff may meet with opposition to the introduction of testimony in support of her demands, but should this occur it must be based on an exception entirely different from one of "no cause of action." It will have to be under an exception of "vagueness and insufficiency of allegation," which, if found well grounded, will be followed by an order to plaintiff to amend her petition and to make it more specific; whereas, the sustaining of an exception of "no cause of action" would cause the demand to be dismissed as one "not amendable."

The most that can be said by way of objection to plaintiff's petition is that defendant is entitled to know, in a manner more definitely stated than plaintiff has done, the time, place, and circumstances from which and under which the damages alleged to have been sustained by her have arisen. Defendant does not ask that plaintiff amend her petition, but prays that plaintiff's suit be dismissed.

Plaintiff's action is based upon the provisions of articles 2692 and 2695 of the Revised Civil Code.

We very recently, in *Lazare Levy v. Madden*, 116 La. 378, 40 South. 767, said:

"The *causa causans* was warranted against by the lessor. We cannot construe article 2700 so as to nullify the lessor's warranty as provided in article 2695."

For the reasons herein assigned, it is hereby ordered, adjudged, and decreed that the judgment appealed from be, and the same is hereby, annulled, avoided, and reversed, and it is now adjudged and decreed that the exception that plaintiff's petition discloses no cause of action be overruled; that this cause be remanded to the district court and reinstated on the docket, and there be proceeded with according to law.

(122 La. 836)

No. 17,187.

Succession of WESTFELDT.

(Supreme Court of Louisiana. Jan. 18, 1909.)

1. TAXATION (§ 861*)—INHERITANCE TAX—RETROACTIVE EFFECT.

The provisions of the Constitution and the statutes touching the liability for an inheritance tax do not extend to or reach back to conditions anterior to the Constitution itself. The

Constitution looked to the present and to the future, and not to the past.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1676; Dec. Dig. § 861.*]

2. TAXATION (§ 863*)—"INHERITANCE" TAX—REAL ESTATE IN ANOTHER STATE.

The inheritance tax law unquestionably deals with a Louisiana succession alone, and with the right and privilege which has been conferred upon the heirs and legatees therein or receiving by inheritance under the laws of Louisiana (Acts 1906, p. 173, Act No. 109). The word "inheritance" in the first and second sections of the act must in the application of the law be held to have the same meaning and scope. The heirs and legatees of P. M. Westfeldt do not receive by inheritance under the laws of Louisiana the real estate situated in North Carolina.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1685, 1686; Dec. Dig. § 863.*]

3. TAXATION (§ 869*)—INHERITANCE TAX—REAL ESTATE IN ANOTHER STATE.

It is the right and privilege conferred upon the heirs and legatees of a succession of receiving by inheritance which is the basis upon which the inheritance tax rests. The Legislature must reasonably be supposed to have measured the burden imposed for the rights and privileges granted by the extent of the rights and privileges which it has itself conferred, and not upon that which has been conferred by the laws of another state.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1688; Dec. Dig. § 869.*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Thomas C. W. Ellis, Judge.

Motion in the matter of the Succession of Patrick M. Westfeldt, deceased, by his widow, praying that Thomas Connell, clerk of the civil district court, *ex officio* collector of the inheritance tax, show cause why he should not receive a certain sum in full settlement of the inheritance tax due from the estate of Patrick M. Westfeldt, deceased. From the judgment fixing the amount of the tax, Connell appeals. Amended, and, as amended, affirmed.

Mark Mayo Boatner, for appellant. McCloskey & Benedict, for appellee.

Statement of the Case.

NICHOLLS, C. J. Patrick M. Westfeldt, a resident of New Orleans, was survived by a widow and three children.

His will bequeathed a third of his property to his widow, and to his children the residuum in equal portions. His estate situated in the state of Louisiana consisted of the following:

Stocks valued at.....	\$26,585
Bonds valued at.....	9,810
Interest in real estate valued at.....	2,200
Household furniture.....	670
Cash	4,921

Total value..... \$44,186

The deceased left also a large quantity of real estate situated in North Carolina. Of property left in Louisiana the legacy

amounts to \$14,728.66, and the share of each of the children to \$9,819.23. Including their interest in the North Carolina real estate, the children inherit more than \$10,000 each.

Among the assets of the succession in Louisiana is an undivided interest appraised at \$500 in a parcel of real estate, in respect to which it was admitted:

"That the inscriptions in the tax collector's office, the city treasurer's office, and the office of the recorder of mortgages for the state tax of 1878 and the city tax of 1883 (thereon) were canceled under a judgment dated October 7, 1881, on a rule taken in the matter of the Succession of E. Charles, former owner of the said property, * * * and that the grounds on which the said judgment was prayed for were that the assessments of the said property for said years were insufficient, that the same were in the name of a person deceased, that the description therein was not sufficient to identify the property, and that the said taxes were prescribed."

On the 6th of March, 1908, a motion was made in the matter of said succession by Mrs. Westfeldt, widow in community of P. M. Westfeldt, and as the natural tutrix of her minor child Jane McC. Westfeldt, and by Louisa B. Ogden, dative tutrix of Patrick M. Westfeldt and Lula Westfeldt, children of P. M. Westfeldt by a former marriage, in which the movers suggesting to the court that the estate of the deceased consisted of the following assets (describing the assets as heretofore given) valued at \$44,186; that under the will one-third goes to the widow as legatee, to wit, \$14,728, leaving a balance to the three minor heirs of \$29,458, or the share of each heir \$9,819.23, less than the minimum amount assessable for inheritance tax under the statute; and suggesting further that the stock in the Hibernia Bank & Trust Company, amounting to \$6,330, is exempt, and the real estate, amounting to \$2,200 is also exempt, making a total of \$28,580, of which said widow as legatee received one-third, or \$2,860, which is to be deducted from her share of said estate, \$14,728, thus leaving a balance of \$11,868, on which alone an inheritance tax of 5 per cent. is due, to wit, \$593.40; prayed that Thomas Connell, clerk of the civil district court, ex officio tax collector of the inheritance tax, be ordered to show cause why he should not receive, in full settlement and satisfaction of the inheritance tax due by the estate of Patrick M. Westfeldt, the said sum of \$593.40.

The court ordered a rule on Thomas Connell to issue as prayed for. On the trial of the rule, the district court rendered judgment fixing the sum of \$618.40 as the inheritance tax due by the succession, its heirs, instead of \$575.40.

The judge assigned the following reasons for his judgment:

"I find that property inventoried at \$500, being a lot of ground bounded by [giving the description of the lot], escaped taxation for the state tax of 1878 and the city tax of 1883 (i. e., the taxes for those years have not been paid).

"(1) This, it seems to me, makes the succession liable for the inheritance tax of 5 per cent. on the value of the property as inventoried, viz., \$500, or a tax of \$25.

"Escaping taxation because of informalities in assessment when the duty of the owner was to have it assessed is not 'paying a just proportion of the general taxation.'"

"(2) Careful consideration has convinced me that the land of the succession situated in the state of North Carolina is not subject to the inheritance tax levied by the state of Louisiana.

"It is true the title of the heirs of the deceased under the inheritance law, or by the terms of his will, to the North Carolina lands, is fixed by the law of this state; but that title, quoad the land situated in North Carolina, may be subject to such regulations as the law of that state has ordained or may ordain, and the land itself is subject to taxation, by that state, alone. It may or may not be the subject of an inheritance tax, when the widow and heirs of the deceased go there with the Louisiana evidence of their title to claim and control it.

"The courts of this state can have no power of administration over said lands. It would seem that it must be the subject of an ancillary administration or other probate proceeding in the court of North Carolina having jurisdiction over its situs.

"On the consideration of well-settled law, and others easily suggested, it seems to me that the value of that land cannot figure in arriving at the total of this Louisiana succession, on which the inheritance tax is to be calculated.

"If the property in North Carolina was personal property, the Louisiana inheritance tax might attach to it under the rule, 'Mobilier personam sequuntur,' but as it is land, subject to taxation, and to administration and general domestic regulation exclusively by the law and jurisdiction of its situs, I think it is beyond the power of this state (Louisiana) to deal with it as the basis for the imposition and collection of an inheritance tax."

The clerk of the civil district court, as ex officio tax collector of inheritance taxes, has appealed.

Opinion.

Act 109, p. 173, of 1906, is entitled:

"An act to carry into effect articles 235 and 236 of the Constitution and to levy taxes solely for the support of the public schools and all inheritances, legacies and other donations mortis causa, to provide exemption therefrom, to prescribe the manner of collecting the same, to fix the fees of attorneys and commissions of tax collectors and to repeal all conflicting laws."

Articles 235 and 236 of the Constitution of 1898 which it was the purpose of that act to "carry into effect" were as follows:

"Art. 235. The Legislature shall have power to levy solely for the support of the public schools, a tax upon all inheritances, legacies, and donations; provided no direct inheritance, or donation to an ascendant or descendant, below ten thousand dollars, in amount of value shall be so taxed, provided further, that no such tax shall exceed three per cent for direct inheritances and donations to ascendants or descendants and ten per cent for collateral inheritances provided bequests to educational, religious or charitable institutions shall be exempt from the tax.

"Art. 236. The tax provided for in the preceding article shall not be enforced when the property donated or inherited shall have borne its just proportion of taxes prior to the time of such donation or inheritance."

The first section of Act No. 109 of 1906 declares that:

"There is now and shall hereafter be levied solely for the support of the public schools on all inheritances, legacies and other donations *mortis causa*, to or in favor of the direct descendants or ascendants of the decedent, a tax of two per centum, and on all such inheritances or dispositions to or in favor of the collateral relatives of the deceased or strangers, a tax of five per centum on the amount of the actual cash value thereof, at the time of the death of the decedent."

Section 2 provides that said tax shall not be imposed in the following cases:

(a) On any inheritance, legacy, or other donation *mortis causa* to or in favor of any ascendant or descendant of the decedent below \$10,000 in amount or value.

(b) On any legacy or other donation *mortis causa* to or in favor of an educational, religious, or charitable institution.

(c) When the property inherited, bequeathed, or donated shall have borne its just proportion of taxes prior to the time of such donation or inheritance.

The syllabus of appellees' brief is as follows:

"The overwhelming weight of authority is that the inheritance tax is a special tax, and, being such, must be construed strictly against the government, and favorably to the taxpayer, so that citizens cannot be subjected to special burdens without clear warrant of law. 27 Am. & Eng. Ency. of Law, 340; Succession of Swift, 137 N. Y. 77, 32 N. E. 1096, 18 L. R. A. 709; State ex rel. Foot v. Bazille, 97 Minn. 11, 106 N. W. 93, 6 L. R. A. (N. S.) 732 (subdivision 6).

"There is nothing in the dicta laid down in the Successions of Levy, Kohn, or Pritchard which militates against this rule.

"(2) Real estate situated in states other than Louisiana cannot be taken into consideration for any purpose in either the assessment or calculation of an inheritance tax imposed by a Louisiana statute. See Swift Case, quoted above (also 18 L. R. A. 709); Am. & Eng. Ency. of Law, 347; Bittinger's Estate, 129 Pa. 338, 18 Atl. 132; In re Handley, 181 Pa. 339, 37 Atl. 587; Connell v. Crosby, 210 Ill. 380, 71 N. E. 350.

"(3) Articles 225, 235, and 236 of the state Constitution of 1898 were adopted contemporaneously, and must be construed together. This is the more apparent since this court has already found 'that the makers of the Constitution of 1898 misapprehended the nature of an inheritance tax.' Succession of Kohn, 115 La. 76, 38 South. 898.

"Hence, such a construction as is placed by the state inheritance tax collector upon these articles, which would impose an unequal, an ununiform burden because of discrimination in amount and capacity to receive, must be discontinued.

"(4) The propositions 'under' and 'below' have different significations. (See Century Dictionary.) The word used in the Constitution, being 'below,' must mean that a tax can be assessed only on the complementary part of a donation above \$10,000.

"The interpretation we here contend for would make said tax equal and uniform. Compare Schwartz v. Ferris, 53 Ohio St. 314, 41 N. E. 579, 30 L. R. A. 218 (subdivision 3); Drew v. Tift, 79 Minn. 175, 81 N. W. 839, 47 L. R. A. 525, 79 Am. St. Rep. 446.

"(5) Where property has been assessed continuously for a period of 37 years, and paid its

taxes every year but one, which a former owner had had canceled because of an illegal assessment, it cannot be said to have 'borne its just proportion of taxation,' to justify the imposition of an inheritance tax upon the estate of a subsequent deceased owner who was never personally responsible for said tax. People's Homestead v. Garland, 107 La. 476, 31 South. 892; Succession of Mercier, 42 La. Ann. 1145, 8 South. 732, 11 L. R. A. 817."

The syllabus on behalf of the appellant is as follows:

"(1) The inheritance tax levied by Act 109 of 1906 pursuant to article 235 of the Constitution is one of general incident, and the exemptions therefrom established by the act and by the provisions of the Constitution, like all other exemptions from taxation, are to be strictly construed. This proposition is *stare decisis* in Louisiana. Succession of Levy, 115 La. 377, 39 South. 37, 8 L. R. A. (N. S.) 1180; Succession of Kohn, 115 La. 71, 38 South. 898; Succession of Pritchard, 118 La. 887, 43 South. 537.

"(2) Real property situated beyond the territorial limits of the state cannot, of course, be subject to taxation by the state, but nothing prevents the Constitution or lawmaker, in fixing the value below which inheritances shall be exempt, from taking into consideration as well the property situated without the state as within.

"The policy and object of the Constitution and the statute being to impose on rich heirs a burden of taxation from which they relieve poor ones, it is immaterial, for the purpose of determining the right to exemption, where the property may be which is inherited. The question of exemption being settled, the tax, of necessity, will apply to the inheritance of such property only as it devolves on the heir by the effect of our laws.

"(3) The Constitution (article 235) and the inheritance tax statute (Act No. 109 of 1906, § 2a) exempt all inheritances falling to ascendants or descendants 'below ten thousand dollars in amount or value.' It is not said of such inheritances, \$10,000 in amount or value shall be exempt. If, therefore, an inheritance be below that amount or value, it is exempt; if not below, it falls wholly outside the exemption, and is taxable. Succession of Abadie, 118 La. 708, 43 South. 806; Gelsthorpe v. Funnell, 20 Mont. 299, 51 Pac. 267, 39 L. R. A. 176; Billings v. People, 189 Ill. 472, 59 N. E. 798, 59 L. R. A. 807; State v. Alston, 94 Tenn. 674, 30 S. W. 750, 28 L. R. A. 180; Magoun v. Bank, 170 U. S. 288, 18 Sup. Ct. 594, 42 L. Ed. 1037; Knowlton v. Moore, 178 U. S. 55, 20 Sup. Ct. 747, 44 L. Ed. 969; Plummer v. Coler, 178 U. S. 183, 20 Sup. Ct. 829, 44 L. Ed. 998.

"(4) Property which has escaped taxation has not borne its just proportion of taxation. In order that it shall have borne its just proportion of taxation, it must have been assessed and the taxes paid. Succession of Kohn, 115 La. 71, 38 South. 898; Succession of Levy, 115 La. 385, 39 South. 37, 8 L. R. A. (N. S.) 1180.

"The exemption under article 236 of the Constitution and paragraph 'c' of section 2 of the statute is not made to depend on the performance or nonperformance by the decedent of his duty to pay taxes during his ownership. It is not said that the son shall be exempt from inheritance tax if the father has paid all his annual taxes, but that the heir shall be exempt provided the property inherited shall have borne its just proportion of taxation. The exemption, therefore, results not from a characteristic of the decedent, but from a characteristic of the property found in his succession at his death. Succession of Pritchard, 118 La. 887, 43 South. 537."

The first question to which we direct our attention is the one submitted to us for decision by the appellants in a prayer for an amendment of judgment, whether or not the city lot valued at \$500, upon which the state tax for 1878 and the city tax for 1883 were not paid, has to be included in ascertaining the amount which the succession must reach in order to make the inheritance tax apply to it, for the reason that it has not borne its just proportion of the burden of taxation. It is urged on the part of the collector of the tax that it makes no difference how far back in the past the failure to pay taxes may have occurred, nor who the owners of the lot may have been at that time; that the fact itself that it escaped taxation controls the situation, independently of time or ownership or cause.

We are of the opinion that the provisions of the Constitution touching liability for an inheritance tax, and the provisions of the statute carrying those articles of the Constitution into effect, do not extend or reach back to conditions anterior to the Constitution itself; that the Constitution looked to the present and the future, and not to the past.

In *Succession of Stauffer*, 119 La. 70, 43 South. 928, this court said that the statutes in question (the same remark applies to the Constitution) should, if possible, be not construed so as to give them retroactivity. Were we to hold otherwise, there would be no place in the past at which we could stop. We cannot assume that the members of the convention intended to bring about such unreasonable results as would follow adopting the construction of the Constitution and the statutes pressed upon us when they can be avoided by applying the well-recognized rule of construction of the Constitution and statutes which we have announced. There is nothing in the language of the Constitution which would lead us to place an exceptional construction upon these articles.

The next question we take up for discussion is, whether the value of the land in North Carolina is to be taken into consideration for the purpose of determining the value of the succession of Westfieldt.

That question is important, inasmuch as, by the Louisiana inheritance tax law, the value of the succession is made the principal factor upon which is made to depend the liability of the heirs and legatees therein to pay that tax.

In presenting the position taken by the collector of the tax on that question, his counsel say:

"The judge of the district court, under the persuasions of counsel's ingenious and able presentation, has fallen into the misapprehension that argument was for the imposition of a tax on real property situated beyond the limits of the state. We did not so contend, and that is not a necessary and logical conclusion from our argument. We are perfectly well acquainted with the authorities by which it is settled to the contrary, and regret that we

were understood to argue such a legal absurdity.

"What we do contend is that, in determining what exemption it will allow from taxation on inheritances subject to its control, a Legislature may consider, and that our constitutional convention and Legislature have considered, the whole value of the inheritance, without restricting the operation of the clauses of exemption to the property situated within the state. That is another matter entirely. Counsel will point out as a fault in this argument that it requires a more extended meaning or application to be given the word 'inheritance' in section 2 of the act than to the same word in section 1. Even if it required not merely a more extended but a different application, that would not apply unsoundness. No rule of rhetoric imposes on the writer of laws or novels in every work, or in every chapter or sentence of any work, or clause of any statute, the necessity of always using but one of the varying meanings of our elastic English words. Words change with the context, and with equal precision mean one thing in one place and another meaning in another place. But we have here a limitation of application, not a difference of meaning. In the first section which levies the tax, the word 'inheritance,' which, being without express restriction, is broad enough to include the acquisition by succession of a mine in Kamchatka or a farm in South Africa, is yet of necessity restricted by the limits of the powers of the state over persons and property.

"In the second section—that providing for exemption—the word is again used without express restriction, but differently from the levying section. No implied bounds can be set to its universal application, because in that field the power of the state is without limit.

"Counsel confesses that he is able to find but one case, that of *Connell v. Crosby*, 210 Ill. 392, 71 N. E. 350, which he can ask the court to take as authority in support of his view.

"In that case, the deceased left real and personal property in Illinois, and real property in several other states. The Illinois inheritance tax applies, like ours, only to the residue of the estate coming to the heirs after payment of the debts, not to the gross estate. The deceased owed debts, all generally demandable against his estate, and none attached by lien or mortgage to any specific piece of real estate. The court held, as of course, that the state could not tax a transfer by succession, not taking place by virtue of its laws, and that no tax was due on the inheritance tax of real estate situated in foreign states. In arriving at the residue which was inherited by the effect of the laws of Illinois, the court deducted from the Illinois property the debts which were owed. It is seen, therefore, that the court was not concerned with fixing an exemption alone, but only with ascertaining what it was that passed by the Illinois law of inheritance. It was construing the levying clause, not the clause of exemption. Even so, the court said that if it had found that any of the debts were secured on foreign real estate, or were specifically demandable in a state where any of the real estate was situated, the case might be different. This authority is therefore not in point."

In another place, counsel say:

"The policy of exempting small inheritances because of the lesser ability of the heir to pay, and of placing the burden of the tax on large inheritances because of the greater ability of the heir to bear it, is one which has appealed to all Legislatures which have established the system of taxation of inheritances as fair. A \$20 tax on a \$1,000 inheritance might be thought oppressive, but a \$1,000 tax on a \$1,000,000 inheritance is barely felt.

"Looking at the question from the standpoint

of the reason which underlies the exemption and, if need be, bearing in mind the construction which must be given to the clause of the statute establishing it, what difference can it make that a portion of the inheritance is of property situated outside of the state? Is the heir, for that reason, less able to pay the tax levied on the portion which he gets here, and will his burden be heavier? We cannot see it."

Counsel for appellee urge that the trend of all decisions is that the inheritance tax is not per se a tax on property, but a tax on the right to receive or inherit property. Understood, it is not the right to transmit, but the right and privilege to receive, that is taxed. They contend that the real estate situated in North Carolina was not, and is not, inventoried here; that no law of the state of Louisiana could impose directly or indirectly any tax thereon; that it could not, and cannot, be subject to the protection of the state of Louisiana; and, furthermore, so far as the descent and distribution of the North Carolina property are concerned, the principle is fundamental that the laws of North Carolina govern in all respects; that the Westfeldt heirs do not take the real estate in North Carolina by virtue of any law of the state of Louisiana, as heirs, nor do they take it under the will, unless the will conforms to the North Carolina law.

The executor has no control over the North Carolina estate; is not entitled to commissions thereon, nor can he do any act under his appointment from the Louisiana court; that he has to be appointed by the court where the "res" is situated before administering. He is not and cannot be charged with the collection of an inheritance tax on the North Carolina real property. The word "inheritance" in both sections 1 and 2 of the law must be given the same meaning, unless the context of the law clearly and beyond doubt requires a different meaning to be attached, and there is nothing in the inheritance law of Louisiana calling for such a difference of meaning; that, that law requiring that all property which has not had its just proportion of the burden of taxation should be included for the purposes of the assessment tax against the minors, the consequence would be that if the North Carolina real estate has not paid its just proportion of taxation it could be included in the assessment of the inheritance tax against the minors in excess of the \$9,819.23 above referred to.

We have carefully weighed the arguments advanced by both parties as to this question, and are satisfied that the conclusions reached by the trial court are correct. The inheritance law is unquestionably dealing with a Louisiana succession alone, and with the right and the privilege which has been conferred upon the heirs and legatees therein of receiving by inheritance under the laws

of Louisiana. The word "inheritance" in the first and second sections of the act must, in the application of the law, be held to have the same meaning and scope. The heirs and legatees of P. M. Westfeldt do not receive by inheritance under the laws of Louisiana the real estate in North Carolina. It is the right and privilege conferred upon heirs and legatees in a succession of receiving by inheritance which is the basis upon which the inheritance tax rests. The Legislature must reasonably be supposed to have measured the burden it imposed for the right and privilege granted by the extent of the right and privilege which it has itself conferred, and not upon that which has been conferred by the laws of another state.

Counsel of the collector of the tax in their brief say that:

"If the court be not with them on the first question it will not be necessary for it to pass upon the second question which it has submitted to us, for the reason that portion of the inheritance which is composed of property in Louisiana is below \$10,000 in value."

The question referred to is:

"Whether the heirs, in a succession where the portion falling to them is above \$10,000 are liable for an inheritance tax not only on the basis of the excess above \$10,000, but on the whole amount of the inheritance received by them."

For the reasons herein assigned, it is hereby ordered, adjudged, and decreed that the judgment appealed from be amended so as to fix the amount of the inheritance due by the succession of Patrick M. Westfeldt and the heirs therein at \$573.40, instead of \$618.40, and, as so amended, it is hereby affirmed

(122 La. 847)

No. 17,060.

RICHARDS et al. v. FULLER et al.

(Supreme Court of Louisiana. Nov. 30, 1908.
Rehearing Denied Feb. 1, 1909.)

1. TAXATION (§ 709*)—TAX SALES—REDEMPTION—TENDER—AMOUNT.

A tender of taxes and costs, without the penalties and surplus, which had been paid by the purchaser at a tax sale, was insufficient to effect a redemption.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1434; Dec. Dig. § 709.*]

2. TAXATION (§ 708*)—TAX SALES—ASSESSMENTS—DEFENSES—LIMITATION.

An action to redeem from a tax sale made in 1881, based on the objection that the assessment under which the sale was made was in the name of "W. H. Fuller," instead of "A. J. Fuller," the rightful owner, was barred by the three-year limitation.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 708.*]

Appeal from Fourth Judicial District Court, Parish of Lincoln; Robert Brooks Dawkins, Judge.

Action by Margaret J. Richards and oth-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ers against C. C. Fuller and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Joel Lafayette Fletcher, for appellants.
John B. Holstead, for appellees.

PROVOSTY, J. A. J. Fuller, through whom the parties to this suit claim title, acquired from the government, in 1854, the S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of section 12, and all of section 13, except the E. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$.

The property sold at tax sale in February, 1881, to one Green for the delinquent taxes of 1878 and 1879, assessed to W. H. Fuller.

A. J. Fuller made an attempt at redeeming the property, but would not offer more than the taxes and costs, whereas Green demanded, in addition, the penalties, and a certain surplus which he had paid at the sale; the property having been adjudicated to the highest bidder, as was then required to be done. A. J. Fuller and his two sons, R. J. and W. H. Fuller, then lived on the property, and continued to do so. In June of the following year (1882) Green sold a part of the property to R. J. Fuller, and in February, 1883, he sold the remainder to W. H. Fuller. These two purchasers continued to live on the property until their death, a few years before the filing of this suit, and their representatives have continued in possession. A. J. Fuller moved off of it more than 18 years before the filing of this suit, thereby, so far as the record shows, abandoning and relinquishing all pretensions to it, if any he continued to have after the failure of his attempt at redemption.

The present suit is brought by the children and grandchildren of A. J. Fuller, other than W. H. and R. J. Fuller, against the widows and heirs of R. J. and W. H. Fuller, and also against Green, to do away with the tax sale and recover the shares of the plaintiffs in the property.

It is alleged that Green was the brother-in-law of W. H. Fuller, and that in purchasing at the tax sale he was simply acting for his brother-in-law and that, in consequence, the pretended tax sale was not in reality a sale, but merely a payment of the taxes.

It suffices to say, on this ground, that it is refuted by the testimony.

The attempt at redemption herein above referred to is relied on as a redemption; but manifestly it was not such, since the full amount required for redemption was not tendered, and since, moreover, nothing shows that a formal tender was made.

The tax sale is impugned on the ground that the assessment under which it was made was in the name of W. H. Fuller, instead of A. J. Fuller. This ground is barred by the prescription of three years pleaded by defendant.

The reason for making Green a party to the suit is that 40 acres of the land in dispute, namely, the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 13, is not included in either of his acts of sale to the Fullers. Green, in his answer, says, that the sale to W. H. Fuller was intended to include the entire remainder of the land after the sale to R. J. Fuller. Be this as it may, the plaintiffs have no interest in the matter, since whatever interest was ever possessed by A. J. Fuller, from whom they pretend to have acquired by inheritance, was transferred by the tax sale.

Judgment affirmed.

(122 La. 350)

No. 17,109.

LEE LUMBER CO., Limited, v. HOTARD et al.

(Supreme Court of Louisiana. Jan. 4, 1909.
Rehearing Denied Feb. 1, 1909.)

1. LOGS AND LOGGING (§ 3*)—CONTRACT—VALIDITY—CERTAINTY—"MERCHANTABLE."

A contract for the sale of all merchantable pine timber, measuring 10 inches in diameter and over, on a described tract of land, was not void for uncertainty, the word "merchantable" being used to describe the grade or quality of the thing sold, and determinable by experts with approximate certainty.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3;* Contracts, Cent. Dig. § 890.]

For other definitions, see Words and Phrases, vol. 5, pp. 4489, 4490.]

2. LOGS AND LOGGING (§ 3*)—SALE OF TIMBER—CONTRACT—CERTAINTY—PRICE—MUTUALITY OF OBLIGATION.

A contract for the sale of standing timber on certain described land for \$1 per thousand feet, to be paid in cash, or vendor's option of equivalent value, by the vendees on the 15th day of the succeeding month for all timber cut during any month, imposed an obligation on the vendees to cut, haul, and scale the timber, and was therefore not objectionable for uncertainty as to the price.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3;* Contracts, Cent. Dig. § 890.]

3. LOGS AND LOGGING (§ 3*)—STANDING TIMBER—SALE—CONTRACT—"CASH OR VENDOR'S OPTION OF EQUIVALENT VALUE."

Where a contract for the sale of standing timber required payment in cash "or vendor's option of equivalent value," such clause should be construed to mean only that payment should be made in cash unless vendor chose to accept something other than cash of equivalent value if offered him by the vendee, and did not render the contract uncertain as to the price, as giving the vendor the right to demand something other than money in satisfaction of the debt, and, as so construed, the clause was mere surplusage.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3;* Contracts, Cent. Dig. § 890.]

4. LOGS AND LOGGING (§ 3*)—SALE OF TIMBER—SPECIFIC PERFORMANCE.

The fact that specific performance of a contract for the sale of standing timber could

not be enforced did not deprive the contract of its obligatory character.

[Ed. Note.—For other cases, see Logs and Logging, Dec. Dig. § 3.*]

5. LOGS AND LOGGING (§ 3*)—STANDING TIMBER—CONTRACT OF SALE—STATUTES.

Rev. Civ. Code, art. 2458, providing that when produce or other objects are not sold in a lump, but by measure, the sale is not perfect, inasmuch as the thing so sold is at the risk of the seller until measured, but the buyer may require either the delivery of them or damages, if there be any, in case of nonexecution of the contract, is applicable to a sale of standing timber, the title to which does not pass until it has been cut.

[Ed. Note.—For other cases, see Logs and Logging, Dec. Dig. § 3.*]

6. LOGS AND LOGGING (§ 3*)—STANDING TIMBER—CONTRACT OF SALE.

A contract of sale of standing timber of certain dimensions on described land for a specified price per thousand feet, to be paid on the 15th day of the month succeeding that in which the timber was cut, constituted a valid sale of the timber, and, being recorded, was valid as against third persons.

[Ed. Note.—For other cases, see Logs and Logging, Dec. Dig. § 3.*]

7. PROPERTY (§ 4*)—STANDING TIMBER—SALE—EFFECT.

Trees continue to be real estate, after they are sold apart from the land, until severance.

[Ed. Note.—For other cases, see Property, Cent. Dig. § 4; Dec. Dig. § 4.*]

8. INJUNCTION (§ 186*)—DISSOLUTION—COUNSEL FEES.

Defendant is not entitled to counsel fees for dissolving an injunction, where the services of his counsel were rendered exclusively on the trial of the case on the merits.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 403; Dec. Dig. § 186.*]

Appeal from Thirteenth Judicial District Court, Parish of Rapides; Wilbur Flak Blackman, Judge.

Action by the Lee Lumber Company, Limited, against Albert E. Hotard and others. From a judgment for plaintiff, defendants appeal. Reversed and dismissed.

Robert P. Hunter & Sons and W. C. & J. B. Roberts, for appellants. Blackman & Overton, for appellee.

PROVOSTY, J. By a contract dated October 14, 1906, and recorded October 22, 1906, J. N. Thornhill sold to plaintiff a certain tract of land, including the timber thereon; and by another contract dated September 24, 1906, and recorded on the same day, he sold to plaintiff all the timber upon another tract. He had previously entered into the following agreement with reference to the same timber:

"Buckeye, P. O., La., August 16th, 1905.

"State of Louisiana, Parish of Rapides.

"Know all men by these presents and this instrument that I, J. Newton Thornhill, of the first part, a resident of Buckeye, P. O., Rapides parish, Louisiana, agree and covenant with J. N. Graves and J. L. Head, parties of the second part and residents of Buckeye P. O., Louisiana, as follows, to-wit:

"Party of the first part bargains and sells

to parties of the second part, their heirs and assigns, all merchantable pine timber measuring (10) ten inches in diameter and over, on the following tract of land, to-wit:

"E. $\frac{1}{2}$ N. E. $\frac{1}{4}$, E. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of Sec. 6 T. S. 4 N. 3 East La. Mer.

"This for and in consideration of one dollar (\$1.00) per thousand feet, which sum is to be paid in cash or vendor's option of equivalent value by parties of the second part to parties of the first part in the following order: All timber cut, hauled and scaled in a given month up to and including the last day of the month, shall be payable on the 15th day of the succeeding month, this giving parties of the second part 15 days grace on each monthly settlement, and further that the agreement shall be in force from date until (10) ten years after date.

"This acknowledges the receipt of one dollar by party of the first part as a part payment in advance.

"[Signed]

Newton Thornhill.

"J. N. Graves.

"J. L. Head.

"Witness:

"I. D. Reynolds.

"S. C. Greer."

This agreement was recorded September 18, 1905.

Graves and Head, the parties with whom this agreement was made, purchased a sawmill already on the land, and began cutting and sawing the timber. They cut and sawed 125,000 feet for which they paid Thornhill at the agreed price of \$1 per thousand. In November or December, 1905, they left the place, and went to the adjoining parish of Avoyelles. They took away the whistle and belting of the sawmill, and shortly afterwards the saw. In March, 1906, they sold the sawmill to the International Lumber Company, and transferred to said company all their right, title, and interest under the said agreement; and on October 11, 1906, this company made a similar sale and transfer to the defendant. These transfers were recorded the day following their respective dates.

When the defendant Hotard attempted to cut the timber in accordance with this agreement, the plaintiff by the present suit enjoined him from doing so.

Plaintiff contends that the foregoing agreement with Graves and Head does not evidence a binding contract, and that consequently Thornhill was at liberty to disregard it and sell the timber to some one else.

In support of this, it is said that there is no certainty in the thing sold, because only the merchantable timber is sold, and no rule is furnished by which to determine which part of the timber is not merchantable; and evidence is offered to the effect that experts will disagree with regard to the merchantability of any particular timber.

In answer to this, we will say that the word "merchantable" is commonly used in sales in describing the grade or quality of the thing sold, and that no one has heretofore thought of suggesting that the object sold was thereby made so uncertain as to

invalidate the contract. There can be no question that experts can determine with approximate certainty the merchantability of timber—they are doing it every day—and the parties to this contract must be understood to have intended that such approximate certainty should answer the purpose of their contract. It must be assumed that they thought that there would not likely be any disagreement if the contract were carried out in a spirit of fairness on both sides, and that in the contrary case the courts could decide.

In this connection, the present case differs *toto cælo* from that of *Werner Sawmill Co. v. O'Shee*, 111 La. 817, 35 South. 919, in which the agreement was that the parties themselves—in other words, not the courts—should name the experts, and one of them refused to do so, thereby rendering the contract impossible of execution.

It is next argued that there is uncertainty also as to the price, because the object sold is not all the merchantable timber upon the land, but only that part of it which Graves and Head or their assigns may cut, without there being any obligation on their part to cut any.

We think there is an obligation on the part of Graves and Head to cut, haul, and scale the timber. After having signed an instrument by which they bought timber to be paid for when cut, hauled, and scaled, they could not be heard to deny that they were under obligation to cut, haul, and scale the timber. The contract manifestly contemplated that the timber should be cut, hauled, and scaled by them; and, by signing it, they assumed that obligation.

The broad distinction between such a case and those of *Union Sawmill Co. v. Lake*, 120 La. 106, 44 South. 1000, and *Thompson v. Union Sawmill Co.*, 121 La. 318, 46 South. 341, is that in the latter cases the contract, for one thing, was not signed by the vendee, and, for another, became void for nonaccomplishment of one of its conditions.

The price is said to be uncertain for the further reason that the stipulation is that it is to be paid "in cash or vendor's option of equivalent value."

Of course, if the clause "or vendor's option of equivalent value" were given the meaning that the vendor was to have the right to demand of the vendee something other than money, there would be fatal uncertainty in the price. But that clause, as we read it, means nothing more than that the payment should be in money, unless the vendor chose to accept something else of equivalent value if offered him. As thus read, the clause is mere *brutum fulmen* and surplusage. The clause could not possibly be accepted as written, because as written it would mean that the vendor was to have the right

to exact from Graves and Head in payment of the timber any and whatever they might own of equivalent value to the timber; for instance, to put an extreme case, that he might thus demand the very shirts from their backs.

The circumstance that specific performance of the contract could not be enforced—if such were in fact the case—would not deprive the contract of its obligatory character. It is more the exception than the rule when specific performance of contracts can be enforced.

Nor is the circumstance that in case the trees perished the loss would fall upon Thornhill a test of the existence *vel non* of a contract, and of the contract being a sale. Article 2458, Rev. Civ. Code, provides for just that kind of a sale. It reads:

"When goods, produce, or other objects, are not sold in a lump, but by weight, by tale, or by measure, the sale is not perfect, inasmuch as the things so sold are at the risk of the seller, until they be weighed, counted or measured; but the buyer may require either the delivery of them or damages, if there be any, in case of non-execution of the contract."

The principle embodied in this article is equally applicable to a sale of trees which are not to pass into ownership of vendee until they have been cut down.

We say nothing of the lease by Thornhill to Graves and Head, as it was recorded after the sale to plaintiff, and is not insisted on in defendants' brief.

The point is not discussed in the briefs whether the contract, conceding it to have been valid and to have been a sale, had the effect of transferring the ownership of the trees, or, if not, whether it had the effect of creating a right upon them such as would follow them into the hands of any third person to whom Thornhill might sell them. Waiving the point whether a sale by weight, tale, or measure conveys the ownership before the thing sold has been weighed, counted, or measured, we think that such a sale as the one in question in this case has all the effects of a promise of sale, and that a promise of sale of real estate follows the thing into the hands of third persons. By recent statutes, trees continue to be real estate after they are sold.

The services of counsel having been rendered exclusively upon the trial of the case on the merits, defendant is not entitled to counsel fees for dissolving the injunction. The other damages could only have been very small, and the claim for them is not seriously pressed.

It is ordered, adjudged, and decreed that the judgment appealed from be set aside, and that there be judgment in favor of defendants and against plaintiff dismissing plaintiff's suit, and setting aside the injunction herein, and that plaintiff pay all costs.

(34 Miss. 901)

THOMPSON v. STATE. (No. 13,626.)
(Supreme Court of Mississippi. Feb. 15, 1909.)**CRIMINAL LAW (§ 939*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.**

One convicted of burglary with intent to commit rape was entitled to a new trial for evidence tending to show his innocence, newly discovered by his counsel, where accused made no defense and was unable to communicate intelligently with his counsel at the former trial, because deaf and of limited intelligence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2318-2323; Dec. Dig. § 939.*]

Appeal from Circuit Court, Monroe County; E. O. Sykes, Judge.

Nick Thompson was convicted of burglary with intent to commit rape, and he appeals. Reversed and remanded.

Geo. C. Paine, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

FLETCHER, J. This appellant, 20 years old, was deaf, able to talk but poorly, and of limited intelligence. He stood mute when arraigned, and was not able to communicate intelligently with his counsel. He attempted no defense on the trial, and was naturally convicted. His counsel, in support of his motion for a new trial, made affidavit as to his client's condition, and asserted that since the trial he had discovered a number of witnesses who would disprove all the material parts of the state's testimony and establish defendant's entire innocence of the crime charged and proven. He satisfactorily accounts for his failure to produce this testimony on the trial, since his client was unable to communicate with him. In view of the unfortunate infirmities affecting this defendant, his total failure to make any defense, and the number of the witnesses and the character of the testimony which, according to the showing, could be produced at another trial, we think the ends of justice demand that a new trial be granted, in order that opportunity be given defendant to establish his innocence, if he can.

Reversed and remanded.

(35 Miss. 41)

HUDSON v. MISSISSIPPI CENT. R. CO.
(No. 13,669.)

(Supreme Court of Mississippi. Feb. 8, 1909.)

1. MASTER AND SERVANT (§ 258*)—INJURY TO SERVANT—DECLARATION—SUFFICIENCY.

Under Code 1906, § 1985, providing that, in actions against a railroad for injuries to employes, proof of injury inflicted by the running of the locomotives or cars of the railroad shall be prima facie evidence of want of reasonable care, a declaration in an action by a parent for the death of his son, which alleges that the son was an employe of defendant, a railroad company, and was killed by the derailment of the train, states a cause of action as against a general demurrer.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 258.*]

2. APPEAL AND ERROR (§ 843*)—RULINGS ON DEMURRER—REVIEW.

Where the demurrer to a declaration containing two counts was improperly sustained as to one count, the court, on appeal from the ruling on the demurrer, will not pass on the question presented by the other count.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3338; Dec. Dig. § 843.*]

Appeal from Circuit Court, Forrest County; W. H. Cook, Judge.

Action by A. C. Hudson against the Mississippi Central Railroad Company for the death of plaintiff's son. From a judgment sustaining a demurrer to the declaration, plaintiff appeals. Reversed and remanded.

Sullivan & Tally and R. N. & H. B. Miller, for appellant. T. Brady, Jr., for appellee.

FLETCHER, J. The second count of the declaration is drawn under section 1985 of the Code of 1906, and states a perfectly good cause of action. It states, in effect, that plaintiff's intestate was an employe of the defendant railroad company, and was killed by reason of the train being derailed. It was not necessary to state more than this in order to put the company upon the defensive. The demurrer being a general one, it was manifest error to sustain it in the face of the second count.

We do not deem it necessary to pass upon the question presented by the first count, since it is obvious that the demurrer was improperly sustained.

Reversed and remanded.

BYNUM et al. v. MEYER. (No. 13,814.)
(Supreme Court of Mississippi. Feb. 15, 1909.)**INJUNCTION (§ 163*)—PRELIMINARY INJUNCTION—DISSOLUTION.**

Where, in a suit to enjoin a sale under a deed of trust given to cover goods sold during a year on the ground that the debt is paid, it appears that the balance claimed under the deed is in part composed of goods sold after the year and the showing thereof is unsatisfactory, the court must retain the injunction until there has been full proof.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 357; Dec. Dig. § 163.*]

Appeal from Chancery Court, Jones County; J. L. McCaskill, Chancellor.

Suit by G. A. Bynum and another against Mrs. Alice Meyer to enjoin a sale under a trust deed executed by complainants. From a decree dissolving the injunction, complainants appeal. Reversed and remanded.

J. P. Thornton, for appellants. Shannon & Street, for appellee.

MAYES J. Complainants seek to enjoin a sale under the deed in trust executed in 1905 on the ground that same is fully paid. On the motion to dissolve the court sustained the motion, and an appeal is prosecuted from that judgment.

It would seem that the deed in trust given was to cover such goods as were sold during the year 1905. The accounts filed as exhibits to the affidavits taken on the motion to dissolve cover a period of time extending from 1904 to 1907, and it seems that the balance claimed to be due under the deed in trust is in part composed of goods sold after the contract as contained in the deed in trust executed for the year 1905, giving the lien, had expired. As to this the showing made on the motion to dissolve is very unsatisfactory, and we do not think it should have been sustained. We do not intimate in any way what the final judgment in this case should be, but on this record the injunction should have been retrained until there had been full proof.

The decree of the chancellor dissolving the injunction was error. For this reason, the injunction is reinstated, and the case reversed and remanded.

(94 Miss. 240)

BLACKWELL v. STATE. (No. 13,608.)

(Supreme Court of Mississippi. Feb. 15, 1909.)

ROBBERY (§ 17*)—INDICTMENT—SUFFICIENCY.

An indictment charging that accused did represent to D. that he was an officer and threatened to arrest D., and did willfully and feloniously take and carry away the personal property of D. mentioned, of a certain value, delivered to the accused by D. through fear of injury to his person by the accused, said property being the property of D., does not charge any offense.

[Ed. Note.—For other cases, see Robbery, Dec. Dig. § 17.*]

Appeal from Circuit Court, Yalobusha County; Sam C. Cook, Judge.

Walter Blackwell was convicted of robbery, and appeals. Reversed, and indictment quashed.

An appeal from a conviction of robbery on an indictment which charged that: "Walter Blackwell, late of the county and District aforesaid, on the 27th day of January, 1908, in said county and district, did then and there represent to H. B. Dobbins that he was an officer and watchman, and did then and there threaten to arrest the said H. B. Dobbins and put him in jail, and did then and there willfully and feloniously take, steal, and carry away the personal property of the said H. B. Dobbins, consisting of a suit case, the value of \$4 and one suit of clothes, value \$20, delivered to the said Walter Blackwell by the said H. B. Dobbins, through fear of threatened injury to his person by the said Walter Blackwell, said property being the property of H. B. Dobbins, against the peace and dignity of the state of Mississippi."

Wm. F. Hamilton and W. P. Shinault, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

MAYES, J. We do not think any offense is charged under the indictment in this case. For this reason the case is reversed, indictment quashed, and the prisoner held to await the further action of the grand jury.

(95 Miss. 211)

ADAMS v. HELMS, County Treasurer.
(No. 13,819.)

(Supreme Court of Mississippi. Feb. 15, 1909.)

COUNTIES (§ 160*)—COURTHOUSE INSURANCE—PROCEEDS EXEMPT FROM CLAIMS.

Under Code 1906, § 307, requiring the supervisors of a county to erect and keep in good repair a courthouse and jail, and under section 319, authorizing them to insure the courthouse, the proceeds take the place of the property as against creditors, and do not become part of the general fund, to be paid out on current expenses, but constitute a trust fund, to be used only to replace the property destroyed, so long as the county needs such property, the character of which fund cannot be changed by the board until the county has had the things replaced.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 160.*]

Appeal from Circuit Court, Tallahatchie County; Sam C. Cook, Judge.

Mandamus proceeding by J. O. Adams against J. W. Helms, County Treasurer. From a judgment refusing a writ, plaintiff appeals. Affirmed.

This was a mandamus proceeding to compel Helms, as county treasurer of Tallahatchie county, to pay a certain warrant held by appellant, which had been legally issued in payment of a valid claim against the county. Payment had been refused because there were not sufficient funds in the county treasury with which to pay same. After presentation of said warrant and refusal of payment, the county courthouse having been destroyed by fire and the county treasurer having collected the proceeds of certain fire insurance policies, appellant again presented his warrant and sought to have it paid out of the proceeds of said fire insurance policies. The treasurer declined to do so, on the ground that the proceeds of said insurance policies did not become a part of the general fund for payment of current expenses, but were held by him as a special fund for courthouse purposes only; the board of supervisors having passed an order directing him to hold it as such. Proceedings were then instituted to compel the payment of said warrant out of the moneys coming into his hands as treasurer from the proceeds of said insurance policies.

Broome & Woods, for appellant. C. E. Harris and H. L. Gary, for appellee.

MAYES, J. By section 307 of the Code of 1906, the board of supervisors are required to erect and keep in good repair, in their respective counties, a good and convenient courthouse and jail. By section 319 they are

given authority to insure the courthouse and certain other property named therein, the cost of the insurance to be paid out of the county treasury. If the property authorized to be insured is destroyed by fire, money collected on the insurance contract takes the place of the property so far as creditors of the county are concerned, and does not become a part of the general county fund, to be paid out on current expenses. It is a trust fund, to be used only for the purpose of replacing the property destroyed, so long as the county stands in need of the thing so destroyed. It required no order of the board to give this effect to the fund. Indeed, no order of the board can change the character of the fund until the county has had the things replaced.

Affirmed.

FLETCHER, J., takes no part.

(% Miss. 104)

MYERS et al. v. MARTINEZ et al.
(No. 13,756.)

(Supreme Court of Mississippi. Feb. 15, 1909.)

1. EQUITY (§ 239*)—PLEADING—ADMISSION BY DEMURRER.

On demurrer to the allegations of a bill, they must be taken as true.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 494; Dec. Dig. § 239.*]

2. EXECUTORS AND ADMINISTRATORS (§ 587*)—ACTION ON BOND—JURISDICTION.

The courts of Mississippi have jurisdiction of a suit on an executrix's bond by decedent's creditors for concealing assets, though executrix resides in Alabama, where administration was undertaken in Mississippi, where she resided at decedent's death, the assets had their situs there, and her surety resides there.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2507; Dec. Dig. § 537.*]

3. CORPORATIONS (§ 134*) — TRANSFER OF STOCK—LIABILITY OF CORPORATION.

That an executrix fraudulently appropriated bank stock to the prejudice of creditors, and that the bank permitted her to sell it, knowing of the pending administration, shows no liability of the bank to the creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 523; Dec. Dig. § 134.*]

Appeal from Chancery Court, Jackson County; T. A. Woods, Chancellor.

Action by Mary J. Martinez and others against Elizabeth D. Myers, the Merchants' & Marine Bank of Scranton, and E. J. Jane. From a decree overruling demurrers to the bill, defendants appeal. Affirmed, except as to defendant bank; reversed and dismissed as to it.

This is a suit filed by Mary J. Martinez and others, children of one C. L. Johnson, who died testate, appointing as executrix of his will his wife, Elizabeth Johnson, now Elizabeth Myers, one of the defendants. The bill makes as parties defendant one E. J. Jane, a bondsman of Mrs. Myers, executrix,

and the Merchants' & Marine Bank of Scranton, Jackson county, Miss., and seeks to hold said executrix liable for failure to properly account for certain property, to wit, 12 shares of stock in said bank, owned by said Johnson in his lifetime and coming into the hands of said executrix. The bill alleges that said Jane was an officer of said bank and that said bank permitted the sale and transfer of said stock by said executrix, knowing of the pending administration, and was therefore guilty of a breach of trust. At the time of the filing of the bill Mrs. Myers was a resident of Mobile, Ala.; but administration papers had been taken out in Jackson county, which was her home at the time of the death of her husband. To this bill demurrers were interposed, which were overruled by the court, and an appeal granted.

Fitts & Leigh and Ford, White & Ford, for appellants. H. B. Everitt, for appellees.

MAYES, J. This is a suit on the bond of Mrs. Myers for a failure to account to the court for certain personal property coming into her possession as executrix of the estate of Charles L. Johnson, deceased. It is claimed that this personal property had its situs in Jackson county, state of Mississippi, at which place letters of executorship were granted to Mrs. Myers and a bond duly executed, with one J. A. Miller and her codefendant, E. J. Jane, as sureties. E. J. Jane resides in Jackson county, where this suit is instituted. It is charged in the bill and admitted by the demurrer that Mrs. Myers breached her bond by failing to report to the court in which the administration of the estate was being conducted 12 shares of stock owned by her deceased testate in the Merchants' & Marine Bank in Jackson county, being of considerable value, and that she wrongfully, falsely, and fraudulently concealed from the court the fact of the existence of the stock, and procured the estate of her testate to be declared insolvent, appropriating to her own use the stock, collecting dividends thereon, which she also appropriated to her own use, finally selling the stock, and appropriating the proceeds thereof, without ever accounting to the court. The bill shows that at the time this was done the estate was largely indebted to complainants, whose debts have been rendered worthless by this act of the executrix.

If the facts are true, and this is admitted in the present attitude of the pleading, the courts of this state undoubtedly have jurisdiction to grant relief. The bill charges that the administration of the estate, so far as it involved property within this state, was undertaken here. The bond was filed and approved in the proper court of this state, and it became the duty of the executrix to fully administer all the property located here and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

pay all debts, in so far as the property would go. The debts of complainants were incurred here and probated in the proper court of this state. It is our view that the court below properly overruled the demurrers filed by E. J. Jane and Mrs. Myers, and the court's action is affirmed as to this, and cause remanded. But we do not think any liability is shown on the part of the Merchants' & Marine Bank; hence the case is reversed, and bill dismissed, as to the bank.

So ordered.

(94 Miss. 904)

GULFPORT COTTON OIL, FERTILIZER & MFG. CO. v. RENEAU. (No. 13,544.)

(Supreme Court of Mississippi. Feb. 15, 1909.)

1. FRAUDS, STATUTE OF (§ 53*)—CONTRACT OF EMPLOYMENT—VALIDITY.

A verbal contract of employment, to begin in the future and to continue for a year, is void under the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 80; Dec. Dig. § 53.*]

2. FRAUDS, STATUTE OF (§ 106*)—"MEMORANDUM"—SUFFICIENCY.

A "memorandum" of a contract within the statute of frauds must include all the material features of the agreement, so that no resort to parol testimony is necessary, except to show the situation of the parties and the application of the terms employed in the writing to the subject-matter.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 210; Dec. Dig. § 106.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4472, 4473; vol. 8, p. 7720.]

3. FRAUDS, STATUTE OF (§ 118*)—MEMORANDUM—SUFFICIENCY.

One employed under a verbal contract, void under the statute of frauds, was discharged. He subsequently wrote to his employer a letter reciting the terms of the contract. The employer replied by letter reciting: "As for the talk I had with you when you applied for the situation, I expected much from you. That is why I offered you a large salary." *Held*, that the employer did not consent to the terms of the contract as stated by the employé, essential to constitute a sufficient memorandum to bind him under the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Dec. Dig. § 118.*]

4. FRAUDS, STATUTE OF (§ 115*)—MEMORANDUM—SIGNATURE—NECESSITY.

A memorandum of a contract within the statute of frauds must be signed by the party to be charged.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 242; Dec. Dig. § 115.*]

5. FRAUDS, STATUTE OF (§ 118*)—MEMORANDUM—SUFFICIENCY.

The memorandum of a contract within the statute of frauds, may consist of several distinct writings, provided they are so related that the particular paper signed by the party to be charged can be held to be an approval of the other documents in which the terms of the contract are set forth, though such other writings are signed by others.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 262-264; Dec. Dig. § 118.*]

Appeal from Circuit Court, Harrison County; W. H. Hardy, Judge.

Action by C. W. Reneau against the Gulfport Cotton Oil, Fertilizer & Manufacturing Company. From a judgment for plaintiff, defendant appeals. Reversed, and cause dismissed.

May, Flowers & Whitfield and Money & Graham, for appellant. T. A. Hardy and L. Brame, for appellee.

FLETCHER, J. On the 20th day of April, 1907, appellee entered into a verbal contract with one Van Winkle, president of appellant company, to take charge of the company's oil mill in Gulfport as superintendent of the operating department. Appellee held himself out as a skilled and experienced man in such matters, and Van Winkle agreed to pay him an annual salary of \$2,500; the term of service to begin on April 24th and, according to appellee's contention, to continue for one year. There were certain other inducements and representations dealing with appellee's status and privileges, in case the plant should be removed to Columbia, which we need not here notice in detail. Appellee on the 24th of April entered upon the discharge of his duties according to the terms of his contract, and was shortly thereafter discharged by Van Winkle without just cause. He was paid for the short time during which he worked, reduced his damages as much as possible, as he was bound to do under the law, and brought suit for the difference between what he had been able to earn during the year and the \$2,500 which Van Winkle had promised to pay him. Under a peremptory instruction from the court, Reneau was given judgment for \$1,350, and this amount is admittedly correct, provided any liability at all exists.

It will be observed that the contract was a verbal one, made on April 20th, to begin on April 24th, and to continue for one year, and is, therefore, unless affected by the letters to be hereafter adverted to, within the inhibition of that clause of the statute of frauds which provides that an action shall not be brought whereby to charge a defendant or other party upon any agreement which is not to be performed within the space of one year from the making thereof, unless the promise or agreement upon which such action may be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith. Indeed, the record before us contains the following recital: "It is admitted by the plaintiff that the contract testified to by the plaintiff is within the statute of frauds and non-enforceable in this state, unless the letters filed as exhibits to the declaration in said case and the letters introduced in evidence in this case are sufficient memorandum to take the same out of the operation of the statute of frauds, together with any compe-

tent oral evidence introduced in said case."

It will thus be seen that the case turns entirely upon the question whether the letters introduced, taken together, contain such a memorandum or note of the contract as will satisfy the statute. The letters referred to were written under these circumstances: After appellee had been discharged, he addressed a letter to Van Winkle, protesting against the treatment he had received, explaining the cause of the unsatisfactory condition of the product of the mill, and reminding Van Winkle of the fact, and at least some of the terms, of the contract. This letter was dated May 18th, and, among other things mentioned, Reneau refers to the fact that he had made no misrepresentation when he had held himself out as thoroughly understanding the oil mill business. The letter then recites: "My contract with you was fixed by the year at a stipulated salary of \$2,500 by the year, and you offered as a further inducement that, after removing the plant to Columbia, you would make it more interesting to me by letting me take stock in the business." On May 20th Van Winkle addressed a letter to Reneau, which does not in so many words acknowledge receipt of Reneau's letter, but does discuss the questions raised by Reneau. Among other things mentioned in this letter is this expression: "As for the talk I had with you when you applied for the position, I expected much from you. That is why I offered you a large salary."

It is insisted on behalf of the appellee that these two letters, taken together, satisfy the statute, and on behalf of the appellant that they come far short of doing so. Appellant's attack upon the sufficiency of these letters may be said to have three aspects: First, that the letters cannot be connected, since there is no direct reference in one to the other; second, that, if considered together, they do not set out all the terms of the contract, so as to render unnecessary any resort to parol evidence; third, that the letter signed by Van Winkle does not sufficiently show the author's assent to and adoption of the statements made in Reneau's letter.

We do not think it necessary in this case to devote much time to the first two points. Suffice it to say that we think Van Winkle's letter bears such internal evidences of having been written in reply to Reneau's that their connection sufficiently appears, although there is no express acknowledgment in the one of the receipt of the other. We observe, on the second ground, that there is some force in the contention that the letters, when taken together, do not furnish a complete memorandum of the contract, since nothing is better settled than that the writing must include all the material features of the agreement, so that no resort to parol testimony is necessary, further than to

show the situation of the parties and the application of the terms employed in the writing to the subject-matter under consideration. It may well be doubted whether these letters measure up to this requirement; but we do not feel called upon to decide this question.

We come to the third, and, as we think, controlling, feature of this case. Of course, by the very terms of the statute the memorandum must be signed by the party to be charged. In this case, before appellant can be held, it must appear that Van Winkle has approved, assented to, and adopted as his own the statements made in Reneau's letter as to the terms of the contract. We, of course, readily assent to the well-understood principle that the memorandum may consist of several distinct writings, provided they are so related that the particular paper signed by the party to be charged can be held to be an approval of other documents in which the terms of the contract are set forth, even though such other writings are signed by others. The reports abound in cases of this sort. But the question here is whether the case at bar falls within this principle. It must be remembered that these letters are written after the breach of the contract. This fact is of value, not because as a matter of law the memorandum must be executed before the making of the contract, or contemporaneous therewith, for the authorities are well enough agreed that the memorandum may be executed after the breach, but as an important factor in determining what effect shall be given to the language employed. We can readily understand that, when parties are engaged in negotiating for a contract, any reply which one may make to a proposal of the other must be deemed as responsive thereto, since the reply marks a step either forward or backward in the progress of the negotiation. But it is a different matter when a contract already made and breached is sought to be confirmed by an interchange of letters. In such a case, when the one not sought to be charged states the terms of the contract, the other must manifest his assent thereto in some manner which clearly evidences his acquiescence in the statement. We are not to be understood as holding that he must sign with the intent to charge himself under the statute of frauds. We agree that his intention is immaterial. But he must adopt his adversary's statement.

We cannot think the letter written by Van Winkle under date of May 20th measures up to this requirement. Reneau's letter, we may concede, states the contract. To this Van Winkle merely replies that, "as for the talk I had with you when you applied for the position," etc. Can this be held as the equivalent of saying, "I agree that you have stated all the terms of the contract correctly?" We think not. True, Van Winkle

enters no specific denial; but he was not called upon to deny. Had he made no reply to the letter, he would not have been bound. What he did sign does not show his assent to the terms stated by Reneau. It can mean nothing more than that, conceding what Reneau said to be true, he (Van Winkle) had not secured the results which he expected. It neither affirms nor denies the correctness of Reneau's declaration. It does no more than to waive his version aside, without committing the writer to its terms. It refers to "a talk"; but it does not say that "you have represented this 'talk' correctly." It cannot, for the purpose of satisfying the statute of frauds, be given the effect of a plea in confession and avoidance; nor can a person bring himself within the statute by conduct such as would operate as an estoppel in many other cases. In this case the statute is far from being satisfied.

It does not with sufficient certainty appear that Van Winkle assented to the terms of the contract, and we cannot enforce it. We are content with the authorities cited by counsel, and do not reproduce them here.

Reversed, and cause dismissed.

(95 Miss. 506)

HARKNESS v. STATE. (No. 13,618.)

(Supreme Court of Mississippi. Feb. 15, 1909.)

1. ELECTIONS (§ 328*) — PUBLICATIONS RESPECTING CANDIDATES—SUFFICIENCY OF ACCUSATION—CLEARNESS AND DEFINITENESS.

An affidavit charging a violation of Code 1906, § 3728, providing that every placard, printed matter, etc., referring to the primary election or to any candidate, shall bear on its face the name and address of the author, printer, and publisher, which averred that H. on a stated day in the county did unlawfully have published and circulated a placard or poster having reference to affiant, a candidate at the municipal primary election at a stated place, without bearing on its face the name and address of the author thereof, etc., is insufficient, as vague and indefinite, in that it does not directly and positively charge that the primary election mentioned was held, nor that any primary election was lawfully called and held, by the properly constituted authorities.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 328.*]

2. INDICTMENT AND INFORMATION (§ 70*) — SUFFICIENCY OF ACCUSATION — CLEARNESS AND PRECISION.

An indictment must charge the acts constituting the offense directly, clearly, and precisely, and not argumentatively, inferentially, or by the process of exclusion.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 192; Dec. Dig. § 70.*]

Appeal from Circuit Court, Harrison County; M. H. Hardy, Judge.

"To be officially reported."

W. T. Harkness was convicted of having published and circulated a placard having reference to a candidate at a municipal election, without bearing on its face the name

and address of the author thereof, in violation of Code 1906, § 3728, and appeals. Reversed, demurrer sustained, and cause remanded.

Barrett & Taylor, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

WHITFIELD, C. J. Section 3728, Code of 1906, is in the following words: "Placards, Posters, Pamphlets, etc.—Every placard, bill, poster, pamphlet or other printed matter, having reference to the primary election, or to any candidate, shall bear upon the face thereof the name and the address of the author, and of the printer and publisher thereof, and failure to so provide shall be a misdemeanor."

Under this section the following affidavit, omitting formal parts, was made out, charging appellant with violation of said section: "That W. T. Harkness, on or about the 7th day of July, 1908, in said county, did unlawfully have published and circulated a placard or poster having reference to affiant, a candidate at the municipal primary election of Biloxi, Mississippi, without bearing upon the face of said placards or posters the name and address of the author thereof, in violation of section 3728, Code of 1906, against the peace and dignity of the state of Mississippi."

A demurrer was interposed to this affidavit on the ground, first, that the same was vague and indefinite, and charged no crime. There were two other grounds we do not deem it necessary now to notice. This affidavit does not charge directly, as is required in accusations of crime, the material averment that any municipal primary election was held in Biloxi at all. The direct charge is, simply, that Harkness "did unlawfully have published and circulated a placard or poster having reference to affiant." The clause in apposition follows, to wit: "A candidate at the municipal primary election of Biloxi, Mississippi." This is no direct charge, positively and clearly, that any such election was held. It is a mere clause of a participial character, an apposition clause, from which, at most, the fact that any election was held in Biloxi, Miss., might be remotely inferred. Neither does this affidavit charge, as we think it must, under section 3728, that any primary election was lawfully called and held by the properly constituted authorities. The affidavit is wholly vague, indefinite, and insufficient.

It is said that the affidavit is in the language of the statute. But this is one of those cases in which the averments in the affidavit must be expanded beyond the language of the statute, to charge any crime at all. The case falls exactly within the principle announced in *Fire Insurance Companies v. State*, 75 Miss. 24, at page 39, 22 South. 99, at page 103, where we said that

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the fundamental rule as to an indictment was that it "must charge the acts constituting the offense directly, clearly, and precisely, and not argumentatively, inferentially, or by the process of exclusion," citing the *Encyclopedia of Pleading & Practice*, vol. 4, p. 722. Where is there any direct, precise, and positive charge in this affidavit that any primary election was held at all in the city of Biloxi? Manifestly none. The very most that can be said in regard to this charge is that it is inferentially adumbrated in the affidavit. This falls far short of the clearness required when the citizen is put to his defense at the bar of his country on a charge of crime.

The judgment is reversed, the demurrer sustained, and the cause remanded.

(94 Miss. 370)

WOODSON v. STATE. (No. 13,500.)

(Supreme Court of Mississippi. Feb. 15, 1909.)
INTOXICATING LIQUORS (§ 199*)—AFFIDAVIT CHARGING CRIME—NECESSITY FOR PRODUCING.

A conviction for unlawfully selling intoxicants must be reversed, where the record fails to show that any affidavit charging any crime was produced in justice court or in the circuit court.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 199.*]

Appeal from Circuit Court, Marshall County; W. A. Roane, Judge.

"To be officially reported."

Sally Woodson was convicted of unlawfully selling intoxicating liquors, and she appeals. Reversed and dismissed.

L. A. Smith, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

WHITFIELD, O. J. No affidavit charging any crime is shown by the record to have been produced in either the justice's court or circuit court.

The judgment is reversed, and this prosecution dismissed, without prejudice to the right of the state to begin a proper prosecution.

(95 Miss. 190)

SMITH v. GULFPORT & MISSISSIPPI COAST TRACTION CO. (No. 13,757.)

(Supreme Court of Mississippi. Feb. 1, 1909.)

1. STREET RAILROADS (§ 110*)—INJURIES TO PEDESTRIAN—SUFFICIENCY OF DECLARATION.

A declaration, alleging that defendant had removed the dirt from under the ties of its track at a place much frequented by the public as a crossing, and did not light the place to warn pedestrians of its unsafe condition, and intestate stumbled and fell onto the track at a point at the end of a curve, so that the headlight did not show his position, and was killed by a passing car, which ran at a rapid rate around the curve, so as to amount to gross negligence, stated a cause of action, and was not demurrable for failure to allege that the crossing was provided by defendant, or was used as a crossing with its knowledge, or was used as a crossing by the public generally; nor

was it demurrable on the ground that it did not allege facts showing a duty upon defendant to maintain the crossing in a safe condition for pedestrians.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 224; Dec. Dig. § 110.*]

2. STREETS RAILROADS (§ 110*)—INJURIES TO PEDESTRIAN—SUFFICIENCY OF DECLARATION.

A count alleging that defendant removed dirt from under the ties of its track at a place in the most populous part of the town, most used by the public, and did not light the place, so that intestate fell onto the track because of its unsafe condition, and was struck by a car after the motorman saw, or could have seen, his helpless condition, and that the motorman was guilty of wanton negligence under the circumstances, was not demurrable for not alleging that the crossing was provided by defendant, or was used as a crossing with its knowledge, or that it was used as a crossing by the public generally.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 224; Dec. Dig. § 110.*]

3. STREET RAILROADS (§ 110*)—INJURIES TO PEDESTRIAN—DECLARATION—ALLEGATIONS OF NEGLIGENCE.

An allegation that defendant's motorman discovered intestate on the track in time to have stopped the car before striking him, had the brakes and machinery been in working order, was not demurrable for not alleging in what manner they were defective.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 224; Dec. Dig. § 110.*]

Appeal from Circuit Court, Harrison County; W. H. Hardy, Judge.

"To be officially reported."

Action by Anna C. Smith against the Gulfport & Mississippi Coast Traction Company. From a judgment for defendant on demurrer, plaintiff appealed. Reversed, demurrer overruled, and cause remanded.

Mrs. Anna C. Smith brought suit against the defendant for the death of her husband, William A. Smith, who was killed by an electric car of said defendant. The declaration is in four counts, and the defendant demurred to each count separately and to the declaration as a whole. The court sustained the demurrer, and plaintiff appeals.

The first count of the declaration is predicated on the fact that defendant had removed the dirt from under the cross-ties at the place on its track where Smith was killed, a place much frequented by the public generally as a crossing, and that defendant had not provided a light to warn pedestrians of the unsafe condition of the place, and that Smith, in going from his work to his sleeping apartments on the night of his death, had to cross the track of defendant at said place, and, on account of the defective condition of said track as aforesaid, deceased stumbled and fell on said track, and while lying in a helpless condition from his fall, just at the end of a curve in said track, where the headlight of the electric car did not throw the light across the track, a car of said defendant struck and killed deceased while going at a rapid rate of speed around said curve, amounting to willful, wanton, and gross recklessness and negli-

gence on the part of the motorman. The demurrer to the first count charged that plaintiff did not allege that the crossing was one provided or established by defendant, or that it was used as a crossing at the time with the knowledge or consent of defendant, or that it was used as a crossing by the public generally.

The second count alleged that the accident occurred in a populous part of the town most used by the public generally; that the track was defective as heretofore set out; that deceased fell and became unable to extricate himself, and while lying on said track the motorman in charge of the car saw Smith in such helpless condition, or should have seen him by keeping the proper lookout, before the car struck Smith; and that under the conditions the motorman was guilty of willful, wanton, and gross negligence, etc. The demurrer to the second count raises practically the same question as the demurrer to the first count.

The third count contains the further allegations that the motorman in charge of the car discovered Smith on the track in time to have stopped the car before striking him, had the brakes and machinery of said car been in proper working order. The demurrer to the third count charges that the declaration does not sufficiently describe the crossing, and does not allege in what manner the brakes and machinery were defective.

The fourth count alleges that there was no light at said crossing and that said Smith did not know of the excavation caused by the removal of dirt, and that the company should have placed a light there, warning pedestrians of the dangerous condition of the track, and that their failure so to do was the proximate cause of the death of said Smith. The demurrer to the fourth count sets up that the declaration in this count fails to allege facts which would disclose any duty upon defendant to maintain said crossing in a safe condition for pedestrians.

J. H. Mize, for appellant. Jas. H. Neville and White & Ford, for appellee.

WHITFIELD, C. J. Each one of the counts in this declaration stated a good cause of action, and the demurrer to each and every count should, manifestly, have been overruled.

The judgment is reversed, the demurrer overruled, and the cause remanded.

PETERS v. LOUISVILLE & N. R. CO. (No. 13,396.)

(Supreme Court of Mississippi. Feb. 1, 1909.)

1. MASTER AND SERVANT (§ 258*)—TRYING ACTIONS—PLEADING—SUFFICIENCY OF DECLARATIONS.

In an action against a master for injuries to a servant while loading a car by pulley and

tackle, declaration *held* to state a cause of action.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 258.*]

2. ACTION (§ 38*)—SINGLE CAUSE OF ACTION—DECLARATION.

A declaration in a servant's action against his master for personal injuries *held* to state only one cause of action.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 38.*]

Appeal from Circuit Court, Hancock County; W. H. Hardy, Judge.

Action by G. W. Peters against the Louisville & Nashville Railroad Company. From a judgment for defendant upon demurrer to the declaration, plaintiff appealed. Reversed and remanded.

The declaration, omitting the formal parts, is as follows: "The plaintiff was employed by the defendant, the Louisville & Nashville Railroad, and was a member of a bridge crew, under one Joseph Catchot, foreman of said bridge crew, and a person having the right to control and direct the services of the plaintiff, as well as the other members of the said bridge crew. That on the 17th day of February, A. D. 1908, while in the defendant's employ, the said Joseph Catchot, foreman, ordered one Theodore Soden to take a squad of men and load a cattle car with mains. That the mains were at a point on the said railroad about 200 feet from the water tank in the railroad yard at Scranton, Miss. The plaintiff was a member of said squad which was sent out, and was directly under Theodore Soden, a person who also had the right to control and direct the services of the plaintiff, as well as the other members of the squad. That the said Soden, boss of the gang, provided a means of loading the mains in said car which was inadequate, insufficient, and dangerous to the servants of the defendant—a small block and fallow, consisting of two pulleys, one a single pulley and the other a double pulley, rope, and strap. The double pulley was attached by its hook to the travel or track on which the door of the car, when opened and shut, traveled. That the travel is a flat piece of iron $\frac{1}{2}$ inch by 3 inches, and about 12 feet in length. The rope connects the pulley and strap, which strap was first put around the front end of a main and the lower pulley was hooked into the strap. Then the men would haul on the rope, thereby raising the front of the main to the floor of the car, and there it rested on the floor, and then the strap was changed to the rear end of the main, and the men at the rope would haul again, thereby pushing the main in the car and raising the rear end at the same time. This complainant was the first man at the rope near the head pulley, and there was one man who took the end of the rope on which the men hauled the main in the car, snubbed the rope around a telegraph pole, so as to make the rope taut, in order

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that the men could get a new hold on the rope. To load any car with these mains in the manner described and from the ground to the door of a car is a work of danger; but a cattle car is wholly unsuitable for the means of transporting such material, for the reason that they are made for the purpose of transporting stock, and because it is a danger added to a work of danger to do so. There were nine cast-iron mains, 10 feet long and 10 inches in diameter, weighing in the neighborhood of 1,400 pounds. That after lifting the front end of one of the mains, and placing it on the front end of the floor of the car, and after the strap was put around the rear end, the lower pulley was attached to it, when it was hauled to about 6 or 7 feet from the ground, the upper pulley made a jump in its fastenings, and the front of the main rolled off of the floor of the car to the ground, and the rear end swung around and caught this plaintiff's right leg between it and the end of a cross-tie. Thereby he was injured to such an extent that he could not walk to the car in which he lived. He suffered great pain therefrom for more than three weeks, besides loss of time, thereby being damaged in the sum of \$500. Wherefore," etc.

W. J. Gex and D. W. Harper, for appellant, cite section 729, Code of 1906; Cheaves v. Southern Railway Company, 82 Miss. 48, 33 South. 649, 34 South. 386.

Gregory L. Smith, for appellee, cites Railroad Company v. Wallace, 90 Miss. 609, 43 South. 469; Railroad Company v. Abrams, 84 Miss. 456, 36 South. 542; McCerren v. Railroad Company, 72 Miss. 1013, 18 South. 420; Powers v. Stowers, 47 Miss. 577; Clary v. Lowery, 51 Miss. 879; Perkins v. Guy, 55 Miss. 178, 30 Am. Rep. 510.

MAYES, J. It is our view that the demurrer to the declaration filed in this cause should have been overruled. The declaration states one good cause of action, and only one. We do not think the authorities cited by counsel for appellee can be applied in this case.

Reversed and remanded.

(94 Miss. 899)

Ex parte PARKER. (No. 13,799.)

(Supreme Court of Mississippi. Feb. 15, 1909.)

PRISONS (§ 14*)—CONTRACTS BY PUBLIC AUTHORITIES FOR LABOR—RIGHT OF CONVICT TO DISCHARGE.

Where the county supervisors have made no order providing for the working of county convicts in any of the modes provided by law, a person convicted of a misdemeanor and confined in jail for default in payment of the fine and costs must remain in jail, and is not entitled to his liberty because of failure of the board to act.

[Ed. Note.—For other cases, see Prisons, Dec. Dig. § 14*]

Appeal from Chancery Court, Calhoun County; I. T. Blount, Chancellor.

Habeas corpus by Ethel Parker. From a judgment denying the writ, relator appeals. Affirmed.

J. L. Bates, for relator. Geo. Butler, Asst. Atty. Gen., for respondent.

FLETCHER, J. This relator, being convicted of a misdemeanor in the circuit court of Calhoun county, was sentenced to pay a fine and costs, and in default thereof to remain in the county jail.

It appears that the board of supervisors of Calhoun county has never undertaken to provide for the working of the county convicts in any of the modes provided by law, but has made no order whatever on the subject of disposing of these convicts. Relator insists that he is entitled to his liberty because no such order has been made. We cannot so hold. In the absence of any action by the board, the defaulting misdemeanant must remain in jail. We agree with the chancellor that, if any error has been committed, it was in favor of the relator, and of this he cannot complain.

Affirmed.

(94 Miss. 228)

CUNNINGHAM v. STATE. (No. 13,628.)

(Supreme Court of Mississippi. Feb. 8, 1909.)

CRIMINAL LAW (§ 855*)—SEPARATION OF JURY—EFFECT.

Where it was highly improbable that a juror in a murder case, who separated from his fellows, saw any one during the separation, the conviction will not be set aside because of the separation.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 855*]

Appeal from Circuit Court, Monroe County; E. O. Sykes, Judge.

George Cunningham was convicted of murder, and he appeals. Affirmed.

Geo. C. Payne, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

FLETCHER, J. We do not think the proof as to separation of the juror Grady from his fellows is sufficient to reverse this case. It was said in Skates v. State, 64 Miss. 645, 1 South. 843, 60 Am. Rep. 70, that it is not enough for the defendant to show that possibly some person might have been with the juror and communicated with him. In the case at bar it is highly improbable that the juror saw anybody during the period of his enforced withdrawal from the body of the jury.

Though we are earnestly urged to reverse the case on the facts, after a careful consideration of the evidence, we do not feel justified in disturbing the verdict of the jury.

Affirmed.

(94 Miss. 201)

GROCE v. PHOENIX INS. CO. (No. 18,405.)
(Supreme Court of Mississippi. Feb. 15, 1909.)**1. INSURANCE (§ 282*)—AVOIDANCE OF POLICY—TITLE OF INSURED—SOLE AND UNCONDITIONAL OWNERSHIP.**

The stipulation in a fire policy that it shall be void if the interest of insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple, is reasonable and valid, and a breach thereof, unless waived by the insurer, will excuse it from liability.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 606; Dec. Dig. § 282.*]

2. INSURANCE (§ 282*)—TITLE OF INSURED—SOLE AND UNCONDITIONAL OWNERSHIP.

A conveyance, though fraudulent and void as to the grantor's creditors, would not be void as against the grantee, claiming as an insured under a policy on the property which provided that the policy should be void if the interest of insured were other than unconditional and sole ownership.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 606; Dec. Dig. § 282.*]

3. INSURANCE (§ 282*)—INTEREST OF INSURED—CONVEYANCE BY WIFE TO HUSBAND—VALIDITY—CONSTRUCTION OF STATUTE—"THIRD PERSON."

Laws 1900, p. 130, c. 90, provides that a conveyance of land, etc., between husband and wife shall not be valid as against any third person, unless the conveyance be in writing, acknowledged and filed for record as a mortgage or deed of trust is required to be, etc. *Held*, that the term "third person" includes only any person in a position to be prejudiced by the secret conveyance; and hence, where a wife conveyed property to her husband by an unrecorded deed valid as to her, and her husband insured it, the deed was not void as to the insurance company, since, as nobody but insured or his wife could be the real owner, and the wife had parted with her interest to insured, the company could not have been prejudiced; its only interest being to know that insured was in fact the owner.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 606; Dec. Dig. § 282.*]

For other definitions, see Words and Phrases, vol. 8, pp. 6960, 6961.]

Appeal from Circuit Court, Pike County;
M. H. Wilkinson, Judge.

Action by W. B. Groce against the Phoenix Insurance Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Action to recover for loss of property by fire. The first trial resulted in a mistrial, and on the second trial there was an agreement of counsel as to the amount of liability, if any existing at all, and it was further agreed that the only point to be decided was whether, under the law, any liability existed.

R. W. Cutrer and Alexander & Alexander, for appellant. Price & Whitfield, for appellee.

FLETCHER, J. This appellant, having insured certain sawmill property in the Phoenix Insurance Company and sustained a loss by fire, brought suit on the insurance

contract. On the trial many defenses were interposed, presented by a variety of pleas and notices; but the course of the pleading and the evidence offered have eliminated from consideration every question except one, arising under section 2522 of the Code of 1906, which question may be thus stated: The policy of insurance contained the familiar stipulation to the effect that the policy should be void if "the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple." On the trial of the case it developed that the land upon which the sawmill was located had been deeded to appellant's wife, and there was no conveyance of record divesting her title. It being clear, so far as the recorded deeds disclosed, that the above-quoted stipulation in the days before the contract of insurance was affected his wife had executed to him a deed policy had not been observed, the plaintiff, upon being reintroduced, testified that some conveying the title to the land in fee simple, but that this deed had never been acknowledged or filed for record.

It was insisted on behalf of the insurance company that this deed is void under section 2522 of the Code of 1906, and, the circuit judge agreeing with this contention, a peremptory instruction was given for the defendant company. We desire to say in the outset that we unhesitatingly construe the agreement entered into by the parties at the second trial as submitting to the court only the question as to whether a peremptory instruction should have been given on the facts developed in the first trial, and decline to give this agreement the effect which would follow if both the law and the facts had been submitted to the court for decision. The statute in question reads as follows:

"What Necessary to Validity of Conveyance.—A transfer or conveyance of goods and chattels, or lands, or any lease of lands, between husband and wife, shall not be valid as against any third person, unless the transfer or conveyance be in writing and acknowledged and filed for record as a mortgage or deed of trust is required to be; and possession of the property shall not be equivalent to filing the writing for record, but, to affect third persons, the writing must be filed for record." Laws 1900, p. 130, c. 90.

The question is whether an insurance company, seeking escape from liability on the ground that the insured is not the sole and unconditional owner of the land on which the property is situated, can be held to be such a "third person" as the statute contemplates. It is very generally agreed, and, indeed, repeatedly decided in this state, that the clause in an insurance policy as to sole and unconditional ownership is reasonable and valid, and that a breach of such stipula-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion, unless waived by the company, will excuse the company from liability. There must be a reason for upholding and enforcing this stipulation, and the reason lies very near the surface. It is clearly and succinctly put by the Pennsylvania court in the following language: "The purpose of this provision is to prevent a party who holds an undivided, or contingent, but insurable, interest in property from appropriating to his own use the proceeds of a policy, taken upon the valuation of the entire and unconditional title, as if he were the sole owner, and to remove from him the temptation to perpetrate fraud and crime; for, without this, a person might thus be enabled to exceed the measure of an actual indemnity. But where the entire loss, if the property is destroyed by fire, must fall upon the party insured, the reason and purpose of this provision does not seem to exist." *Imperial Fire Insurance Co. v. Dunham*, 117 Pa. 460, 12 Atl. 668, 2 Am. St. Rep. 686.

This view of the purpose of the clause must be kept in mind in giving effect to its provisions, and in applying it to any given state of facts. It was doubtless in the mind of the court when there was decided the case of *Liverpool, etc., Ins. Co. v. McGuire*, 52 Miss. 227, in which it was held that the clause had to do, not with nice questions of title, to be precisely determined, but with beneficial, practical, and equitable ownership; and therefore the court held that, though the legal title was in a partnership, yet it was competent to show by parol that the partnership had been dissolved and the real estate divided. And again, in *Phoenix Ins. Co. v. Bowdre*, 67 Miss. 620, 7 South. 596, 19 Am. St. Rep. 323, the court reaffirmed with emphasis and elaboration the doctrine of the *McGuire* Case, and upheld the policy, although the deed to the insured was so defective that the legal title had probably not passed. After a most searching analysis of the purpose of this clause in insurance policies, the court concludes: "Applying these principles to the case at bar, we will see that plaintiffs are the sole, undisputed, beneficial owners of the property in question, holding under a conveyance purporting to invest them with an estate in fee simple. The truth is, so far as this record discloses, plaintiffs are the only persons on earth having any sort of interest in, or claim of beneficial ownership to, the premises. There is, at the utmost, a mere naked legal title outstanding in one of the three surviving executors of Merriweather, and this executor is the mere trustee of the title for these very plaintiffs and their brothers and sisters; all of said brothers and sisters having conveyed their undivided interests to these plaintiffs. Will any one deny that plaintiffs might not, if thought necessary to protect their title, go into a court of chancery and immediately have the naked

legal title divested out of the trustee and invested in themselves? The appellees are the real owners of the premises, they are the sole owners asserting title, and they must bear the total loss involved in the destruction of the building, unless we shall hold the company liable."

The authorities are all agreed that a conveyance, though void at the instance of creditors, because executed fraudulently, is not to be held as void against a claim by the insured for the value of the property, though covered by an insurance policy containing the identical stipulation here under review. *Steinmeyer v. Steinmeyer*, 64 S. C. 413, 42 S. E. 184, 59 L. R. A. 319, 92 Am. St. Rep. 809; *Rochester Loan & Banking Co. v. Liberty Ins. Co.*, 44 Neb. 537, 62 N. W. 877, 48 Am. St. Rep. 745.

The statute under review does not render absolutely void all unacknowledged and unrecorded conveyances between husband and wife. They are perfectly good as between the parties. They are void only as to "third persons." That this expression "third persons" does not apply in all its literal significance seems clear from the case of *Green v. Weems*, 85 Miss. 566, 38 South. 551. It would certainly be true that if the expression is to be held to embrace all persons whatsoever, without regard to their interest in the property conveyed or the possibility of their being injuriously affected by the transfer, it would include all creditors, whether secured or unsecured. But this case holds correctly that when creditors are involved the reference is to secured creditors only, following the analogy of another statute dealing with conveyances. This case cannot be reconciled with the view that all third persons are meant, independent of the power of the conveyance to do them mischief. We cannot attach significance to the solitary word "otherwise," used in one sentence of the opinion, after mention of creditors and purchasers. That usually innocuous word cannot be extended to include a class excluded by the reasoning and effect of the opinion. We must look to the purpose of the statute.

No sound reason can be given for requiring conveyances between husband and wife to be recorded, except that the world may know as to the change of ownership. If any given individual has not been prejudiced by this secret conveyance, how can his lack of knowledge possibly operate to his injury? The insurance company is not affected in its risk or its liability by the fact that constructive notice was not given of the conveyance. It is only interested in knowing that the party claiming to be owner is in fact the owner, and that nobody else is. Now in the case at bar either Groce or his wife is the real owner. Manifestly Mrs. Groce is not, since she has, as Groce testifies, conveyed the property by a deed admittedly valid as to her. She has no interest in the proceeds

of insurance, no claim on the property. We cannot see that the insurance company could possibly have been prejudiced by the failure of the husband to have the deed acknowledged and recorded, and we further hold that the statute includes only such "third persons" as are in a position to be prejudiced by the secret conveyance. We intimate nothing as to the value of the proof offered to establish the execution of the deed, since that is a question for the jury.

Reversed and remanded.

(95 Miss. 6)

STATE v. JACKSON COTTON OIL CO.
(No. 12,990.)

(Supreme Court of Mississippi. Jan. 25, 1909.)

1. CORPORATIONS (§ 38*)—REGULATION—POWER TO REGULATE.

Though corporations are entitled to the protection of the state and federal Constitutions, they may be dealt with differently from natural persons; their charters being subject to amendment at the legislative will.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 120; Dec. Dig. § 38.*]

2. CORPORATIONS (§ 41*)—REPEAL OF CHARTER.

The Legislature may repeal the charter of a corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 128; Dec. Dig. § 41.*]

3. MONOPOLIES (§ 9*)—TRUSTS—POWER TO REGULATE.

The legislative power to regulate trusts, agreements, etc., inimical to the public welfare does not depend upon Const. 1890, § 188, authorizing laws to prevent trusts, etc., inimical to the public welfare; the Legislature having general power, within constitutional limitations, to declare what combinations are inimical to the public welfare.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 8; Dec. Dig. § 9.*]

4. MONOPOLIES (§ 10*)—COMBINATION TO RESTRAIN TRADE—STATUTORY PROVISIONS—CONSTITUTIONALITY.

Laws 1900, p. 125, c. 88, prohibiting trusts, combinations, and agreements to restrain trade and hinder competition, are not unconstitutional; such agreements being contrary to public policy, and punishable.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 9; Dec. Dig. § 10.*]

5. STATUTES (§ 64*)—VALIDITY—VALID IN PART—"TRUST"—"COMBINE."

Laws 1900, p. 125, c. 88, defining a "trust" or "combine" as a combination or agreement between two or more persons, etc., (a) in restraint of trade; (b) to limit, increase, or reduce the price of a commodity; (c) to hinder competition, etc.—is severable, and if any provision thereof is invalid it may be eliminated, without affecting the validity of other provisions.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 63; Dec. Dig. § 64.*]

For other definitions, see Words and Phrases, vol. 2, p. 1275; vol. 8, pp. 7116-7124, 7822.]

6. MONOPOLIES (§ 26*)—COMBINATION TO RESTRAIN TRADE—REMEDIES TO PREVENT UNLAWFUL COMBINATION—SUFFICIENCY OF INFORMATION—"COMBINE."

An information in the nature of a petition for quo warranto alleged that defendant and an-

other cotton oil company were competitors in buying cotton seed, and agreed that defendant would not buy any seed in the territory adjacent to the plant of the other concern if it would ship defendant a certain amount of seed at certain prices, and that the agreement was an unlawful combination to restrain trade, for the purpose of limiting the price of a commodity, etc. Held, that the information, though containing unnecessary averments, alleged a single cause of action, and was sufficient under Laws 1900, p. 125, c. 88, defining a "combine" to be a combination to hinder competition, and making such agreements illegal.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 26.*]

7. MONOPOLIES (§ 31*)—ACTION FOR PENALTIES—PENALTIES.

Where a violation of the anti-trust act occurred in 1903, while Laws 1900, p. 125, c. 88, permitting both a fine and forfeiture of charter, was in force, the penalty declared by Code 1906, § 5004, imposing certain fines would not apply; and under section 5020, permitting a fine of \$200 to \$5,000 and providing that both a fine and forfeiture of charter should not be imposed for offenses committed prior to the adoption of the chapter, a fine of \$200 would be a proper penalty for a violation prior to that time, in view of the legislative intimation of leniency in such cases.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.*]

Appeal from Circuit Court, Hinds County; John B. Ricketts, Special Judge.

Proceedings by the State against the Jackson Cotton Oil Company. From a judgment for respondent upon demurrer to the petition, the State appealed. Reversed, demurrer overruled, and cause remanded for further proceedings.

The state, through the Attorney General, filed an information in the nature of a petition for a writ of quo warranto against the Jackson Cotton Oil Company, a Mississippi corporation, alleging a violation of the anti-trust statutes of the state, and praying for the forfeiture of its charter. The complaint alleges that said defendant and the Wilson Cotton Oil Company, of Lexington, Miss., were competitors in business, each engaged in buying cotton seed, and that in the year 1903 they agreed between themselves that the Jackson Cotton Oil Company would not buy any cotton seed in the town of Lexington, or in the territory adjacent thereto, provided the Wilson Cotton Oil Company would ship the Jackson Cotton Oil Company a certain amount of cotton seed at Lexington prices, and that said agreement was an unlawful combination in restraint of trade, for the purpose of limiting the price of a commodity, and that said defendant company thereby became a member of an unlawful trust or combine, in violation of the statutes of the state of Mississippi.

To this information a demurrer was interposed, which set up the following grounds:

- (1) That the acts complained of did not constitute a violation of the anti-trust statutes.
- (2) The statute, if violated, is unconstitutional.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

al, because it deprives the defendant of its property without due process of law and denies it equal protection of the law, in violation of the fourteenth amendment to the Constitution of the United States. (3) That said statute is unconstitutional, because it impairs the obligations of a contract conferred upon defendant by its charter of incorporation, and is therefore in violation of article 1, § 10, of the Constitution of the United States. (4) That it is in violation of section 198 of the Constitution of the state of Mississippi of 1890, prohibiting combinations inimical to public welfare; it not being alleged that the agreement complained of is inimical to the public welfare, or was an unreasonable restraint of trade. (5) Because the statute (chapter 88, p. 125, of the Laws of 1900) under which this action was instituted has been repealed, without a saving clause as to proceedings of this nature. (6) That said petition is bad, because attempting to allege in one joint petition divers, different, and entirely independent grounds for a single cause of action.

This demurrer was sustained by the court, and the state appeals.

See, also, *Kosciusko Oil Mill & Fertilizer Co. v. Wilson Cotton Oil Company*, 90 Miss. 551, 43 South. 435, 8 L. R. A. (N. S.) 1053.

May, Flowers & Whitfield and R. V. Fletcher, Atty. Gen., for the State. Green & Green, Mayes & Longstreet, and Smith, Hirsh & Landau, for appellee.

CAMPBELL, Special Judge. This case has been argued by several counsel with a great wealth of learning, which has received due attention by the court, and, aided by it, we do not consider it proper to do more than to decide the questions involved in the case before us, leaving all others to be decided as they may arise hereafter.

While corporations are entitled to the protection of the Constitutions of the state and the United States, they are in a class by themselves, and their charters are held at the will of the Legislature, subject to amendment or repeal, and they may be dealt with differently from natural persons. *Berea College v. Kentucky*, 211 U. S. 45, 29 Sup. Ct. 33, 53 L. Ed. —.

The power of the Legislature to prohibit "trusts, combinations, contracts and agreements inimical to the public welfare" is not derived from or dependent on section 198 of the state Constitution of 1890, which neither confers nor limits its power, which exists by virtue of the general grant of legislative power. This section imposes on the Legislature the duty to pass such laws, and the use of the expression "inimical to the public welfare" by the Legislature has no effect, except to show that what it prohibits is by it regarded as of that character. That expression might be stricken from the Constitution and laws without affecting the validity of the law. It is for the Legislature to declare

what is inimical to public welfare, and it is only when it transcends the limit of legislative power that the courts may interpose to shield the fundamental law from violation.

This case is to be determined by chapter 88, p. 125, Laws 1900, in force in 1902, when the act complained of by the information occurred. We do not regard that statute as unconstitutional, for it is certainly true that an agreement, the purpose and effect of which are directly to restrain trade and hinder competition in the sale or purchase of a commodity, is against public policy and void and punishable.

If it is true that any provision of the act of 1900 is violative of the Constitution of the state or the United States, it may be disregarded and eliminated, since the various provisions are severable, and do not present the difficulty which has sometimes caused statutes to be condemned.

We find no fault with the information containing several unnecessary averments, but all characterizing a single cause of action. Its averments bring this case fully within the case of *Kosciusko Oil Mill & Fertilizer Co. v. Wilson Cotton Oil Co.*, 90 Miss. 551, 43 So. 435, 8 L. R. A. (N. S.) 1053, decided by this court, which is decisive of this.

The appellee, if it shall be convicted, is not liable to the penalty declared by section 5004 of the Code of 1906, for the offense charged occurred in 1903, when the act of 1900 was in force, the penalty for violation of which was forfeiture of charter; and section 5020 of the Code provides that for any former violation of the law the penalty may be a fine of \$200, without forfeiture of charter. So, if appellee shall be convicted, the trial court, regarding the clear intimation of the legislative will for lenience in such case, may be expected to impose only a fine of \$200, without forfeiture of charter.

Judgment reversed, demurrer overruled, and cause remanded for such proceedings as may be had according to law.

HARRISON NELSON CO. v. WILLIAMS. (No. 13,510.)

(Supreme Court of Mississippi. Feb. 15, 1909.)

Appeal from Circuit Court, Simpson County; R. L. Bullard, Judge.

Action between the Harrison Nelson Company and Ed. W. Williams. From the judgment, the company appeals. Affirmed.

R. C. Russell and J. P. Edwards, for appellant. McIntosh Bros., for appellee.

PER CURIAM. Judgment affirmed.

COATS v. STATE. (No. 13,760.)

(Supreme Court of Mississippi. Feb. 15, 1909.)

Appeal from Circuit Court, Harrison County; W. H. Hardy, Judge.

Abraham Coats was convicted of crime, and appeals. Affirmed.

M. D. Brown and C. R. Haydon, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

PER CURIAM. Judgment affirmed.

THOMAS v. TOWN OF CLINTON (three cases). (Nos. 13,779-13,781.)

(Supreme Court of Mississippi. Feb. 13, 1909.)

Appeal from Circuit Court, Hinds County; W. H. Potter, Judge.

Will Thomas was thrice convicted of violating an ordinance of the Town of Clinton, and appeals. Affirmed.

Geo. Butler, Asst. Atty. Gen., for appellee.

PER CURIAM. Judgment affirmed.

(122 La. 856)

No. 17,374.

STATE v. BERTRAND et al.

(Supreme Court of Louisiana. Jan. 18, 1909.)

1. BAIL (§ 49*)—ORAL ORDER TO ACCEPT—SUFFICIENCY.

The court of first instance fixed the amount of the bond, and thereafter the sheriff accepted a bond with surety for the amount, and released the defendants from custody.

This was done in accordance with the practice of the court. The surety knew that he was signing a bond on which the defendants would be released. Nothing shows that the steps taken were unauthorized, and that the sheriff acted otherwise than in accordance with the court's verbal order.

The order to accept a bond in a criminal case may be given orally.

[Ed. Note.—For other cases, see Bail, Dec. Dig. § 49.*]

2. BAIL (§ 66*)—BOND—DESCRIPTION OF OFFENSE—SUFFICIENCY.

The bond sufficiently describes an offense known to the law.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 279-283; Dec. Dig. § 66.*]

3. HOLIDAYS (§ 6*)—PUBLICATION OF STATUTE.

The law was published in the official journal on the 4th of July. This is not an illegality; it does not vitiate the bond.

[Ed. Note.—For other cases, see Holidays, Dec. Dig. § 6.*]

4. BAIL (§ 79*)—FORFEITURE OF BOND—MOTION TO SET ASIDE—RIGHT TO MAINTAIN—SURETY.

The defendants placed an amount in the hands of a surety to meet liability in case of a forfeiture of the bond.

The surety is not exposed to a loss, and has no grounds upon which to stand.

[Ed. Note.—For other cases, see Bail, Dec. Dig. § 79.*]

(Syllabus by the Court.)

Appeal from Criminal District Court, Parish of Orleans; Frank D. Chrétien, Judge.

Eugene Bertrand and Odette Duval having been arrested for concubinage, they were released upon bonds signed by Joseph Bonomo as surety. The bonds having been thereafter forfeited for failure of the principals to appear, Bonomo moved to set aside such judg-

ment of forfeiture, which motion was denied, and he appeals. Affirmed.

Paul Charles La Salle, for surety, appellant. St. Clair Adams, Dist. Atty., and Harold Alexander Molse and Warren Doyle, Asst. Dist. Attys., for appellee.

BREAUX, C. J. The appellant was surety on defendants' bonds. He seeks to have the judgment rendered against him as surety reversed.

The amount of each of the two bonds is \$250.

The defendants, Eugene Bertrand and Odette Duval, were charged in an affidavit, in the First city criminal court, with feloniously living in open concubinage, in violation of Act No. 87, p. 105 of 1908, one being a colored man, the other a white woman.

A subpoena was issued on motion of the district attorney, and served on defendants and their surety.

At the time fixed by the court, the defendants failed to appear. Thereafter, in the court in which it was incumbent upon the defendants to appear, the court ordered Joseph Bonomo, surety, who was present in court, to procure the presence of the defendants into court.

This he failed to do, and thereupon the district attorney offered the required evidence to forfeit the bond, which was admitted. Upon this evidence a judgment was rendered (again on motion of the district attorney) against the defendants and their surety in solido for an amount of \$250 in each case.

The law under which the defendants were prosecuted was approved on the 1st of July, 1908, and promulgated in the official journal on the 4th of that month. The affidavit was made against the defendants on the 27th day of July, 1908, and the bail bond was furnished the next day.

Counsel for the bondsman in due time presented a motion before the court to set aside the judgment of forfeiture.

The complaint of the surety is, in substance, that the judge originally did not issue a written order to the sheriff to accept the bond.

The second ground of attack of the judgment was that the bond upon which it was based does not state an offense known to the law; and, lastly, the bondsman urged that the law before cited had not been promulgated at the date that the prosecution was instituted by reason that the law was promulgated in the official journal on the 4th of July.

We take up the first point above stated for decision; that is, the want of an order to the sheriff by the court.

The amount of the bond was fixed by the court. At the time that the bond was executed, the defendants were in charge of the sheriff. It is usual for the court to direct the

sheriff to accept the bond. We have no good reason to infer that it was otherwise in this case.

There is a pertinent decision on this point. *State v. Hendricks*, 40 La. Ann. 724, 5 South. 24.

We insert here the pertinent part of the text:

"It is also contended that the bond was not ordered or accepted by the justice of the peace, and that the sheriff accepted the bond without a written order from the magistrate. The minutes of the justice of the peace court show that the bond was ordered and the amount thereof fixed by the magistrate, and his testimony and that of the sheriff both show that the latter was authorized by the justice of the peace to accept the bond. A verbal order to that effect was sufficient, and no authority can be invoked to show that a written order would be necessary to legalize such a bond. But as several of these objections involve only alleged irregularities, the surety is estopped from urging them by the fact, as shown by the sheriff's return and also by the minutes of the magistrate's court, that the accused was in actual custody when the bond was executed, and that he was thereby released. Having reaped the advantages and realized the object of the bond, the parties cannot be allowed to avoid its effect or be heard to gainsay the regularity of the proceeding."

State v. Ansley, 13 La. Ann. 299; *State v. Badon*, 14 La. Ann. 783; *State v. Canady*, 16 La. Ann. 141; *State v. Nicol*, 30 La. Ann. 628. This latter portion of the text relating to the estopped situation in which the surety is placed we will have occasion to refer to again later. The facts bring the case within the terms of another decision in point, viz., *Louisiana Society for the Prevention of Cruelty to Children v. Moody*, 52 La. Ann. 1815, 28 South. 224.

The case of *State v. Badon* was evidently well considered, and the court quoted approvingly from *State v. Ansley*, 13 La. Ann. 299, the following:

"We think that, inasmuch as the accused was in the custody of the sheriff or his deputies, it may fairly be inferred that the sheriff and his deputies (no other persons being mentioned) were intended as the proper persons to take the bond, and that neither the accused nor his sureties, who have put this construction upon the order of the court for the bond, and have secured his discharge upon this construction, can now be permitted to gainsay this conclusion, upon which they have acted."

The proceedings of the magistrate, the court said, were extremely irregular in an important matter, and yet maintained the forfeiture.

This brings us to a consideration of the second proposition upon which learned counsel insists as ground to justify us in setting aside the judgment. This proposition is that the bond does not describe an offense known to the law.

This proposition of defendant is broad enough as stated in his pleading, and, if sustained by the facts, it would have the effect of striking all the proceedings with nullity.

In passing upon this point, we will state that the defendants were charged with "vio-

lating Act No. 87, p. 105, of 1908," known as the "Concubinage Act."

In disposing of this complaint, directed by the surety against the judgment of forfeiture, we in the first place refer to the statute which the defendants were charged with having violated. It in terms denounces concubinage between a person of the Caucasian or white race and a person of the negro or black race, and makes it felony, and directs that whoever shall be convicted shall be sentenced to imprisonment, at the discretion of the court, for a term not less than one month or over one year, with or without hard labor.

The statute is plain enough. When the bond was taken to secure the presence of the defendants charged with its violation, it directly included "the accused of different races," within its terms, for violating the statute by living in open concubinage. The bond could refer to no other concubinage than that charged in the affidavit. It also is manifest that it relates to the statute itself, cited supra, the only statute of the kind upon the statute books.

From that point of view, the surety must have had knowledge of just what he was doing. He does not assert that he had no knowledge when he became party to the bond as surety.

The charge of having violated the statute is equivalent to the charge of having committed an offense known to the law.

A question very similar was considered in *State v. Tennant*, 30 La. Ann. 852.

The defendants in this last case were indicted for murder. The bond was forfeited. They were placed under bond for shooting with intent to kill. The court held that the validity of a bail bond is not affected by an indictment for a higher grade of crime than that expressed in the bond. The accused was bound to appear at court to answer to a specific charge, and not to depart without leave of the court.

The accurate description required in drafting an indictment or in preparing an information is not required in a bail bond.

Although the decision last cited is not directly pertinent, it shows that a substantial compliance is all that is necessary.

In *State v. Ansley*, 13 La. Ann. 299, as in the case in hand, the accused was by the condition of the bond required to answer whenever called upon. The accused in that case was indicted for uttering and publishing as true a certain forged counterfeit order for the payment of money. In the bond he bound himself to appear to answer to the charge of forgery. As there was no charge of forgery, technically speaking, pending against him, the contention was that there could be no forfeiture of the bond. The court held to the contrary.

In *State v. Loeb*, 21 La. Ann. 599, the condition of the bond was that the prisoner should not depart without leave of the court. The sureties were held bound, although the

offense was not described correctly in the body of the bond.

We stated above that we would return to the proposition that the surety could not raise the question he attempts to invoke because his principals were concluded by their own acts.

A similar view was expressed not long since in *State v. Arledge and Posey, Surety*, 48 La. Ann. 774, 19 South. 761.

This case in some respects is very similar to the case in *State v. Moody (Cage, Surety)*, 52 La. Ann. 1815, 28 South. 224, alluded to above as directly in point.

The court states in the reasons for judgment that the amount of the bond was deposited with the surety. On appeal, the statement was not denied. Besides, the court *a qua* states, as part of the ruling, that it was alleged and admitted on the trial of the pending rule in open court that the fugitives had given to the surety an amount of money to secure their liability under the bond. The surety thus protected has no real interest in the result.

In the bill of exceptions taken to the ruling of the trial judge in forfeiting the bond, the following appears:

"The bill includes a bail order upon which the sheriff acted herein. It also is made part of this bill of exceptions; the ruling of the court on the motion herein filed, being in writing is also made part of this bill of exceptions, together with the note of evidence and notice served on surety, thus bringing up the evidence of a fact."

We must decline to set aside the judgment. The surety cannot raise the technical defenses such as could have been raised by the defendants. There are some objections which must be taken at the earliest opportunity, else they will be waived. Besides, the 52 La. Ann. and 28 South. case disposes of the case entirely.

The want of legal publication or promulgation of the statute is another of defendant's grounds.

The laws relating to the publication of a statute are not subject to the rule applying in legal proceedings or in any matter of administering or enforcing the law.

Defendants urge that Sundays and legal holidays should be deducted from the twenty days.

We do not think that we are authorized to so decree.

Fellman v. Mercantile & Marine Ins. Co., 116 La. 723, 41 South. 49, is to the contrary. Moreover, the Constitution does not exclude holidays. Why should we? The publication on the 4th of July was not an illegality. Laws may be promulgated on all days except Sundays. The statement is included incidentally, for, as before stated, the 52 La. Ann. and 28 South. case is controlling.

For reasons assigned, the law and the evi-

dence being in favor of plaintiff and against the defendants, the judgment appealed from is affirmed at appellant's costs.

MONROE, PROVOSTY, and LAND, JJ., concur in the decree.

(122 La. 863)

No. 17,219.

RILEY v. UNION SAWMILL CO.

(Supreme Court of Louisiana. Jan. 4, 1909.
Rehearing Denied Feb. 1, 1909.)

1. LOGS AND LOGGING (§ 3*)—SALE OF STANDING TIMBER—CONTRACTS—CONSTRUCTION.

The language of a contract must be presumed to have been intended to have some meaning, and as an agreement, between individuals, that one of them should return for assessment, and pay taxes on, his own property, would be without meaning, a stipulation, in an inchoate contract for the sale of timber, to the effect that the party named as vendee should return the timber for assessment and pay the taxes thereon from the date of its acquisition, will be construed to mean that, for the purposes of assessment and taxation, at all events, such person was to be regarded as the owner of the timber from the date of the instrument, and hence as having assumed the obligation to relieve the other party of the burden of paying the taxes on it from that date.

[Ed. Note.—For other cases, see *Logs and Logging*, Dec. Dig. § 3.*]

2. LOGS AND LOGGING (§ 3*)—SALE OF STANDING TIMBER—PERFORMANCE OF CONTRACT.

Returning an inchoate contract for the sale of timber, for assessment, as an option, and paying taxes thereon, does not discharge an obligation to return the timber for assessment and pay the taxes thereon.

[Ed. Note.—For other cases, see *Logs and Logging*, Dec. Dig. § 3.*]

3. LOGS AND LOGGING (§ 3*)—SALES—CONSTRUCTION—PERSONAL GRANT TO BUYER.

Where an instrument, purporting to be a sale of standing timber, contains the stipulation "all rights acquired by, and privileges granted to, the said second party, under this sale and contract, shall vest in, and inure to the benefit of, his heirs, successors, and assigns," the proposition that the grant is personal to the original grantee is untenable.

[Ed. Note.—For other cases, see *Logs and Logging*, Dec. Dig. § 3.*]

4. CONTRACTS (§ 10*)—VALIDITY—MUTUALITY.

An inchoate contract to sell standing timber, wherein the party of the one part says, in effect, to the other: "If you assent to this contract at once, and thereby bind yourself thenceforth to return the timber for assessment, and to pay the taxes thereon, and further bind yourself to cut and remove the timber within 10 years, or within 20 years if you elect to pay the price herein stipulated for the extension of time, and to pay for such timber at the rate of 50 cents per 1,000 feet monthly, as the same is cut and removed, or pay 10 cents per acre per year on the land for the last 10 years of the term of the contract, then I sell and transfer the timber to you for those considerations; provided that, should a standard-gauge railway not be built to X. within 4½ years, this engagement to be null," is not, if converted by the assent of the other party into a contract, void

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

for want of consideration or mutuality of obligation.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 10.*]

5. LOGS AND LOGGING (§ 3*) — CONTRACTS — TIME FOR ACCEPTANCE.

Where an obligation purports to be a sale in present of standing timber and to impose obligations, to be executed in the future, upon the person named as vendee, but such person does not sign the instrument or assume such obligations, and the circumstances do not authorize the conclusion that the person signing the instrument as vendor had any other intention than that expressed in the instrument, there is no contract, and no time other than as absolutely necessary, is allowed for the assent of the named vendee, and the signer, upon being notified several years afterwards of such assent, is within his rights in signifying his change of intention and withdrawing the offer.

[Ed. Note.—For other cases, see *Logs and Logging*, Dec. Dig. § 3.*]

(Syllabus by the Court.)

Appeal from Fourth Judicial District Court, Parish of Union; Robert Brooks Dawkins, Judge.

Action by William Riley against the Union Sawmill Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Lamkin, Millsaps & Dawkins, for appellant. Clayton, Hawthorn & Atkinson and Elder & Moore, for appellee.

Statement of the Case.

MONROE, J. Plaintiff, as the owner of a tract of land described as the E. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of Sec. 19, and the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of Sec. 20, T. 23 N., R. 3 E., in the parish of Union, sues defendant for damages for cutting and removing timber therefrom, felling and damaging timber thereon, for his alleged malicious arrest, and for loss of time, annoyance, and expense resulting therefrom. He alleges that defendant fraudulently pretends to be the owner of the timber on said land, under a title derived, through mesne conveyances, from an instrument executed by him (plaintiff) in favor of John McShane, but that the alleged contract evidenced by said instrument is void for want of consideration, for want of mutuality of obligation, and because the conditions were not complied with.

He obtained a preliminary injunction restraining defendant from further trespassing pending the suit, and he prays that it be made perpetual, and that he have judgment for the damages alleged by him. Defendant, for answer, sets up title through mesne conveyances, from McShane to all the merchantable white oak, pine, and cypress timber on the land in question, and alleges that McShane acquired said timber from plaintiff by warranty deed, regular in form, and expressing a fair consideration in the obligations assumed by him, and that it, respondent, acquired in good faith and for a sound price, without knowledge of possible

equities between the former owners. It further alleges that it and its immediate authors have paid the taxes assessed against the timber, and that a railroad has been built to Farmerville in discharge of part of the obligations assumed by McShane as grantee of said timber, all to the knowledge of plaintiff, and that, having received consideration for his grant, plaintiff is estopped to deny its binding effect. Defendant alleges that the injunction was maliciously obtained and has occasioned it loss, and it reconvenes for damages.

It appears from the evidence that plaintiff acquired the land in question as a homestead by patent from the United States, of date October 11, 1902, prior to which date, to wit, on March 18, 1902, he had executed an instrument in writing, reading in part as follows:

"This contract and agreement, entered into on this, the 18th day of March, 1902, by and between William Riley, * * * party of the first part, and John McShane, * * * party of the second part,

"Witnesseth: That the party of the first part, being the sole owner of * * * E. $\frac{1}{2}$ of S. E. $\frac{1}{4}$, Sec. 19, & S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$, Sec. 20, T. 23, R. 3, E., containing 120 acres, more or less, has granted, bargained and sold, and does, by these presents, sell and convey and transfer unto the said second party, all the merchantable white oak, cypress and pine timber, growing, standing, or being, on said land, for the price and sum of 50 cents per thousand feet, payable at the end of each month as the same shall be cut and removed. That, for the purpose of cutting, felling and removing said timber, the party of the second part shall have possession of said land and the right to cut out and construct roads and tramways over, and across, the same, and the right to use the same for the removal of timber he may buy on lands adjoining, and beyond, that described herein, and to have free ingress and egress for employes, teams and vehicles into, upon, and off the same. The party of the second part shall cut and remove (the timber) from the land herein described, within ten years from the date hereof, and, upon the failure to do so within said time, the said party of the second part shall have the right to prolong the period of performance, and preserve all rights vested in him by this sale and agreement, for ten years additional, by paying to said party of the first part, commencing at the expiration of the first ten years, ten cents an acre, per year, for each acre from which the timber shall not have been cut and removed, during the prolonged period, which payment, when made, shall be in full compensation for any and all claims or demands, of whatever nature, for the failure of the second party to cut and remove timber within the first and second periods of time herein granted.

"It is further agreed that, whenever said timber shall be cut and removed, the party of the second part shall enter into full possession of said land, at once, whether the time for such removal be expired or not; provided, that all right of railroad and right of way herein granted shall be perpetual, said right of way to be not less than fifty feet wide, and the same shall be used for a regular freight and passenger railroad, before, during, and after the removal of the timber, and so long as the same is operated as a railroad.

"As part of the consideration for the execution of this contract, the second party binds and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

obligates himself to render for assessment, and pay all legal taxes imposed upon, the timber purchased, from the date of its acquisition.

"It is agreed, in case the Hamburg, Ruston and Southern Railway, or some other standard gauge railway is not completed to Marion, La., within 4½ years from date hereof, this contract shall be null and void.

"In case of sale, lease, or transfer of said land, said first party agrees to reserve and protect the rights of the second party, as the same exist under this contract.

"All rights, acquired by, and privileges, granted to, said second party under this sale and contract, shall vest in, and inure to the benefit of, his heirs, successors and assigns.

"Done and signed, in the presence of the undersigned witnesses, on the day and year above written, at Marion, Union parish, Louisiana.

"William ^{his} X Riley.
mark

"Attest: [Signed] J. L. Hopkins.
"F. M. Powell."

This instrument was recorded in Union parish (though at what time does not appear), and whatever rights were acquired under it by McShane were conveyed by him to John Lockwood and H. W. Ragan, by act of date January 17, 1903, and on June 30th, following, Lockwood and Ragan, together with Geo. T. Ross, Frederick D. Hager, and W. F. Jackson, executed an instrument, which recites that they each, with McShane, owned an undivided interest in all the standing timber described in certain timber deeds (which appear to have been specified, and to have included that from Riley reproduced above); and further reads, in part, as follows:

"That said deeds, or sales, though, apparently, made to John A. McShane, were, in truth * * * made to and owned by appearers, in indivision with * * * McShane."

That Lockwood and Ragan had bought McShane's interest by deed, of date, etc.

"That they, the said appearers * * *, accept said deed * * * and assume all the duties and obligations imposed therein upon the grantee, and especially, the following, viz.:

"(1) The obligation to construct, or cause to be constructed a standard gauge railway, northerly, through the parish of Union to a connection with the line of road of the El Dorado and Bastrop Railway Co., in Union county, Arkansas, and within the limit of time and upon the course, or route specified in said deeds. * * *

"(2) To pay all taxes legally assessed against said timber and real rights conveyed by said deeds.

"(3) To pay the said vendors, their heirs or assigns, 50 cents per thousand for said timber, monthly, as the same may be cut and removed. * * *

"(4) And, generally, to do and perform any and all other things, provided for in said deeds, to be kept and performed by said grantees. * * *"

On October 7, 1903, Lockwood, Ragan, Ross, Hager, Jackson, and J. J. Booles executed a deed whereby they sold to the Pine Hill Lumber Company—

"all the merchantable white oak, pine, gum, cypress and other timber, on the following described lands: * * *

"E. ½ of S. E. ¼ of S. 19, and S. ½ of S. W. ¼ of S. 20, T. 23 N., R. 8 E.
* * *

On October 31, 1903, the Pine Hill Lumber Company sold to defendant—

"all of the pine, cypress and hardwood timber owned" by it "and standing and growing upon the following described lands, situated in the parish of Union. * * *"

The deed, as copied in the record, contains the following:

"Note: This deed contains several pages of description, but the description, east half of southeast quarter, sec. 19, and southwest quarter of southwest quarter of section twenty, does not appear therein."

The deed, however, continues:

"All of the above described lands, upon which the timber is sold * * * are situated in the parish of Union, Louisiana, and north of Bayou D'Arbonne, and the same are designed and intended as being all the timber and timbered lands owned by the Pine Hill Lumber Company, Limited, in said parish and state, north of Bayou D'Arbonne, at this time, and in the event that any timber or timbered lands, not herein specially described, shall be found to belong to the Pine Hill Lumber Co. Limited, the same shall and is hereby intended to be, the property of this vendee, with full and complete warranty of title."

It further appears that, just before this suit was brought, defendant sent a gang of men on the land here in question to cut the timber, and that plaintiff protested against their doing so, and, before they had gone very far with their work, caused the writ of injunction to issue. Prior to the issuance of the writ, however, Bratton, defendant's employé, who was in charge of the men, being told that plaintiff was disposed to be belligerent and had made certain threats, which appeared to intimidate his men, consulted defendant's attorneys, and, upon their advice, made an affidavit charging that plaintiff had said:

"That if the said timber was cut by affiant and the other parties * * *, it would have to be done over his dead body, and that, from the statements made and actions of the said William Riley, affiant has just cause to apprehend that he intends to break or disturb the peace or to do him and the other parties mentioned some bodily harm, and that it is necessary, and affiant prays, that he, the said Riley, be placed under a peace bond for their protection in cutting said timber."

And plaintiff, who lives in the country (on the land in question), was accordingly notified by the constable to appear in town (Marion), which he did, and, being understood to have waived a hearing, gave bond to keep the peace. He was at no time subjected to actual restraint, but lost practically the entire day from his work. It is shown that defendant's men cut and removed about 22,000 feet of timber and felled about 1,600 feet, which was not removed, but was destroyed by worms or insects, and that the timber was worth about \$2 per thousand.

"It is admitted that the defendant was going upon the land to cut the timber, acting in good faith that he (it) was the bona fide owner; that defendant was the owner of the timber."

The judge a quo gave judgment, perpetuating the injunction, condemning defendant to—

"pay \$46.77 as damages for the cutting and removing of timber, * * * and the further sum of \$25, as attorney's fees for the enjoining of the trespass"—

and rejecting plaintiff's claim for expenses incurred in the prosecution of this suit, and for damages claimed for malicious prosecution. Defendant has appealed, and plaintiff answers, praying that the amount awarded be increased.

Opinion.

There was offered in evidence, on the trial in the district court, the record in the case of *W. B. Thompson & Co. v. Union Sawmill Co. et als.*, in which a grant to McShane, almost identical in terms with that here involved, was considered, about the only difference being that, whereas in the Thompson Case the instrument contained the stipulation that the grant ("contract") should be void unless the Hamburg, Ruston & Southern Railway should be completed within two years, the stipulation in the present case reads:

"It is agreed, in case the Hamburg, Ruston & Southern Railway, or some other standard gauge railway, is not completed, to Marion, within 4½ years from date hereof, this contract shall be null and void."

In the Thompson Case, it was found that the road mentioned was not completed within the time stipulated, or at all, and Mr. Justice Nicholls, as the organ of this court, said:

"If parties had, prior to that time, by acceptance, acquired the right to cut down trees and remove the same, and had in fact commenced doing so * * * within two years, that right came to an end by the very fact itself that the time limit had expired without the completion of the road, and, if the right of cutting and removing timber had not been exercised up to that time (which it was not), it could not be exercised thereafter. The stipulation on that subject was the controlling stipulation of the whole act; all the other clauses and stipulations of the instrument were held in check and subordination and governed by it." *W. B. Thompson & Co. v. Union Sawmill Co.*, 46 South. 341, 121 La. 318.

From which, and from the language of the syllabus, it appears that the decision was based upon the nonfulfillment of the "controlling stipulation" thus referred to. The case of *Union Sawmill Co. v. Lake Lumber Co.*, 120 La. 106, 44 South. 1000, presented a similar state of facts, and was similarly decided. It is true that, in both of the cases thus referred to, the court considered and expressed some views upon other questions presented than that of the noncompletion of the railroad, but that circumstance cannot have affected the rights of the parties to this suit, which were fixed long before the opinions in the cases mentioned were handed down.

In the instant case, it appears that the stipulation in question was fulfilled, and that a standard-gauge road was completed to

Marion in September, 1904, well within the 4½ years from the date of the instrument in which said stipulation was embodied. If, therefore, the "McShane contract," now before the court, is to be declared void ab initio and of no effect, it must be for some other reason than the noncompletion of the railroad. Plaintiff's grounds of attack are stated, in substance, as follows:

"(1) That said pretended contract purports to be merely an offer to sell a license to cut and remove the said timber to the said McShane, and was, and is, without consideration, and was personal to him, which said offer was never signed and accepted by the said McShane.

"(2) * * * In the alternative, * * * that the said pretended contract is null and void, for want of mutuality; that the said McShane does not bind himself to cut and remove the said timber or to pay the price, or to do or perform, or not to do or perform, any act or thing thereunder whatsoever. * * *

"(3) That, should the court hold that said pretended instrument is not null and void, for any of the reasons hereinabove set forth, and in that event only, * * * that it is null and void for the reason that its conditions have not been complied with."

1 (3). Thinking it advisable to deal with these propositions in inverse order (as regards that in which they are stated), we shall first consider the questions of the grantee's compliance vel non with the obligations imposed on him by plaintiff's offer or grant, and the happening vel non of the conditions upon which the offer or grant was to become a binding contract in all its parts. The first of the obligations assumed by defendant is to pay for the timber—

"at the end of each month, as the same shall be cut and removed."

The only cutting and removing of timber, under the authority of the alleged grant, appears to have been done in the month of April, and before the end of the month this suit had been instituted. At the time of its institution, therefore, there had been no default in the matter of payment. After the suit was instituted, it would have been idle for defendant to have made a tender of payment under an alleged contract which it is the purpose of the suit to repudiate and destroy. We next find that the grantee is allowed 20 years within which to cut and remove the timber, subject to the condition that, after the expiration of the first 10 years, he shall pay 10 cents an acre per year for each acre from which the timber shall not have been cut and removed "during the prolonged period." And, as the first 10 years have not yet passed, it is clear that he is not in default in the matter either of cutting the timber or of paying the acreage. The next obligation imposed upon the grantee is that he—

"shall render for assessment, and pay all legal taxes imposed upon the timber purchased, from the date of its acquisition."

There is nothing in the immediate transcript in this case to show that the grantee,

or those who hold under him, have ever returned the timber here in question for assessment or have ever paid taxes on it. Turning to the transcript in the Thompson Case (which is made part of this transcript), we find nothing conclusive upon the subject. Of course, it would require no stipulation in a contract between plaintiff and McShane to impose upon the latter the obligation to pay taxes on his own property, and, as that matter was one in which plaintiff had no interest whatever, the stipulation in question either means nothing, or it means that, for the purpose of assessment and taxation, at all events, McShane was to be considered as acquiring the timber by virtue of the grant contained in the alleged contract, and hence as coming under an obligation to relieve plaintiff of the burden of taxation that might otherwise be assessed against him. We gather from the evidence in the Thompson Case that those who acquired, directly, or through mesne conveyance, from McShane, have been assessed, in some instances upon the timber (probably where, as appears to have been done quite frequently, the grantees had closed the transactions by paying down the whole agreed price), and in other instances that they have been assessed upon the contracts (if they may be so called) held by them as options, and we rather infer that the inchoate contract here in question has been in that category, from which it would follow that the parties of the second part have not complied with their obligations to "render for assessment, and pay all legal taxes on the timber purchased," since returning a mere option for assessment and paying taxes on it is a very different thing from returning for assessment and paying taxes on the property that the option may give one the privilege of buying; the option in cases such as this, being assessed at 52 and 55 cents an acre, whilst the timber has been assessed at \$2.50 an acre, and perhaps more, and the assessment of the option to the holder affording, as we imagine, no relief to the owner of the land and timber. Finally, we have the stipulation, or condition, that:

"In case the Hamburg, Ruston & Southern Railway or some other standard gauge railway, is not completed to Marion, La., within 4½ years, * * * this contract shall be null and void"—

which was, no doubt, of prime importance to both parties, since the evidence shows, upon the one hand, that the people of Union parish were exceedingly anxious that railroads should be built to connect them with the outer world, and, upon the other, that, without a railroad, McShane and his associates had no way of finding a market for their timber, even at 50 cents per 1,000 feet, and it appears that they worked energetically and successfully to have a road built. H. W. Ragan, testifying in the Thompson Case, was asked what part he took in the building of the Farmerville & Southern Rail-

road, and he answered, and further testified, as follows, to wit:

"I was identified with this matter from the very start wherein the company was made to secure some pine timber. We first had to find out if we could secure enough timber to justify the construction of a railroad, and, after some six or eight months' work, we thought we had sufficient timber to justify the building of a road; at least, some of us thought so, but Mr. McShane did not; he didn't think, after an estimate of the timber was made, that we had enough, so he withdrew from the enterprise, and myself and Mr. Lockwood bought him out. * * * After we had purchased the interest of Mr. McShane in the property, I, personally, took the matter up with the officials of the Missouri Pacific Railroad Company, in St. Louis, and told them of the enterprise we had started down in Union parish, and told them that it was necessary to build a railroad and secure the tonnage that we had contracted for, and that we did not have sufficient capital to build the road. * * * They wanted to know how much tonnage we had, and we told them 350,000,000 feet. They agreed to build the line provided we guaranteed the tonnage that we had secured, and made a contract we had signed up, in the proper manner, by the main individuals who were party to it."

Which contract, he says, was absolutely complied with, and, as we understood it, was a contract of date February 14, 1903, whereby it was agreed between Ragan and others, of the first part, and the St. Louis, Iron Mountain & Southern Railroad Company, of the second part, that the parties of the first part owned 350,000,000 feet of standing timber in the parishes of Union and Lincoln, subject to the fulfillment of the conditions under which it had been acquired; that said parties owned or controlled all the capital stock (and subscriptions thereto) of the Ruston, Hamburg & Southern Railroad Company; that they were the owners of all the property and rights acquired and guaranteed to McShane and others, acting as a committee to represent the property holders of Union parish to secure the building of a railroad to Farmerville and Marion; that they should give and secure to the party of the second part all traffic in timber, lumber, etc., which they then owned, or might thereafter own or control, in said parishes; that they should turn over to the party of the second part their interest in and control of the Ruston, Hamburg & Southern Railroad Company; that they should provide a right of way for the road to be built by the party of the second part and ground for terminal facilities in the towns named and at other places; that they should pay to the party of the second part \$6,000, and any other sums or land that might have been earned by the Ruston, etc., Railroad Company; and that they should give bond for the faithful performance of their obligations; that the party of the second part should, before May 1, 1903, begin the construction of a standard-gauge road in the parish of Union, to be completed, from Farmerville, through Marion, in a northerly direction, to the Arkansas line, and, thence, to a point of connection with the El Dora-

do & Bastrop Road, in Arkansas, within 12 months.

And there are some other stipulations which need not be set out at length. By supplemental contract of even date with the original, the parties of the first part agreed, substantially, to divide with the party of the second part any profit that might be made in the buying and selling of town sites, and further agreed to furnish, without charge, all the timber needed for cross-ties for the road from Farmerville to the connection with the Bastrop, etc., Road, in Arkansas. And by a further contract, of May 26, 1904, the parties of the first part, with others, agreed to allow the Farmerville & Southern Road to connect with the main line track of the Little Rock & Monroe Road; the result of it all being, as we have stated, that there was a standard-gauge road completed to Marlon in September, 1904.

2 (2). Considering the question of mutuality of obligation vel non, and assuming that McShane or his transferees have in some way assented to the inchoate contract signed by plaintiff, it is clear that McShane did not bind himself to build the railroad to which we have been referring, or to cause it to be built. Upon the other hand, as plaintiff's obligation ceased, unless he did build the road, or cause it to be built, within $4\frac{1}{2}$ years, they were, at least, mutually interested that the road should be built, and the happening of that event may be said to have been a "mixed condition," which was also "suspensive" in fact, if not in law. Mixed, because the happening of the event depended partly upon McShane and partly upon the capitalists whom he needed to assist him (Rev. Civ. Code, art. 2025); suspensive, in the sense that McShane could not avail himself of the right to remove the timber until a railroad was built, and could have no object in cutting it unless he could remove it. The instrument in question, after reciting that plaintiff—

"has granted, bargained and sold, and does, by these presents, sell and convey and transfer * * * all the * * * timber * * * for the price of 50 cents per 1,000 feet, payable at the end of each month, as the same shall be cut"—

and, after granting to the party of the second part the right of entry on the land, etc., proceeds as follows:

"The party of the second part shall cut and remove [the timber] * * * within ten years, and, upon his failure to do so, within said time, * * * shall have the right to prolong the period of performance * * * by paying, commencing at the expiration of the first ten years, ten cents an acre, per year, for each acre from which the timber shall not have been cut and removed, during the prolonged period, which payment, when made, shall be in full compensation for any and all claims or demands, of whatsoever nature, for the failure of the second party to cut and remove timber within the first and second periods of the time herein granted."

It will thus be seen that there is an obligation imposed on the party of the second part to cut and remove certain timber from

certain land within a certain time, which, however, by the last clause of the paragraph, may be discharged by the payment of the acreage during the second period of the term for which the contract is to run. It is true that, to persons not interested in the matter, the time allowed may appear long, and the consideration for which it is to be extended beyond the period first mentioned may appear inadequate; but the right to fix the time within and the consideration for which a contract shall be executed belongs to the contracting parties, and not to persons who are without interest in the contract, or to the courts. They are essential parts of the right to contract, and about all that our law has to say upon the subject of the time is to declare what shall be considered days, months, and years in ascertaining what is intended to be the "term" of a contract. Rev. Civ. Code, art. 2408 et seq.

The instrument in question, therefore, discloses, upon the one hand, the various obligations assumed by the plaintiff to give the vendee possession of the land, in order that he may cut and remove the timber sold, to permit the construction and maintenance of a railroad thereon, to protect the rights of the vendee in the event of his selling the land or mortgaging it, etc.; and, upon the other hand, the obligations assumed by the vendee (taking for granted, for the moment, that the offer contained in the instrument was accepted by him) to return the timber purchased by him for assessment and pay the taxes on it, and to pay the price agreed on for the timber each month as he cuts and removes it, or pay 10 cents an acre per year for the last 10 years of the term of the contract, from which it follows that the instrument (with the acceptance) evidences a bilateral, commutative contract; that is to say, a contract in which the parties expressly enter into mutual engagements, and in which, according to its terms—

"what is done, given or promised, by one party, is considered as equivalent to, or a consideration for, what is done, given or promised by the other." Rev. Civ. Code, arts. 1765, 1768.

3 (1). Plaintiff alleges that his offer was personal to McShane, but the instrument containing the offer concludes as follows:

"All rights acquired by, and privileges granted to, said second party, under this sale and contract, shall vest in, and inure to the benefit of, his heirs, successors and assigns"—

from which it follows that McShane had the right to assign the contract, at least, from the moment at which he himself became bound. Plaintiff says that the offer was without consideration, and was not accepted by the offeree. If the offer has never been accepted, no contract has resulted, and, unless it was then too late, the offer may be considered as having been withdrawn by the institution of this suit, and the offerer can no longer be held bound.

On the other hand, if the offer has been accepted, then a contract has resulted, and the consideration is to be found in the obligations assumed by the offeree by virtue of such acceptance. The questions, then, are, what was it necessary for the offeree to do in order to convert the offer into a contract? And what has he, or what have his "successors and assigns," done? Considering the offer or inchoate contract a little more particularly, it amounts to this: The party of the first part says to the other, in effect:

"If you assent to this contract at once, and thereby bind yourself henceforth to return the timber herein referred to for assessment, and to pay the taxes on it, and further bind yourself to cut and remove the timber within 10 years, or within 20 years if you choose to pay the amount herein stipulated for the extension of time, and to pay for such timber at the rate of 50 cents per 1,000 feet monthly as you cut and remove it, or pay 10 cents an acre per year on the land for the last 10 years of the term of the contract, then I sell and transfer the timber to you, for those considerations; provided, however, if a standard-gauge railway is not built to Marion within 4½ years, this engagement is to be null and void."

It is important in this connection to observe what we may have called an "offer" is not in the form of an offer at all. The language used imports a contract, completed at the moment by the assent of both the parties thereto, and the idea that it was so intended is confirmed by the fact that J. L. Hopkins, at whose instance plaintiff affixed his mark to the instrument, and who witnessed the mark, appears to have subscribed to an affidavit, indorsed upon the instrument, and reading as follows, to wit:

"State of Louisiana, Parish of Union.

"Before me, T. L. Holloway, a justice of the peace in and for this parish and state, duly commissioned and qualified, personally came and appeared J. L. Hopkins, to me well known, one of the attesting witnesses to the within and foregoing private act of sale and contract, who, being, first, duly sworn, says that he saw the contracting parties sign the same, also saw the other witnesses sign, and signed himself, as such, on the day and date therein mentioned, and he verily believes the same was done in good faith and for the uses and purposes and considerations therein set forth.

"[Signed] J. L. Hopkins.

"Sworn to and subscribed at Marion, La., this 7th day of May, 1902, before me, T. L. Holloway, J. P."

Whether Hopkins was authorized to bind McShane to anything does not appear, but his affidavit is peculiar, in that he swears that he saw the "contracting parties" sign the instrument to which it refers, when, in point of fact, one of the parties has never signed, to this day, and the cross mark of the other was not made until May 18, 1902, 11 days after the affidavit purports to have been made. It serves, however, as we have

said, to confirm the impression, created by the language of the instrument, that it was not plaintiff's intention to give any more time in the matter than might be necessary for McShane's agent to take the instrument to him and obtain his signature.

It will be observed, too, that the instrument is not like an ordinary deed, evidencing a sale in which the vendor acquits the vendee of all further obligation by giving a receipt in full for the price of the thing sold. It purports to be a contract whereby the vendee assumes certain obligations, to be discharged in the future, but which he did not assume, and, as he did not become bound, neither did the plaintiff.

"It is the assent of the parties which gives the contract its binding force; both must be bound or neither." *Cavelier v. Germain*, 6 La. 218.

Article 1809 of the Revised Civil Code reads:

"The obligation of a contract not being complete, until the acceptance, or, in cases where it is implied by law, until the circumstances which raise such implications are known to the party proposing, he may, therefore, revoke his offer or proposition before such acceptance, but not without allowing such reasonable time, as, from the terms of his offer, he has given, or, from the circumstances of the case, he may be supposed to have intended to give to the party, to communicate his determination."

Where, however, from the terms of the offer, and, from the circumstances of the case, it appears that it was not the intention to give the offeree any time, not absolutely necessary to communicate his determination, and it also appears that the offeree did not act within such time, the offerer need only signify his change of intention when he receives the unqualified assent of the offeree. Rev. Civ. Code, art. 1801.

So far as the record shows, no unqualified assent of the offeree in this case was ever communicated to the offerer until defendant's men appeared upon his place and began cutting his timber, whereupon, and immediately, he signified that he had changed the intention expressed in the instrument to which he had affixed his mark some five years before. We are of opinion that he had that right.

Plaintiff having waived his right to a hearing in the matter of his arrest, and having been placed under bond to keep the peace, that proceeding cannot be inquired into here, and, in view of the result, he has no standing with respect to his claim for damages therefor. Nor do we otherwise find any sufficient reason for increasing the award made by the district court.

The judgment appealed from is therefore affirmed.

(122 La. 881)

No. 17,019.

SIEWARD v. DENECHAUD.

(Supreme Court of Louisiana. Jan. 18, 1909.)

LANDLORD AND TENANT (§ 213*)—RENT—TEN-
DER OF PAYMENT.

A lessee is within his rights when he tenders payment of his rent in accordance with the terms of his contract, and cannot be forced, as a condition to such payment, into an understanding with the lessor, or into an acquiescence in the latter's proposition, as to the effect of such payment, and acceptance of payment, upon the lessor's rights in a pending suit for the dissolution of the lease.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 213.*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; George Henry Théard, Judge.

Action by Marie L. Seward against Justin F. Denechaud. Judgment for defendant, and plaintiff appeals. Affirmed.

See, also, 120 La. 720, 45 South. 561.

Buck, Walshe & Buck, for appellant. Miller, Dufour & Dufour and Omer Villeré, for appellee.

Statement of the Case.

MONROE, J. Plaintiff's deceased husband, in 1902, leased to certain parties, of whom the defendant is the successor, the Hotel Denechaud, for a term of five years, expiring September 30, 1907. In 1905 he made another lease, beginning October 1, 1907, and expiring September 30, 1912. In 1907 plaintiff and John Clair Campbell, as executors, brought suit to annul both leases, on the ground that the lessees had changed the name or designation of the property to "The Inn," and the suit was decided against them on the appeal, in January, 1908. *Seward v. Denechaud*, 120 La. 720.¹ In the meanwhile (November 18, 1907), plaintiff instituted the present suit, in which she alleges that her late husband made the lease last above mentioned "at a monthly rental of \$700 * * *, payable on the first day of each and every month," for which the lessee (defendant herein) gave "sixty rent notes, payable to the order of petitioner at the People's Bank * * *"; that the leased property was sold in due course of administration and purchased by her, and that she is the owner of the notes; that the note maturing November 1, 1907, has not been paid, though due demand has been made for the payment; that the suit previously brought (being the suit mentioned above) is pending and is made part hereof, and that her rights therein are reserved; that, on October 29th her attorneys addressed a letter to defendant's attorneys, which reads:

"Mrs. Seward has placed the rent note maturing on November 1, next, in our hands and we will be glad to receive payment of it, with the understanding that the payment is accepted under the terms of our petition in the suit for

amendment of the lease and with reservation of all rights. If this is satisfactory, kindly advise Mr. Denechaud to pay the note to us and we will surrender same, coupled with the reservation above expressed."

That on November 2d, defendant, accompanied by two witnesses, tendered to plaintiff's attorney the amount necessary for the payment of the note in question, and that her attorney offered to accept the payment—

"with reservation of all the rights of petitioner under the pending suit * * *, in accordance with the terms of the letter of October 29th."

That defendant declined to pay said note if any condition was attached, or if any reservation was insisted upon.

That petitioner's attorney—

"to avoid all possible doubt or misconception, prepared, in writing, the substance of the reservation, expressing the condition on which payment would be received."

That said document was submitted to said defendant—

"who refused to accede to it or make the payment if any condition were attached to its being accepted, and withdrew. Said document, expressive of the reservation made, is annexed and filed herewith"

—and reads:

"This is to certify that, according to the terms of the letter of Buck, Walshe, and Buck, Attys. for Mrs. M. L. Seward, of Oct. —, addressed to Messrs. Miller, Dufour & Dufour, Attys. for Justin F. Denechaud, payment of note, for rent of premises corner Carondelet and Union Streets is accepted and note delivered with full reservation of all rights under pending suit for annulment of the lease. * * *"

That thereafter, on the same day, her attorney "received a communication, * * * filed as part hereof," and reading as follows:

"Gentlemen: Acting under our advice, Mr. Justin F. Denechaud made you, this morning, a legal tender of \$700, in payment of the note, for that amount, due Nov. 1, 1907, and held and owned by Mrs. Marie Louise Seward. This tender was made to you as Mrs. Seward's attorneys, in view of the advice received by us, from you, to the effect that the note was in your possession and payment should be made to you. Mr. Denechaud is prepared to pay the note and we now reiterate the tender. We will agree to no reservation. If you are entitled to any reservation, or to receive this money without prejudice, under the law, the law will protect you without formal agreement from us. Mr. Denechaud will continue to decline to make any reservations, and will hold the money, subject to Mrs. Seward's order and upon surrender of this note."

That her attorneys sent an answer, hereto annexed, which concludes as follows:

"We ask you to consider this a formal and peremptory demand for payment of rent due under the lease commencing October 1, 1907, with reservation stated. We decline to be the judges of our client's legal rights, without such reservation, and, therefore, expressly insist on it. * * *"

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

¹ 45 South. 561.

That, on November 4, 1907—

"defendant again accompanied by two witnesses, * * * repeated the tender of the cash money in payment of the rent note and demanded its acceptance, unconditionally, and refused to make said payment if its acceptance was coupled with any reservation whatever, urging, orally, however, that, if Mrs. Sieward, lessor, would make certain repairs, which it was claimed had been demanded, and in reference to which, if she agreed to make them, they would agree to have it understood that she did so with reservation of all rights under said pending suit, and in that event would pay the rent note, subject to similar reservations. Your petitioner, through her said attorneys, declined to enter upon any discussion on the subject of repairs, and insisted upon the payment of the note, which was again refused. Your petitioner is informed and believes that the failure to pay, under the circumstances, is willful and arbitrary, and is a violation of the contract, and entitles her to demand the nullity and cancellation thereof."

And she prays for judgment accordingly.

Defendant answers that he offered to pay the note, when it fell due, in accordance with the terms of his lease, without entering into new stipulations, or demanding, or granting, any reservations, and has always been ready to pay it on those terms.

Plaintiff appeals from a judgment rejecting her demands.

Opinion.

There was some little oral testimony taken, but the case to be decided is embodied in the foregoing statement of the pleadings, and amounts to this: That defendant was the debtor of a note reading (in part):

"On the first day of November, 1907, I promise to pay to the order of A. H. Sieward seven hundred dollars, value received in rental for the month of October, 1907, payable at People's Bank, New Orleans."

That the note was given in connection with a contract of lease which contains the usual stipulations with regard to the punctual payment of the rent. It was his right, as well as his obligation, to pay the note and the rent according to his contract, and he could not, for the purposes of such payment, or as a condition thereto be compelled to become a party to any understanding outside of his contract.

The difference between the case of *Staehle v. Leopold*, 107 La. 399, 31 South. 882 (to which we are referred), and the instant case, is that in the former the lessor gave a receipt for his rent containing a reservation of his right to prosecute a pending appeal from a judgment maintaining the lease, which he was seeking to dissolve, and the lessee accepted it, without objection; whilst in the instant case the lessor insisted that the lessee should make himself a party to an "understanding," and should acquiesce in her proposition that her rights should be reserved in accepting such payment, and the lessee declined to bind himself by any un-

derstanding or acquiescence, which we think he had the right to do. Whether, if plaintiff had simply notified defendant that she did not intend, by accepting the rent, to waive her rights in the pending litigation, such notice would have served the purpose she intended to accomplish by insisting upon an understanding with defendant to that effect, it is unnecessary to inquire. She could not force upon him an understanding with regard to, or an acquiescence in her interpretation of, the effect of such acceptance.

Judgment affirmed.

(122 La. 885)

No. 17,235.

STATE ex rel. BOARD OF SCHOOL DIRECTORS OF IBERIA PARISH v. ROMERO.

(Supreme Court of Louisiana. Jan. 18, 1909.)

STATUTES (§ 5*)—MANDAMUS (§ 77*)—LEGISLATION GERMANE TO GOVERNOR'S CALL—GROUNDS OF RELIEF—PUBLIC OFFICERS.

The subjects legislated upon in Act No. 17, p. 19, of 1907 (Extra Session), are germane to the objects of legislation designated (in Nos. 1, 2, and 4) of the Governor's call, and it being the plain duty, under that act, of the parish treasurers, acting as treasurers of the school boards, to turn over to their successors, the parish superintendents of public schools, thereby made treasurers of such boards, the books, papers, and vouchers pertaining to such offices, mandamus will lie to compel the performance of that duty.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 4; Dec. Dig. § 5;* Mandamus, Cent. Dig. § 165; Dec. Dig. § 77.*]

(Syllabus by the Court.)

Appeal from Nineteenth Judicial District Court, Parish of Iberia; James Simon, Judge.

Mandamus by the State, on the relation of the Board of School Directors of Iberia Parish, against Adolph B. Romero. Judgment for relators, and defendant appeals. Affirmed.

Andrew Jackson Cammack, for appellant. Hacker & Muller and Weeks & Weeks, for appellees.

Statement of the Case.

MONROE, J. Relators, including J. C. Ellis, allege that the latter was elected superintendent of the public schools of the parish of Iberia, and ex officio treasurer of the school board, under Act No. 17, p. 19, of the Extra Session of 1907, and has duly qualified. That, by virtue of said statute, he is the custodian of—

"all the books, accounts, vouchers, bank books, blank check books, and all other books, documents, papers and vouchers, belonging to the said office of treasurer."

That after he had qualified as treasurer, the school board caused the books and ac-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

counts of the former treasurer, Adolph B. Romero, to be audited, and demanded delivery thereof to said Ellis, which demand was refused, without just cause. That Romero, by virtue of his office of parish treasurer, was treasurer of the school board until February 1, 1908, at which date the statute mentioned became operative, and he ceased to hold the office last mentioned, and ceased to have any right to the possession of the books, documents, and vouchers pertaining thereto, which are absolutely necessary to relators for the administration of the affairs of the public schools. Relators further allege that they are without other adequate remedy, and they pray for a writ of mandamus, directing said Romero to turn over said books, documents, etc., to them, and particularly to said Ellis.

Adolph B. Romero, made respondent, for answer says that he claims to be the legal incumbent of the office of treasurer of the school board, and that the proper method of testing his right thereto is by a proceeding under section 2593 of the Revised Statutes; that Act No. 17, p. 19, of 1907, is unconstitutional, for the reason that the call for the special session did not provide for such legislation; wherefore he prays, etc. The evidence shows that the relator, Ellis, is superintendent of education for the parish of Iberia, and that on February 19 and 24 (respectively), 1908, he took the oath and gave bond for the discharge of the duties of the office of treasurer of the school board of that parish. On April 30, 1908, the board authorized its president to take legal proceedings to recover from respondent the books, papers, and moneys of the board in his possession. Thereafter the attorneys employed for that purpose called on respondent, and, being given to understand that he would not surrender such books and papers, brought this suit. There was judgment in favor of relators in the district court, and respondent has appealed.

Opinion.

Article 75 of the Constitution, authorizing the Governor to convene the General Assembly on extraordinary occasions, provides that:

"The power to legislate shall be limited to the objects specially enumerated in the proclamation convening such extraordinary sessions. * * * Any legislative action * * * as to objects not enumerated in said proclamation, shall be null and void."

On October 25, 1907, the Governor issued a proclamation calling an extra session of the General Assembly, and designating 11 certain objects to be considered, and, among them, the following, to wit:

"(1) Reducing the salaries, fees and compensations of existing officers, putting officials on a salary basis, and converting, into the public treasury, fees and perquisites of office now enjoyed by incumbents of such offices. This to include, if necessary, the proposing of amendments to the Constitution.

"(2) Decreasing the revenues of the state and its political subdivisions, including costs of assessing property for purposes of taxation, and to this end, and in connection therewith, the abolition of unnecessary offices and the consolidation of existing offices, and, where necessary to accomplish this, proposing amendments to the Constitution."

"(4) Directing that the public funds be placed on deposit in the solvent bank, or banks, within the state, offering the highest compensation for such deposits, and making provision for properly safe-guarding the public interest by having such bank deposit, as security, in the state treasury, bonds of the state, or any political subdivision thereof, commanding par, or more, in the open market, equal in amount to the amount of funds placed on deposit with such bank, or banks, or otherwise."

The Lieutenant Governor (in the absence of the Governor) subsequently added two other objects to those enumerated in the original call, but they have no bearing upon the present question. When the original call was issued there was in force Act No. 214, p. 423, of 1902, which provided (section 65) that the parish treasurers should be the treasurers of the parish school funds, and that their compensation should be fixed by the school boards, and should not exceed 2½ per cent. of the amount disbursed by them respectively. When the General Assembly convened, in compliance with the call, it passed an act (No. 17) which provides that the superintendents of public schools in the different parishes (Orleans excepted) shall be the treasurers of the school funds, and that they shall receive "no compensation whatever" for their services as such. It also provides that the—

"said treasurer shall deposit the school funds in such bank, or banks, as may be designated by the parish school boards, leaving to the school boards the right to select the bank that will pay the highest rate of interest on their deposits."

It further provides that it shall take effect from and after February 1, 1908.

Upon the trial in the district court, there was offered in evidence an excerpt from an editorial, published in a New Iberia paper, referring to an opinion said to have been given by the Attorney General upon the subject of the relation of the legislation thus adopted to the call of the Governor, and to article 75 of the Constitution, which excerpt reads, in part, as follows, to wit:

"* * * The following letter written by him [the Attorney General] * * * and addressed to a gentleman of this city is printed * * *. The name of the gentleman who received it is withheld by request:

"Dear Sir: * * * I thoroughly agree with you concerning the proposed system of disbursing the funds of the school board, * * * and believe that some more economical plan ought to be adopted. * * * It will be impossible, however, to have this matter taken up at the extra session, for the reason that the matter is not included in the call for the extra session, made either by the Governor or the Lieutenant Governor," etc.

This letter, as it appears, was not written in the discharge of any official duty, and whilst the able Attorney General gave to

his correspondent the benefit of his opinion, as predicated upon the information then in his possession, it may be that, if he had been acting officially, his investigation would have led him to a different conclusion. At all events, we are unable to concur in the view expressed in the letter, and are of opinion that the consolidation of the offices of superintendent of public schools and treasurer of the school boards, and the requirements that such treasurer shall receive no compensation, and shall deposit the school funds in the bank or banks, to be designated by the school boards, paying the highest rate of interest on their deposits, is legislation which is germane to the objects (heretofore mentioned) designated in the call of the Governor. It is true that the General Assembly itself seems to have entertained some doubt upon the subject, since, at the regular session of 1908, p. 348, it passed an act, No. 232, in the same language as Act No. 17, p. 19, of the Extra Session of 1907, so that the question here presented, from any point of view, really involves only the right of the respondent to act as treasurer of the school board from February 1, 1908, to, say, July 29, 1908 (at which latter date, Act No. 232, p. 348, of 1908, became operative in the parish of Iberia). For the reasons stated, however, we are of opinion that the act passed at the extra session is constitutional, from which it follows that respondent became *functus officio*, as treasurer of the school board, on February 1, 1908, and that it was his duty at that time to turn over to his successor the books and papers pertaining to that office. High on Extraordinary Legal Remedies, §§ 73, 306; 26 Cyc. p. 258; *Hatch v. New Orleans*, 1 Rob. 470.

The judgment appealed from is therefore affirmed.

(122 La. 890)

No. 17,237.

HIBERNIA BANK & TRUST CO. v. WHITNEY.

(Supreme Court of Louisiana. Jan. 4, 1909.
On Rehearing, Feb. 1, 1909.)

1. PETITORY ACTION.

The succession was accepted by plaintiff under the benefit of inventory. The *de cuius* died testate. His heir and universal legatee under the will seeks to recover the property as an heir at law, ignoring the will, and thereby avoiding all accounting to an adjudicatee of property of the succession, who was an innocent third person.

2. EXECUTORS AND ADMINISTRATORS (§ 380*)—SALE OF SUCCESSION PROPERTY—SETTING ASIDE—TENDER OF PRICE.

If the heir be entitled to the property, she cannot recover it without first tendering the amount.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1550½; Dec. Dig. § 380.*]

3. NECESSITY OF TENDER.

The property having been sold to pay debts, a return of the price is an essential before recovery of the property sold (if the sale be null). *Sharkey v. Bankston*, 30 La. Ann. 891.

4. EXECUTORS AND ADMINISTRATORS (§ 383*)—SALE OF SUCCESSION PROPERTY—COLLATERAL ATTACK.

The questions involved will have to be raised in a direct action, and will not be (under repeated decisions) considered in collateral proceedings, in which all that was done in the settlement of the succession is treated as the merest nullity, as if nonexistent.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1554; Dec. Dig. § 383.*]

(Syllabus by the Court.)

Appeal from Twenty-Sixth Judicial District Court, Parish of St. Tammany; Thomas Moore Burns, Judge.

Petitory action by the Hibernia Bank & Trust Company, dative tutor of Elenore Pochelu, an infant, against George M. Whitney. Judgment for defendant, and plaintiff appeals. Reversed, and action dismissed.

T. M. & J. D. Miller and Ellis & White, for appellant Farrar, Jonas, Kruttschnitt & Goldberg and Miller & Morgan, for appellee. Miller & Morgan, for Eugène Esquinance, warrantor, appellee. Joseph Bradford Lancaster, for George F. Bierhost, warrantor, appellee.

BREAUX, C. J. This is a petitory action instituted by plaintiff to recover lands for its ward, Elenore Pochelu, claimed by plaintiff as belonging to her by inheritance from her late father, Raymond P. Pochelu. He died testate, a fact which plaintiff wishes to pass over and ignore.

The defendant interposed an exception to the petition, alleging, among other defenses, that plaintiff cannot prosecute this action, the succession being in the possession of the testamentary executor; that the succession was accepted for the minor, with benefit of inventory; that it was in debt, and that the property plaintiff seeks to recover was sold to pay debts on July 18, 1896, and adjudicated to Eugène Esquinance, under whom the defendant holds, and the proceeds were, defendant avers, applied to the payment of the debts of the succession; that the minor, plaintiff, is not the heir at law of the decedent, and cannot maintain this suit as an heir at law; that the probate sale cannot be attacked collaterally, but by the executor in office; that there was no tender made of the purchase price, an essential step; and that any attack on the sale is barred by the prescription of five years.

The pertinent facts, in deciding the points presented by the exception, are that the clerk of court probated the will of Pochelu without having required an affidavit of the proponent or his counsel that the judge was absent from the parish of St. Tammany, in which the suc-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

cession was opened; that he some time afterward gave the order to sell the property involved in this suit, again without requiring an affidavit showing the absence of the district judge from the parish; and, furthermore, that the petition for the sale was not accompanied by a schedule of debts, as required by Act No. 43, p. 54, of 1882, and Act No. 13, p. 11, of 1894.

Another of plaintiff's grounds in the argument is that the property was illegally offered for sale, and, the sale failing for want of satisfactory bid, it was readvertised on the same terms by instruction of the executor.

The defendant sought to supply the affidavit by oral testimony as follows: The judge of the district testified, substantially, that he was not in the parish at the date of the orders. The clerk also testified he did not recall the fact that such an affidavit had been filed, but testified as to his custom not to issue orders without the affidavit.

The court referred the exception to the merits.

Defendant by motion prayed for reinstatement of the exception and for a decision thereon, as if it had not been referred to the merits. This the court declined to do.

The defendant answered, reserved the grounds of the exception, and pleaded that he bought the property from George F. Bierhorst in August, 1906, for \$10,000. He pleaded the prescription of 5 or 10 years. He called Bierhorst in warranty.

The latter answered, admitting the defendant's allegations in his answer. He also pleaded the prescription of 5 and 10 years. He alleged that he bought the property on August 19, 1897, from Eugène Esquinance for \$1,400.

Esquinance, called in warranty, answered Bierhorst's call in warranty, and joined in the exceptions and defenses of the first defendant. He specially averred that he bought the property on the 10th day of July, 1896, at the probate sale of the property of the succession of P. Pochelu. He called the plaintiff and the widow of Pochelu in warranty. This last warrantor, Esquinance, alleged that the succession was not represented, that the executor had died recently, and asked for a delay in order to have the succession represented and to call its legal representative in warranty.

The court refused to grant the delay asked, but, instead, the court entered an order and directed that Elenore Pochelu, the minor, through the bank, tutor, and Mrs. Lucie Andrac, widow of Pochelu, be called in warranty.

The Hibernia Bank & Trust Company answered the call in warranty, denying that the minor was bound in warranty, and alleging further that in the event the minor obtained a judgment, before she obtained possession of the property, she would have to refund to Esquinance the sum of \$2,000, the price paid by him for the land, because the amount had in-

ured to her benefit, and had been applied to the payment of debts due by her late father's succession.

The court on motion struck out this part of the answer, as the whole of the price had not been applied to the payment of the debts.

The widow in her answer to the call in warranty disclaimed all interest in her husband's succession, the land having been his separate property; averred that she has relinquished the usufruct left to her in her husband's will.

Judgment was rendered in favor of the defendant.

EXCEPTION: The Probate of the Will of the De Oujus.

The plaintiff, as representative of the minor, Elenore Pochelu, has not noticed the disposition contained in the will of her father. It is treated as so much waste paper.

The suit was instituted directly for the property.

She, as an heir at law, has accepted the succession with benefit of inventory, but ignored the bequest in the will which made her the universal legatee.

The justification for thus proceeding is sought in the assertion that the will has never been probated, and that in consequence she cannot be held by any of its terms.

The will was probated in the absence of the district judge from the parish. There was no affidavit found to show that the judge was absent.

If no attempt had ever been made to probate this will, if it had been laid aside as useless or worthless, it would be different; but the least that can be said is that a serious attempt was made to have it probated, and that if not probated in due form, or for want of a required affidavit, it was owing to negligence or oversight, and that it was not due to intention on the part of those by whom it was presented for probate.

The petition was presented to the court by the one named in the will to be the executor. At the executor's instance, a day was fixed for hearing the evidence; it was heard; the will was decreed probated, ordered executed, and he was authorized to qualify, and did qualify, and letters of executorship were issued to him.

The will became a part of the proceedings in matter of the settlement of the succession.

The alleged executor took charge of the estate and administered to the date of his death, which was not long since. He had seisin of the property, and performed all the functions of an executor. He was appointed to assist the court, and as such received recognition.

We would have to pause a long time before arriving at the conclusion that the proceedings up to the date of the sale, to which we will refer in a moment, were void in so far as relates to innocent third persons. They may be

null, but are not void. The heir cannot be heard to plead that they are not in the least binding on the succession; that whatever was done was void. To declare such acts void would introduce an element of chance into proceedings never seriously contemplated.

Plaintiff will have to expressly assail the probating of the will in a direct action.

The legal representative of the succession will have to be made a party, and contradictorily with him it will be determined to what extent he has properly administered the affairs of the succession, and the extent of his liability, if any.

We leave the executor's tenure to take up the next question.

The grounds of the exception following are germane, and will be considered and decided as one.

They are that the required affidavit was not made showing the judge's absence before the order of sale was issued; and, further, the petition for the sale was not accompanied by a schedule of debts as required by Statute, Act No. 43, p. 54, of 1882, and the amending Act No. 13, p. 11, of 1894, passed under provision of article 122 of the Constitution of 1879.

We have noted in our statement of the facts that the judge was unquestionably absent from the parish when the order to sell the property was signed by the clerk of court. We are not by any means certain that an affidavit was ever made. But be that as it may, at this time it is sufficient to state that in our opinion, despite the very serious omission, a direct action will have to be instituted to set aside the proceedings.

Tender as a Condition Precedent.

There was tender due by plaintiff, is another proposition presented by the defense.

The difficulty in requiring a preceding tender grows out of the fact that the amount sometimes is not known; the extent of benefit received is not established. In a number of cases it has been held that tender must be made. In a few cases it has been held that plaintiff does not have to make a tender, as it may be claimed by reconvention. The amount being known in this case, no such difficulty arises. The amount should be tendered.

it is a matter of equity, and the purpose is to protect the purchaser in the matter of his claim if he loses his title.

Direct Suit and Collateral Attack.

The former is required in case of suits to set aside relative nullities; the latter will suffice in absolute nullities.

The question is frequently difficult to solve, as the boundary line between relative and absolute nullities is not clearly marked.

Under our jurisprudence, article 12 of the Civil Code of 1838 (among others on the subject) is pertinent.

This article is traced more particularly to law 5, tit. 14, bk. 1, of the Justinian Code, under which our jurisprudence has taken shape. The doctors of the civil law have sought to classify them in two rules or maxims.

Under the former, the maxim is, "*Multa fiere prohibentur; quæ si facta fuerint obtinent firmitatem*," in contradiction from the second maxim or rule. Cross on Pleadings, § 277 et seq.

It means that there are nullities in their character almost void, if not void, that may be cured, and which in the interest of third persons may be held to have had some effect (if not cured entirely by time and the facts of the case).

In all such cases, the action to set them aside should be direct.

Nullities frequently have some effect, though in character void. It has driven some of the doctors of the civil law to the declaration that there are no absolute nullities. That is an exaggeration; it is, none the less, true that an unquestioned act for years upon which innocent third persons have acted in good faith may have effect. Cross on Succession, § 253 et seq.

The second rule or maxim is, "*Nullum, nullum effectum habet*," i. e., That which is void has no effect.

The application is not here direct.

The nullity has had some effect. Innocent third persons have bought the property. The nullity may be sufficient to afford good ground to set aside the sale. As they were in good faith, in setting aside the sale, they must, to the extent possible, be reinstated in their rights before the purchase.

The first rule has been followed in our jurisprudence.

In the Grevenberg Case, 44 La. Ann. 400, 10 South. 786, this court held that effect must be given to the order of sale granted by the judge.

The contention was that the succession was opened in an entirely different parish from that of the residence of the decedent.

The court did not go into an investigation of the question; the decision was that the—

"authorities are uniform, and our jurisprudence consistent and emphatic; such a decree must stand until the same is set aside in due course of law"

—citing Lalaune's Heirs, 13 La. 431, in which orders of competent courts are so clearly defined and the principles involved so well stated.

Citing also Duson v. Dupre, 32 La. Ann. 896, in which the court said:

"These questions can be looked into and adjudged upon only in a direct action before the same court."

In another case it was decided:

"This is an attempt to annul a judicial sale in a collateral proceeding. The court did not sustain the action."

In the Fontellen Case, 28 La. Ann. 639, it was decided that the appointment of a tutor without a family meeting is not void, and that the absence of the schedule of debts was not ground of absolute nullity.

See, also, Hoover v. Sellers, 5 La. Ann. 180.

The court was clear and emphatic on a point directly pertinent:

Ford's Heirs v. Mills, 46 La. Ann. 331, 14 South. 845, in which the deputy clerk in matter of an order had assumed to act without authority, the court held that the act could only be inquired into in a direct action.

See, also, Beland v. Gebelin, 46 La. Ann. 326, 14 South. 843; Bankston v. Cypress Co., 117 La. 1053, 42 South. 500.

In the Gaither Case, 46 La. Ann. 286, 15 South. 50, cited by plaintiff with great confidence, the point involved was strictly judicial. There was a complete want of notice to the heir, and still plaintiff sought to hold this heir bound. This was not listened to. A different ground is presented than in the pending case.

The French law-writers have discussed the question closely. They at some points agree with Louisiana jurisprudence.

Huc, in his first volume, quoted freely from Laurent on the subject. He writes:

"L'acte auquel manque l'une des conditions nécessaires pour sa validité, existe, mais il est nul, ou plutôt il est annulable c'est-à-dire que la nullité doit être demandée par les parties intéressées, ou par celle en faveur de qui elle est édictée. La nullité en effet n'opère jamais de plein droit. Quand la loi dit que certains actes sont nuls de droit (exemple: art. 503), cela signifie que le juge doit prononcer cette nullité sur la demande de celui valablement à qui l'action appartient." (Italics ours.) Volume 1, p. 189.

We have not sought to anticipate issues if a direct action be brought. They remain to be determined on the merits.

If the sale be void, it may be decreed in a direct action; if avoidable, it also may be decreed; in either case the effect may be passed upon.

The executor of the estate of Pochelu should be made a party.

For reasons stated, the law and the evidence being in favor of defendant, it is ordered, adjudged, and decreed that the judgment be, and the same is hereby, annulled, avoided, and reversed.

It is further ordered, adjudged, and decreed that the case be dismissed at plaintiff's costs in both courts as in case of nonsuit.

On Rehearing.

MONROE, J. In this case, it is ordered that the decree heretofore handed down be amended by condemning the appellee, instead of the appellant, to pay the costs of the appeal. The question of prescription is properly left where the decree leaves it.

Rehearing refused.

No. 17,175.

(122 La. 900)

UNION SAWMILL CO. v. MITCHELL et al.
(Supreme Court of Louisiana. Jan. 4, 1909.
Rehearing Denied Feb. 1, 1909.)

1. CONTRACTS (§ 22*)—ACCEPTANCE—SEPARATE INSTRUMENT.

Under the express provisions of Rev. Civ. Code, art. 1804, an acceptance of a proposal to contract need not be by the same act as the proposal.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 22.*]

2. CONTRACTS (§ 19*)—ACCEPTANCE—TIME—DEATH OF PARTY PROPOSING.

Where a person, after signing a proposal, died before an acceptance, there was no contract, under Rev. Civ. Code, art. 1810, providing that, if a party making an offer die before it is accepted, his representatives are not bound.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 58; Dec. Dig. § 19.*]

3. CONTRACTS (§ 19*)—OFFER—WITHDRAWAL—"CHANGE OF INTENTION."

Where, after a person had made a written offer, he received no actual notice of an acceptance until after he had made a contract involving the subject-matter with another, the acceptance came too late to bind him, he having already signified his change of intention within Rev. Civ. Code, art. 1801, providing that a party proposing shall be presumed to continue in the intention which his proposal expressed, if, on receiving the unqualified assent of him to whom the proposal is made, he does not signify the change of his intention.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 19.*]

4. LOGS AND LOGGING (§ 3*)—OFFER TO SELL—TIMBER—ACCEPTANCE—TIME—STATUTORY PROVISIONS.

Rev. Civ. Code, art. 1802, provides that a party proposing to contract is bound by his proposal, and cannot signify a dissent if the proposal be made in terms which evince a design to give the other party the right of concluding the contract by his assent, and if that assent be given within such time as the situation of the parties and the nature of the contract shall prove that it was the intention of the proposer to allow. *Held*, that written offers to sell timber by the owners executed out of the presence of the vendees or of any person having authority to accept for them were intended to be submitted to the vendees as propositions of contract for their acceptance, and, no time being fixed for acceptance, no more time was intended to be allowed to the vendees than would be required for submission to them for acceptance or rejection, and they could not hold the offers for months for purposes of speculation before accepting or rejecting.

[Ed. Note.—For other cases, see Logs and Logging, Dec. Dig. § 3.*]

Appeal from Fourth Judicial District Court, Parish of Union; Robert Brooks Dawkins, Judge.

Action by the Union Sawmill Company against Charles F. Mitchell and others. Judgment of dismissal, and plaintiff appeals. Affirmed.

Lamkin, Millsaps & Dawkins, for appellant. Preaus & Mathews, for appellees.

PROVOSTY, J. The defendant Mitchell was proceeding to cut and remove the tim-

ber from his own land, and also doing so through his codefendant, when the plaintiff brought this suit, enjoining him and his codefendants, and sequestering so much of the cut timber as was yet within the reach of the sheriff, and claiming large damages for the timber theretofore removed and disposed of.

Plaintiff relies upon three certain so-called "timber contracts"; two executed by the defendant Mitchell, and one by J. W. Loper, from whose widow and heirs the defendant Mitchell acquired a part of the land in question. By assignment the contracts have passed to the plaintiff company.

These so-called "contracts" are not signed by the vendees or purchasers. They are impugned by the defendant Mitchell on sundry grounds, one of which alone need be considered. It is that they were not timely accepted by the vendees.

The same printed form was used for making them, and they, in consequence, are alike in verbiage. They purport to be sales of the standing timber at 50 cents per thousand feet, payable as cut and removed, the purchaser binding himself to cut and remove within 10 years, with right to prolong 10 years more by paying 10 cents per year per acre after the first 10 years, and obligating himself to give in the timber for assessment and to pay the taxes thereon from date of contract. The contract is to be null in case a railroad is not completed to Farmersville within 2½ years. All rights and privileges of the purchaser under the contract are to vest in and inure to his assigns.

In the J. W. Loper contract the vendee is one McShane; in one of the contracts of the defendant Mitchell the vendee is one Jackson; and in the other, the vendees are Lockwood and Regan. McShane assigned to Jackson, Lockwood, and Regan whatever interest he had under the Loper contract. After this assignment, and about a year after the date of the contract, and about three months after the date of the Mitchell contracts, Jackson and Lockwood and Regan executed and recorded a notarial act unqualifiedly accepting the contracts and binding themselves to all the obligations therein stipulated. No notice of this acceptance, except such as may have resulted from the registry, was ever communicated to the vendor. The circumstances under which the contracts were executed were these: McShane, Lockwood, Regan, and several others were jointly interested in a speculative scheme, the main feature of which was the construction of a railroad through the country where the timber in question is situated. This country was without a railroad, and the timber was of little value for want of an outlet to market. The associates did not propose to construct the railroad themselves, but to induce others to do it, and to that end it was important for them to make sure of an amount of tonnage sufficient to

justify the construction of the road. This they sought to do by entering with the landowners into contracts like those involved in this suit. Accordingly, they sent solicitors throughout the district to secure these contracts. These solicitors drew up the contracts, and got the landowners to sign them, and themselves signed them as witnesses, and caused them to be recorded. The profit of the associates was to be realized from the increase in the value of the timber to result from the advent of the railroad. The landowners had for entering into the contracts the double inducement of selling their timber and securing railroad facilities.

The contracts read as if intended to be signed by the vendee at the same time as by the vendor. Nothing on their face indicates that there was any intention to allow the vendee any delay for consideration.

The circumstance that the acceptance was not by the same instrument is insignificant, since article 1804, Rev. Civ. Code, expressly provides that the acceptance need not be by the same act.

Article 1810, Rev. Civ. Code, reads:

"If the party making the offer, die before it is accepted, or he to whom it is made, die before he has given his assent, the representatives of neither party are bound, nor can they bind the survivor."

J. W. Loper died long before the said acceptance; hence, in the case of the contract made by him, the said acceptance manifestly came too late.

Article 1801, Rev. Civ. Code, reads:

"The party proposing shall be presumed to continue in the intention, which his proposal expressed, if, on receiving the unqualified assent of him to whom the proposition is made, he do not signify the change of his intention."

As already stated, the first actual notice Mitchell had of the said acceptance was, so far as the record shows, the institution of this suit, or the protests of plaintiff immediately preceding this suit. When thus notified, his change of intention had already been signified to plaintiff by the fact itself of his having made another disposition of the timber.

Article 1802, Rev. Civ. Code, reads:

"He is bound by his proposition, and the signification of his dissent will be of no avail, if the proposition be made in terms, which evince a design to give the other party the right of concluding the contract by his assent; and if that assent be given within such time as the situation of the parties and the nature of the contract shall prove that it was the intention of the proposer to allow."

There can be no question that the written instruments here in question are so expressed as to—

"evince a design to give to the other party the right of concluding the contract by his assent"—

and, in view of the fact that the instruments were executed out of the presence of the vendees, or of any person having authority

to accept for them, the inference is irresistible that these instruments were intended to be propositions of contract to be submitted to the vendees for their acceptance. But no time is fixed for such acceptance, and the question arises, what length of time does the situation of the parties and the nature of the contract prove that it was the intention of the proposer to allow?

Under the circumstances, we think no more time was intended to be allowed to the vendees than what might be required to submit the contract to them for acceptance or rejection.

As a matter of fact, the vendees waited for giving their acceptance until the construction of the railroad had become an assured thing, more than a year after the date of the Loper contract, and more than three months after the date of the two other contracts. In other words, theirs was a pure speculation. If the railroad came to make the timber valuable, they accepted; if not, not. We do not think the intention was to allow them this opportunity for speculation. The judgment held the contracts to be null, and dismissed plaintiff's suit.

Judgment affirmed.

(122 La. 906)

No. 17,105.

MURPHY v. ST. LOUIS CYPRESS CO., Limited.

(Supreme Court of Louisiana. Nov. 30, 1908. Rehearing Denied Feb. 15, 1909.)

SALES (§ 359*)—ACTION FOR PRICE—EVIDENCE. This case involves only questions of fact.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1056; Dec. Dig. § 359.*]

(Syllabus by the Court.)

Appeal from Twenty-First Judicial District Court, Parish of Iberville; Calvin Kendrick Schwing, Judge.

Action by John H. Murphy against the St. Louis Cypress Company, Limited. Judgment for plaintiff, and defendant appeals. Affirmed.

Edward Blunt Talbot, for appellant. Clarence Samuel Hebert and Alex. Hebert, for appellee.

LAND, J. Plaintiff sued for a balance of \$4,075.56, with legal interest from June 29, 1905, alleged to be due on the purchase price of certain machinery and for erection of the same pursuant to contract.

The defendant for answer pleaded the general issue, and admitted having contracted with the plaintiff for the furnishing, delivery, and erection at Houma, Terrebonne parish, of boilers, etc., for its sawmill, according to specifications, for the total price of \$6,300, payable one-half on delivery of the machinery and the balance on the erection thereof sub-

ject to discount of 1 per cent. on cash payment. The answer further avers that on delivery and before inspection the respondent paid one-half of the purchase price, less said discount and certain charges and expenses due by plaintiff for cost of erection, but that on inspection certain parts of said machinery were found to be defective and not in accordance with the specifications; that plaintiff, on being notified, refused to replace said defective parts; and that respondent was compelled to do so at a cost of \$1,553.60, leaving a balance due plaintiff of \$1,143.60.

The case was tried, and there was judgment in favor of the plaintiff for a balance of \$2,594.87, with legal interest from June 29, 1905, and costs.

The defendant has appealed, and plaintiff for answer has prayed that the judgment be so amended as to allow him the full amount claimed in the petition.

It appears from the petition and documents annexed that there were two sets of specifications, and it is alleged that in the second it was "stated in error that petitioner's original agreement called for the erection of said machinery by him." The petition alleges that plaintiff offered to furnish and deliver the machinery called for in the original specifications f. o. b. New Orleans for \$6,300, and this offer was verbally accepted on June 8, 1904, by the defendant. It is further alleged that subsequently it was agreed to make certain changes in the original specifications, and that the same were finally reduced to writing on or about October 31, 1904, as shown by the second set of specifications annexed to the petition. The two sets differ materially. In the second a heavy Corliss engine, heater, and pump were omitted, and these significant words were added: "Boiler and stack to be set up by the contractor." As we appreciate the evidence, the contract sued on was based entirely on the second specifications, and the delivery was to be f. o. b. Houma. The allegation of error is not made out. The two sets of specifications were furnished to plaintiff and several other dealers in machinery, two of whom at once noticed that the second set imposed on the contractor all the expenses of erection. We do not see how a business man of ordinary prudence could bid on specifications without carefully reading every clause therein. The very account sued on shows that the defendant was credited with cash and material furnished the plaintiff's foreman while engaged in erecting the machinery. The charging back of the same items seems to have been an afterthought.

We concur in the conclusion of the trial judge that the plaintiff was not entitled to recover anything for the cost of erecting the machinery.

As to the boiler tubes the specifications did not call for any particular test, and the in-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

spector could only see that they were charcoal iron tubes in apparent good condition. The boilers were tested as a whole and found satisfactory. The specifications called for "tubes of best lap-welded charcoal iron." Defendant's contention is that the tubes furnished did not come up to the standard of the specifications. These tubes were manufactured by the Monongahela Tube Company, which made but one grade of standard charcoal iron tubes. The defendant sent a sample from one of the tubes to the Monongahela Company to be tested. Such test was made by the Pittsburg testing laboratory on two pieces cut from the sample. One showed a tensile strength of 50,100 pounds per square inch, and the other a tensile strength of 49,550 pounds per square inch, indicating a good, strong quality of iron, up to the grade of standard charcoal tubes. Four pieces of tube were tested by two professors of Tulane, who reported that they did not represent the best grade of lap-welded charcoal iron, as their average tensile strength with the grain was only 45,745 pounds. These tests prove nothing as to the very large number of tubes not examined by the experts. The reports show marked differences of quality in the pieces examined. A laboratory test of all the tubes was impracticable. There was no agreement as to the samples to be tested. They were selected by the defendant without consulting the plaintiff. We are satisfied from the evidence that the tubes were up to the standard of best charcoal iron tubes in the commercial sense of the term.

The item of \$58.45 for guy posts is not claimed in the answer, and is not included in the specifications which stop at bands on the stack for guy fastenings. If guy wires and posts were also intended, why were they not included in the detailed specifications? The fact that the defendant had the materials on hand may account for their omission.

The item of \$113 for defective hoppers is claimed in the answer and was properly allowed, as those furnished were not according to either the specifications or blue print.

There remains to be considered an item of \$179.30, allowed to the plaintiff for extra work and material in the matter of smoke boxes. Defendant's contention is that the smoke boxes originally furnished were too small, and did not accord with the specifications as to the area of the breeching, which was to be 20 to 30 per cent. greater than the tube area of one boiler at the small end. The defendant's manager testified that a portion of the smoke boxes were too small, and were even smaller than the area of the tubes, and consequently choked the draught. It is admitted that four new smoke boxes were substituted for the four which were furnished and found to be unsuitable. Those first furnished were according to a blue print which was sent to and approved by the defendant company. Defendant now argues

that the blue print did not accord with the specifications. Admitting the correctness of this proposition, for the sake of argument, the defendant nevertheless accepted the blue print as a correct construction of the specifications, or as a modification of the same, and cannot be heard to complain that the blue print differed from the specifications.

Judgment affirmed.

(122 La. 909)

No. 17,097.

RICKMAN v. LEE LUMBER CO., Limited.
(Supreme Court of Louisiana. Nov. 30, 1908.
Rehearing Denied Feb. 15, 1909.)

MASTER AND SERVANT (§§ 238, 244*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where an employé of a mill is engaged in oiling the machinery when the whistle to start is blown, and is afforded ample opportunity to get into a safe position pending the giving and answering of the signal to start, and the starting of the machinery, he cannot recover damages for injuries sustained whilst failing to avail himself of such opportunity. On the other hand, if, having experience in such matters, he attempts to oil the machinery after it has been put in motion and under conditions unnecessarily dangerous, he cannot recover for injuries received whilst so engaged.

[Ed. Note.—For other cases, see Master and Servant. Cent. Dig. §§ 743, 777; Dec. Dig. §§ 238, 244.*]

(Syllabus by the Court.)

Appeal from Thirteenth Judicial District Court, Parish of Rapides; Wilbur Fisk Blackman, Judge.

Action by Peter L. Rickman against the Lee Lumber Company, Limited. Judgment for plaintiff. Defendant appeals. Reversed, and suit dismissed.

Barksdale & Barksdale and Blackman & Overton, for appellant. William Cullen Roberts and John Bunyan Roberts, for appellee.

Statement of the Case.

MONROE, J. Plaintiff obtained a judgment for damages for an injury received whilst working in defendant's service, and defendant has appealed.

The story told by plaintiff is about as follows, to wit:

That he was employed as "extra edgerman"; that on October 1, 1907, he was directed to report for an evening run, and whilst the machinery was at rest, was oiling the edger, using his right hand for the purpose, with his left hand hanging by his side, just over the feed roller, the sleeve of his jumper being unbuttoned and hanging loose; that the usual hour for starting the mill, in the evenings, was 7 o'clock, and that the whistle to start was usually blown 5 minutes before 7, but that on this occasion the whistle was blown some 14 or 15 minutes before 7; that it "seemed" to him that the machinery started "right immediately" after-

wards, and that he was startled and did not have time to get out of the position in which he had placed himself; that the sleeve of his jumper got caught in the feed roller; and that, in pulling it loose, he brought his hand in contact with the saw, and was thereby injured, losing a finger. He says that Dean, the millwright, who blew the whistle to start, was about 10 or 15 feet distant from him at the time, and could see him plainly; that he heard the three whistles to start slowly, and did not hear the customary three whistles, in response, from the engineer, who was on the floor below; but that the machinery started quite slowly. He says that he has worked about lumber mills for seven or eight years; that he has heard the whistle blown three times a day, or oftener; and that there was nothing unusual about the blowing on this occasion, except that it came sooner than he expected. He also says that, when the whistle blew the second time, he was still oiling the edger.

McDonald, the edgerman (called for plaintiff), says that he understood that plaintiff was his assistant, and that he had requested him to oil the edger; that it is the duty of the foreman to see that every one who happens to be on the same floor and can be seen is out of danger before starting the machinery; that ordinarily, where three whistles are blown to start, and three by the engineer in reply, a person would have ample time, before the starting of the machinery, to get out of any place of danger.

Two witnesses for defendant, Dean and King, testify that plaintiff was not oiling the edger and was not in a place of danger when the whistle to start was blown, but that he went to the place where he was hurt after the machinery was in motion, corroborating each other. Dean also testifies that he told plaintiff, before he blew the whistle, to get out of the way, that he was "going to start up the little engine to run some chains on," and that plaintiff heard him, though he made no reply. Tucker, the foreman, says that he was in the engine room (on the floor below where the accident happened) when the whistle to start was blown, talking to the engineer, and that the engineer got up, walked 15 or 20 feet to the engine, answered the signal to start by three whistles, and started the engine, and that from the time the whistle was blown upstairs until the answer was given there was an interval of about half a minute. He also says that it was some six or seven minutes later (and in this he is corroborated) before the whistle to stop was blown; and it is shown that the whistle to stop was blown some ten seconds only after plaintiff's sleeve was caught, so soon after, in fact, that his oil can, which he presumably dropped at the moment, and which appears to have fallen on a slowly moving belt, had been carried only about eight feet.

The foreman also testifies that plaintiff was employed as an offbearer, and not as an

assistant, or extra edgerman, and that he, the foreman, had given him no instructions to operate or oil the edger. It otherwise appears, however, that plaintiff was in the habit of doing such work, and it seems probable that the foreman knew and countenanced it. Deville (who was employed to "punch clocks") says that, in passing through the mill a few minutes before 7 o'clock, he saw plaintiff, and noticed that he had on a blue jumper and that one sleeve was unbuttoned—a fact which plaintiff admits.

J. E. Butler was examined, under commission, as a witness for plaintiff, and we have duly considered his testimony (which has been added to the transcript, since its filing, on motion of plaintiff), though it does not appear to have been offered in evidence, and does not commend itself when considered. He says that the whistle was blown but twice to start the machinery, whereas plaintiff and other witnesses testify that it was blown three times. He says, also, that he was "helping Charley Dean fix the transfer chains, from the long side to the short side," and that, when he first saw plaintiff, the latter had pulled himself loose from the edger saw. He also says that he heard no answering signal from the engineer, and "that plaintiff did not have time to get away from the machine, after the signal to start was sounded, before the edger did start."

Opinion.

If plaintiff was in a place of danger when the whistle to start, which he heard and the significance of which he understood, was blown, it appears that he had ample time, whilst the engineer was walking 15 or 20 feet and blowing three whistles in reply, to get into a place of safety. But he himself says, and repeats, that he "was oiling when he [Dean] blew the second whistle." It is clear, therefore, that he was not so much startled by the blowing of the whistle, and that he did not consider himself pressed for time.

According to Butler's testimony, Dean, after blowing the whistle to start, had had time to get to his place of work and to engage with the witness in fixing the transfer chains before the accident happened (and Dean says the same thing), and we can see no reason why the plaintiff should not, during that time, have stepped out of his position in the edger, if, in fact, he was in that position.

On the other hand, accepting the testimony of Dean and King, to the effect that plaintiff was not engaged in oiling the edger when the signal to start was given, and the testimony, with the corroborating circumstances, to the effect that the accident did not happen until the machinery had been in motion six or seven minutes, and we must conclude that plaintiff, having been requested by McDonald to oil the edger, undertook that duty after the machine had been put in motion. From either point of view, the facts are

against him, and defendant cannot be made liable in damages for the injury sustained by him.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided, and reversed, and that there now be judgment for defendant, rejecting the demand of the plaintiff and dismissing this suit, at his cost.

(122 La. 913)

No. 17,172.

CRUSEL v. HOUSSIERE-LATREILLE OIL CO.

(Supreme Court of Louisiana. Jan. 4, 1909.
Rehearing Denied Feb. 15, 1909.)

1. JUDGMENT (§ 253*)—CONFORMITY TO PLEADINGS.

Where, in a suit to recover compensation for services rendered under an alleged contract, plaintiff having offered evidence to establish the contract alleged, and defendant having offered evidence to prove that, under the alleged contract as interpreted by it, the compensation was fixed at a lower rate than that claimed, plaintiff acquiesces in such interpretation, and proves that otherwise the alleged contract was fully executed by him, he is entitled, under his prayer for "general relief," to judgment for compensation on the basis established by such interpretation and acquiescence, and will not be driven to another suit for the recovery of the same.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 253.*]

2. CORPORATIONS (§ 406*) — CONTRACTS OF GENERAL MANAGER—RATIFICATION.

Where the business of a corporation, composed of a few persons, is loosely conducted, mainly by an officer called "general manager," who is urged by the other members to make contracts and incur obligations on behalf of the corporation, pursuant to a policy approved by them, and not ultra vires of the corporation, and, such an obligation having been incurred, and the consideration therefor having been accepted by the board of directors, composed of practically all the members of the corporation, and having inured to its benefit, the corporation will be considered bound therefor, originally and also by ratification.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1611-1614; Dec. Dig. § 406.*]

(Syllabus by the Court.)

Appeal from Twenty-Third Judicial District Court, Parish of St. Mary; Albert Campbell Allen, Judge.

Action by J. Edward Crusel against the Houssiere-Latreille Oil Company. Judgment for defendant, and plaintiff appeals. Reversed, and judgment for plaintiff rendered.

Farrar, Jonas, Kruttschnitt & Goldberg and Clegg & Quintero, for appellant. Walter Lemann, Hampden Story, Henry Darley Smith, and Edward Nicholls Pugh, for appellee.

Statement of the Case.

MONROE, J. Plaintiff alleges, in substance, that defendant agreed with him that, if he would find a person who would enter into a satisfactory contract to exploit for

oil certain land of which it was the owner, it would pay him 5 per cent. of all the oil produced under such contract; that he found the person; that the contract was entered into; that more than 3,000,000 barrels of oil have been produced thereunder; that the production is continuing; and that defendant refuses to pay him in accordance with its agreement. Wherefore he prays for an accounting, and for judgment for his compensation, either in oil or money. Defendant filed an exception of "vagueness," whereupon plaintiff filed a supplemental petition, affirming the allegations of the original petition, and further alleging:

"That the contract which petitioner has with the Houssiere-Latreille Oil Company was formed and entered into, first, by conferences and verbal agreement between your petitioner and Donelson Caffery, Jr., the general manager of the Houssiere-Latreille Oil Company, on or about the latter part of December, 1903, and the matter of these conferences and the terms of this agreement were subsequently made known to Donelson Caffery, Sr., the president of said company, to Eugene Houssiere, its vice president, and to J. Sully Martel, its secretary-treasurer, and were approved, accepted, and acted upon by them. That the terms of said contract between your petitioner and the Houssiere-Latreille Oil Company were further discussed and ratified in various letters which passed between your petitioner and the officers of the Houssiere-Latreille Oil Company, and more particularly the following letters [specifying certain letters], copies of which letters are hereto annexed and made part hereof. And petitioner further shows that at a conference held on or about the 29th of March, 1904, between the representatives of the Houssiere-Latreille Oil Company, the representatives of the Texas Company, and your petitioner, the terms of the contract between your petitioner and the Houssiere-Latreille Oil Company were again fully and clearly laid before the president, vice president, secretary-treasurer, and general manager of the Houssiere-Latreille Oil Company, who, with knowledge of said contract with your petitioner, entered into a lease * * * with the Texas Company whereby the said officers, for the Houssiere-Latreille Oil Company, accepted, ratified, acted upon, and availed themselves of the services of your petitioner, rendered under the said contract, in the obtaining of the said lease."

He prays as in the original petition, and, further, for the reservation of his future rights. An exception of "no cause of action" was filed, and overruled (or referred to the merits). Defendant then filed a "general denial," and there was a trial, in which it was shown that in 1902 Eugene Houssiere, Arthur Latreille, Donelson Caffery, Donelson Caffery, Jr., and J. Sully Martel owned, in indivision, a tract of what was supposed to be oil-bearing land, and that they were exceedingly anxious to find some one who would furnish the money to develop it; that the situation was complicated by reason of the fact that there was a suit pending concerning the title to the land, and another pending or threatened, in which other parties were claiming rights as lessees, so that it was considered necessary to find a strong

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

party to take hold of the matter; that, at the instance of Martel, plaintiff brought him and his associates into negotiations with the Texas Company, but that, a contract having been sent to that company for signature which was not in accordance with its understanding, the negotiations were broken off; that the parties thereafter endeavored to contract directly with the Texas Company, but without success, as appears from the following testimony, given by D. Caffery, Jr., to wit:

"The result was that the Texas Company declined to lease the property or to make any contract with us concerning it. We had gone to the Texas Company to induce them to operate on this land. Senator Caffery and I met Mr. Cullinan [president of the Texas Company] in Beaumont, and went over the matter with him, and the Texas Company had declined to take up the proposition."

On May 5, 1903, Houssiere, Latreille, the Messrs. Caffery, and Martel (together with Ismerie Latreille, whom we take to be the wife of Arthur Latreille) incorporated themselves, under the name of the Houssiere-Latreille Oil Company, with D. Caffery, president, Houssiere, vice president, Latreille, second vice president, Martel, secretary-treasurer, and D. Caffery, Jr., general manager; said parties constituting at once the board of directors and (Madame Latreille excepted) the whole body of the stockholders. According to the charter there ought to have been regular meetings of the board of directors once in three months, and there might have been special meetings when called by the president, of his own motion or at the request of two directors. As a matter of fact the first meeting of the board was not held until December 3, 1903, seven months after the incorporation of the company, after which, there were eight meetings in 1904, one in 1905, none in 1906, one in April, 1907, and none thereafter up to the date of the trial of this case in May, 1908. In the meanwhile business, involving large amounts of money and the most vital interests of the company, had been transacted and several of the meetings had done nothing but ratify the previously taken action of the officers to whom the management of the affairs of the company had by common consent been intrusted; the facts being that the Messrs. Caffery and Martel are prominent members of the bar of this state and court, whilst Houssiere and Latreille, though the original owners of the land in question and the owners of nearly four-fifths of the stock of the defendant company, are immigrants from France, who were farming the land when oil was discovered, and did not consider themselves sufficiently familiar with the English language or with business methods to justify them in attempting to handle the situation. The transaction of the business of the company was therefore left to the Messrs. Caffery and Martel, and, though Houssiere and Latreille, and probably Madame Latreille, were

advised, informally, of any important action taken or to be taken, it is evident that much was done that does not appear on the minutes of the board of directors, or that appears there as having been approved after it was done. As time wore on, the burden and responsibility of taking the initiative in the matter of the development of the company's land devolved mainly on the general manager, who on November 24, 1903, wrote to plaintiff (with whom he and the others had kept in touch) in part as follows, to wit:

"In case you succeed in interesting any one in the Corkran land [being the land of the company], could you not arrange that the royalty to the landowners shall be a straight half of the oil produced. * * * If some such concern as the Texas Company could be induced to take 10 or 15 acres out of the 40-acre tract, and develop it, we would be willing to make it handsomely worth your while."

His reason for making this offer is stated in his testimony as follows:

"My going to Crusel, or meeting him accidentally, and telling him the result of our interview with Cullinan, was what induced me to take up the matter with him. There was pressure on me, from the other members of the company, to bring about development. The pressure was so great that I determined to make some sort of a commission. I had hoped to bring about the development without paying any commission."

The subject-matter of the letter thus quoted was thereafter further discussed and referred to between plaintiff and the writer, and between plaintiff and Martel, and on February 20, 1904, the writer and plaintiff met in New Orleans, by appointment, and had an extended conversation, in which they came to an understanding as to the terms upon which the Houssiere-Latreille Company was willing to make an "exploiting" or "development" contract, and agreed (or thought they had agreed) upon the compensation that plaintiff was to receive in the event of his producing a satisfactory contractor. Plaintiff made some rough notes at the time of the important points considered, and when the interview ended went to his office and embodied them (as he interpreted the conversation) in a letter to the general manager, bearing even date with the interview, in which he said:

"This is to confirm the conversation between us relative to leasing some of the territory of the Arnaudet-Latreille tract."

He then specified what he understood should be the substance of any contract that he might negotiate between the exploiter (whom he was to find) and the company, and concluded his letter as follows:

"My commission for bringing the above deal about is to be 5 per cent., and, in case that you should have to make concessions, whereby, for yourself and for your co-owners of the land, you should have to take less than 25 per cent. royalty, then I am to take the corresponding decrease in the amount of my commission, which comes out of your 25 per cent."

D. Caffery, Jr., testifying as to this letter, says that he received, but did not reply to, it. He further says:

"I read the confirmatory letter, recently, with special care, and I think he stated what the agreement was, with the exception of there being an ambiguity about his commission. There was no ambiguity in our agreement."

* * * Q. Mr. Caffery, what was the agreement and understanding about the commission?

A. The agreement was that Mr. Crusel's commission would be 5 per cent. Q. Of what?

A. Of what we were to receive, of course.

* * * A. The idea that the 5 per cent. was to be upon the total production of the land never occurred to me until after this suit was instituted. It was presented to me when Mr. Crusel sent me his contract to be signed [referring to some demand made by Crusel, long afterwards]; but it did not come clearly home to me until after the institution of this suit. In other words, it would be giving Mr. Crusel a sixth of the Houssiere-Latreille Oil Company's royalty, and I am sure that Mr. Crusel would not have dared to advance such a proposition as a business man. * * *

Q. Then you knew that he was expecting a commission? A. Yes; I expected that he would claim a commission. Q. You had a contract for a commission? A. Yes. Q. For a 5 per cent. commission? A. Yes. Q. That was made in New Orleans? A. Yes. Q. Made in a conversation? A. Yes. Q. And Crusel wrote you a letter which embodied the conversation, on the 20th of February, 1904? A. Yes, sir.

* * * Q. You have never denied the contract for Crusel's commission in case he would bring about a deal? A. No, sir; I have never denied it. Q. Did you at any time submit that letter of February 20, 1904, to the board of directors? A. I don't think that I actually submitted that to anybody; but I am quite sure that the matter was discussed with Senator Caffery and Mr. Martel. I do recall several criticisms I received from the Senator for agreeing to the commission, and I do recall that my reply was that there was no other way to reach the Texas Company, and, but for my belief that that was the only way—that belief being brought about by Crusel's statement and what had happened before—but for that belief, I would not have agreed to the commission."

At another place his examination reads:

"Q. Mr. Caffery, did you ever, before the 29th of March, 1904, raise any opposition to the payment of a commission to Crusel, or signify that none was due him, under your contract with him? A. No, sir; I did not, but my impression is that there was always war in the company over the commission. Q. Was that communicated to Crusel? A. No, sir; that was in the company. The war was principally between the Senator and myself, and my recollection is that, when I told him we could not get any contract, except with the Texas people, and that we could not deal with the Texas people except through Crusel, he did not express satisfaction, but he ceased to oppose it."

No war having been declared on him, and not being advised of what was going on among the members of the defendant company, Crusel devoted himself to the business of getting the Texas Company to undertake the development of defendant's land, and on March 15, 1904, being in Beaumont, Tex., he wrote a letter to defendant's general manager, saying (inter alia):

"I have made an appointment to meet you on Saturday morning at Franklin, La. Mr.

Freeman will be along, representing the Texas Company. He will also have the manager that company has in the field along, in case his services should be required, relative to the locality of the wells, etc. Mr. Freeman will come over disposed and much inclined to do business, and hopes to find you in the same frame of mind, so that we will accomplish something this time. If this appointment suits you, kindly let me hear from you by return mail."

The general manager not being at Franklin when the letter reached there, Crusel received a reply from Senator Caffery (defendant's president), as follows:

"Your letter of the 15th, to my son, received. He is now in New Orleans, and I will take the appointment with you. I know he will be back in time to meet you and Mr. Freeman on Saturday at the point indicated."

Agreeably to the understanding so reached, Crusel and Freeman, with the field manager of the Texas Company, went to Franklin on the day appointed. D. Caffery, Jr., was unable to be there, and they spent a good part of the day discussing the subject-matter of their errand with Senator Caffery, who, however, declined to enter into any contract, in the absence of the general manager.

On March 23d Mr. Freeman wrote, from Beaumont, to D. Caffery, Jr., saying:

"In pursuance of our engagement with you, through Mr. J. Edw. Crusel, we called to see you last Saturday. Finding you had been unexpectedly called away, we had a very full and pleasant interview with your father and Mr. Martel, in which we discussed pretty fully the terms of agreement that would be mutually satisfactory."

He then recapitulates the proposition that he had submitted, and continues:

"Under date of March 22d I am in receipt of a letter from Mr. J. Edw. Crusel, to the effect that this proposition is acceptable to you and your associates, and that you are willing to close, except as to the one-sixth proposition, and that you think that, after the wells cease to produce by natural pressure, and have to be pumped, you should have one-fourth, instead of one-fifth, and that, if we are willing to make this concession, you are ready to close, or, if we are willing to make the royalty 30 per cent., all around, from the beginning to the end of the production, without reference to whether the well gushes or has to be pumped, that you would be agreeable to closing the contract on the lines of our talk and as herein outlined. After due consideration, we have decided to accept the proposition, subject to the satisfactory showing as to the legal status, both as to the title and as to the adverse lease claimed to a portion of the land which will be covered by this agreement. I would be pleased, therefore, if you would send us a statement covering the result of the litigation."

* * * On hearing from you, in response to this, with the information in hand, we are ready to close the transaction with you, subject, of course, to the concurrence of our attorney as to the legal matters, and to go promptly to work on the leased property, and we will be glad to prepare and submit to you a contract covering the transaction."

And agreeably to the understanding thus arrived at, and to an appointment thereafter made, Mr. Freeman, the secretary, and Mr. Autry, the attorney, of the Texas Company,

together with Crusel, in his capacity as broker, reached Franklin early on the morning of March 29th, and after breakfast repaired to the office of the Messrs. Caffery, where they found those gentlemen, together with Martel, Houssiere (in the forenoon), and Latreille (in the afternoon), representing the Houssiere-Latreille Oil Company, and ready to deal with them. There are some discrepancies in the testimony given by the parties thus named as to exactly what took place at the conference which was then held, and as to the precise order of events, and, after comparing the different statements with each other and considering them with reference to that which is known and undisputed and that which is probable, we find the facts to be as follows:

The forenoon was devoted to the discussion of the terms of the proposed contract, which were agreed upon and reduced to writing in the rough. The conference then adjourned and the members went to dinner, leaving to the typewriter the redrafting of the contract for final consideration and signature. The conference reassembled, about 2 o'clock p. m., and the redrafted instrument was shortly afterwards presented, and the parties were ready to sign it, when D. Caffery, Jr., invited Crusel to a private interview in another room, and, the invitation having been accepted, he told Crusel that he and his father had discussed the question of Crusel's commission and (in effect) thought it ought to be reduced. To this suggestion Crusel demurred, saying that he had done the work required under the agreement, and ought not, at the last moment, to be deprived of his reward. There was a good deal of discussion, during which Crusel asked Caffery whether he (meaning the Houssiere-Latreille people) was ready to pay for the work which he (Crusel) had done, and was answered, "No." Caffery, however, said that he would consult his father, with a view, as we take it, of agreeing with the latter upon some definite proposition to be submitted to Crusel, and he did so consult, and, returning, proposed that the amount of Crusel's compensation should be limited to \$5,000; that is to say, in the event oil should be found by the Texas Company, Crusel should receive the commission of 5 per cent. until the aggregate should amount to \$5,000, which sum should be accepted as payment in full. This proposition Crusel declined to accept, and thereupon President Caffery, or General Manager Caffery, or both, informed the representatives of the Texas Company that, in consequence of a misunderstanding with Crusel as to his compensation, they would go no further with the proposed contract. To that the Texas Company people replied that the question of Mr. Crusel's compensation was one in which they had no interest and did not care to become involved; that they had dealt with him as the agent or broker of the Houssiere-Latreille Company; that he

in no sense represented the Texas Company; and that they would withdraw from the conference, leaving the contract, as prepared, for the further consideration of the Houssiere-Latreille Company people, and leaving them to settle their difference with Crusel as they might think proper. They accordingly withdrew, and, hurrying, boarded a train which was about leaving for Beaumont, and Crusel did likewise. After they had gone, Latreille told Martel that he and Houssiere wanted their land developed, that they did not altogether like the idea of leasing as much as 200 acres to one company, and that the proposed allowance for the cost of wells was "considerable," but, that they wanted their land developed—in other words, that they wanted the proposed contract signed, and thereupon Martel urged upon President Caffery the adoption of that course, and President Caffery yielded the point and requested Martel to wire the Texas Company people to that effect, which the latter did; the telegram reaching Freeman, on the train, at Lafayette, La. (about two hours after he and his associate and Crusel had left Franklin), and reading:

"Contract signed; will reach you to-morrow morning."

This was supplemented by a letter, of even date, signed by President Caffery and reading:

"I inclose you a copy of contract and counter letter [the latter being in accordance with the agreement of the parties whereby the Texas Company was to be held harmless as against certain claims and litigation], duly signed. We decided to accept the contract as it stands, as you will see by copy of resolutions of the board, which I inclose."

D. Caffery, Jr., testifying concerning this phase of the transaction, says:

"Mr. Martel insisted on the contract being completed. The contract itself was not satisfactory to me, nor to Senator Caffery; but Mr. Martel took the position that the other parties interested, Mr. Houssiere and Mr. Latreille, were very anxious to have developments, and that we owed it to them to accept even an unsatisfactory contract. The question of Crusel's commission was considered, as I had postponed everything for the purpose of settling the status of that question, and we decided that Mr. Crusel would have no claim to any commission, and, after deciding that Mr. Crusel would not be entitled to any commission and that the contract ought to go through, for the best interests of all the members of the company, a telegram was sent to some member of the Texas Company, on board the train, notifying them that it had been accepted by the Houssiere-Latreille Oil Company," etc.

The basis of the conclusion (reached after the interruption of the negotiations and the departure of the Texas Company people and Crusel) that "Crusel would have no claim to any commission" seems to have been the information, conveyed in the statement of the Texas Company people, that Crusel did not represent the Texas Company, and that they had dealt with him as the agent or broker of the Houssiere-Latreille Company.

D. Caffery, Jr., testified at some length upon this subject and upon the subject of his relations with Crusel generally, and we reproduce his testimony in part as follows:

"During the discussion of Mr. Crusel's commission, it developed that the Texas people were not interested in Crusel at all, and one officer of the Texas Company, or perhaps more than one, made the declaration that that was a matter which they did not care to hear, and that they would allow the representatives of the Houssiere-Latreille Oil Company and Mr. Crusel to settle between themselves. That was a development which surprised me very much, and, when that announcement was made, all negotiations stopped, and I notified the parties that there would be no contract. * * * I cannot recall the details of the discussion. All I recall is the salient fact that, after Mr. Crusel was shown up to me by the representatives of the Texas Company, I immediately cut off from him."

Referring to prior dealings between him (and his associates) and plaintiff, the witness says that the Texas Company had "declined to make any contract with them" (meaning the Houssiere-Latreille people), and that he told Crusel so, after which Crusel said, and wrote, that he had parties who would, as he thought, be willing to do certain things looking to the sale or development of the Houssiere-Latreille land. "My recollection," says the witness, "is that his principal in the matter" (referring to some one of the propositions) "was the Texas Company. I think Mr. Crusel stated that he expected to deal with the Texas Company—to get the Texas Company interested in the land. * * * He then refers to letters received from Crusel in 1902, and proceeds:

"In other words, the relations between Mr. Crusel and myself were that he came to us to make us propositions for other people. At no time did Mr. Crusel come to us and ask to be made the agent of the Houssiere-Latreille Oil Company. That status was never thought of by me. When the first negotiations with the Texas Company fell through, Mr. Crusel, having, as I thought, the Texas Company as his principal, as stated in the letter, could not get in touch with us for a long time. We were negotiating for ourselves. We thought we could find an operator who would take up the land and enter into a lease, without Crusel. I took up the matter with the Texas Company direct, and went to Beaumont to see the president of the Texas Company, with Senator Caffery. * * * I had met a good many operators at Beaumont, and I thought I could find an operator to take hold of these lands; but the Texas Company was the only company that we looked upon as being strong enough to come to Jennings at that time, as being strong enough to resist the pressure from the Heywoods, who claimed to own the lease on the best part of the property. * * * But, when Mr. Cullinan [the president of the Texas Company] said the Texas Company declined to consider our proposition, and when Mr. Crusel met me in New Orleans and I told him that we had failed to do anything with the Texas Company, he told me that the Texas Company would not deal with us, except through him, and it struck me that there were such relations between him and the Texas Company as would prevent our making a contract except through Mr. Crusel. Mr. Crusel having first introduced us, and the Texas Company having refused to deal with us, the corroboration of Mr. Crusel's statement was so strong that I accepted it unhesitatingly. * * * So that, when Mr.

Crusel exposed himself as an impostor, and admitted, as he did, in his letter of September 8, 1904, written from New Orleans, and as was also shown by the representatives of the Texas Company, at our interview, to have been an impostor, I washed my hands of him entirely. Q. It was at the interview of March 29, 1904, that the fact was brought to your knowledge that you could act and deal with the Texas Company without Mr. Crusel? A. Yes. Q. When you discovered that fact, what did you do? A. I suspended all negotiations, brought things to a halt, told the Texas people that we would not discuss the matter any further, and it was my intention not to make any contract at all. * * *

"I base my resistance to this claim on two grounds: First, on the ground that Mr. Crusel represented, falsely, that the Texas Company would not deal with us, except through him. What he said about representing the Texas Company is borne out, and speaking of them as principal is borne out, in letters to us in which he spoke of his principal. I refer to only some of these letters—these letters of October 16, 1902, and November 5, 1902, to Mr. Martel, and of July 11, 1903, to Mr. Martel—in all of which he refers to somebody else he is representing. Mr. Crusel's course of dealing with us was one long systematic deceit, beginning with those letters, pretending to have associates up North, pretending to have people with him who would consider propositions from us, while his only status was that, as it afterwards developed, of agent for the Houssiere-Latreille Oil Company, which status it was not intended to give him, and which was not given him."

The witness nowhere particularly designates the second of the two grounds of resistance to which he thus refers.

Plaintiff, having been called to the stand in rebuttal, positively denied that he "at any time, or at any place, by word of mouth, letter, or suggestion," sought to impress Mr. Caffery with the idea that the Houssiere-Latreille Company could deal with the Texas Company only through him. From the testimony of Martel, Freeman, and Autry it appears to us that the "development" (to which defendant's general manager refers) of the fact that plaintiff was not representing the Texas Company did not take place until after plaintiff's claim for his commission had been refused recognition. The letter of September 8, 1904, in which (the general manager says) plaintiff exposed himself as an impostor, was not offered in evidence and is not in the record, and it appears to have been written more than five months after the Messrs. Caffery had concluded that plaintiff was entitled to no commission.

The letters of October 16 and November 5, 1902, and July 11, 1903, referred to by the general manager, were written to Martel concerning deals that plaintiff was then attempting to negotiate, and we find nothing in the record to justify the belief that they contained any misstatement, or were intended to deceive, or did deceive, Martel or any one else. They read as follows:

Letter of October 16, 1902:

"This is to state to you that, after conference held to-day, we have decided to submit the matter of the proposition to our associates, up North. It might be that some few suggestions or other will be made; but, if so, we shall submit them to you, promptly upon arrival of re-

ply, discuss them freely, and I feel that we should reach a basis to go ahead with the work."

Letter of November 5, 1902:

"This is to state that I, most likely, will be able to give you some very good news within the next few days relative to last proposition pending between us. The matter has been considered favorably, and it only remains to have the closing touches put upon it. I will therefore, most likely, see you very shortly for this."

Letter of July 11, 1903, written from Beaumont:

"I wired you to-day that I am going to New Orleans this evening. This was decided upon suddenly. If it would be convenient for you and Mr. Caffery to meet me at New Orleans next week, I think we can, very likely, frame a contract that will prove very satisfactory to you and friends. If you don't wire me reply to-day, you may telephone me at my house, New Orleans, to-morrow (No. 3,596), or communicate with me at the office there Monday."

Plaintiff gives the following uncontradicted testimony in regard to his relations with the parties defendant, and in regard to what we take to be the subject referred to in the above-quoted letter, to wit:

"As an oil broker and operator and dealer in lands and oil, I was interested in the development of the Beaumont field. When the Jennings field came forward, I took many trips to Jennings; had several meetings with Messrs. Houssiere and Latreille, at their house. I sought to see if I could make some arrangement with them whereby their lands could be developed, and I was informed by both of them that Messrs. Caffery and Martel were the authorized parties to deal with, as they had not sufficient knowledge about these matters; that these attorneys were interested in the land with them; that they knew more about it and were better prepared to preserve their interests. I then met Mr. Martel, and had many conversations with him. He came to New Orleans often. I met him at Franklin. We negotiated for a long time. I first made a contract, I think it was the latter part of 1902, for a lease of a portion of the property on the Latreille tract. That contract was made with the Texas Company. The representations as to the title to the land and all those things were stated to me, and I brought them to the Texas Company, expecting to receive a contract from those parties according to my proposition. A contract reached them [the Texas Company, as we understand the witness] quite different from the proposition, and it was not signed. There was nothing done about it. Later on negotiations were resumed. I had many more interviews with Mr. Martel, and I met the Messrs. Caffery, also. Whenever we would meet, we would discuss the matter together. About the latter part of 1903 I was informed by Mr. Martel that the proper party to deal with was Mr. D. Caffery, Jr.; that he had full authority; and that he (Martel) was not carrying on negotiations about leases."

For the rest, and as showing plaintiff's relation to the Texas Company in the matter of the contract of March 29, 1904, we quote as follows from the testimony of Freeman, to wit:

"I was active and instrumental in bringing about this lease, as the representative of the Texas Company, and my negotiations in this regard were conducted through Mr. J. Edw. Crusel. * * * So far as my knowledge of the transaction extends, all of the preliminary correspondence which led to the conferences herein-

before described, and which ultimately led to the making of the lease, * * * were brought about by, and carried through on, the activities of Mr. J. Edw. Crusel, and he was present and participated in both the conferences which were conducted between the representatives of the two companies, and it was at his insistence and appointment that the dates of meeting, etc., were agreed upon between the two companies. * * *

I think, in connection with my withdrawing from the room, in connection with the controversy which had arisen between Mr. Crusel and the Houssiere-Latreille Oil Company, that I did make it perfectly clear to all parties concerned that Mr. Crusel was in no way connected with the Texas Company in the matter, and that, whatever questions in the way of compensation or commission were in the matter for him, it was entirely between him and the Houssiere-Latreille Company people, and was a matter in which the Texas Company and its representatives had nothing to do; and it was at this point of discussion that Judge Autry and I withdrew from the discussion, leaving the contract, as hereinbefore stated, for the consideration and signature of the Houssiere-Latreille Oil Company people. * * * Mr. Crusel did not represent the Texas Company in any way in the matter of the contract between the Texas Company and the Houssiere-Latreille Company. * * * In so far as I knew, or now know, Mr. Crusel's status in relation to said contract was that of a broker, or agent, for the Houssiere-Latreille Oil Company, and it was in that capacity that I dealt with him. * * * I know of no reason why the Texas Company would not have entered into a contract with the Houssiere-Latreille Oil Company independent of Mr. Crusel, if the matter had come to us in that way; but I also know that, so far as my contract [connection] with that transaction is concerned, all of the preliminary negotiations and the fixing of dates and conferences that finally resulted in the making of a contract resulted from Mr. Crusel's activities and touch in the matter, and he was thoroughly familiar with all the details preliminary to the final meeting, and continued active up to the day of the closing of the contract. This being true, we could not, at that time, have closed the transaction, independent of those facts."

Opinion.

The grounds upon which defendant's general manager, in his testimony, predicates his "resistance" to the payment of any compensation to the plaintiff are wholly ignored by defendant's counsel, and in their stead we have presented to us certain propositions, which, as we understand them, may be stated as follows:

(1) That plaintiff, having set up a contract which would entitle him to recover 5 per cent. of all the oil produced and to be produced under the lease to the Texas Company, is bound by his allegations as to the meaning of such contract, and, failing to prove them, cannot be permitted to establish a contract by virtue whereof he would be entitled to recover, as commission, 5 per cent. of the oil received and to be received by defendant as royalty under said lease; the fact being that plaintiff interpreted the supposed contract in one way, whilst the other contracting party (defendant's general manager) interpreted it in another way, from which it follows that there was no *aggregatio mentium*, and no contract, and hence can be no recovery.

(2) That defendant's general manager was

without authority to bind it for the purposes of a contract such as that here sued on; that the ratification relied on was not predicated upon full knowledge, brought home to defendant's board of directors, as such, of the action said to have been ratified; that such knowledge, even if brought home to the members of such board individually, does not bind the board, or corporation, with respect to any subsequent supposed ratification by either.

1. It is true that plaintiff sets up a contract which he alleges entitles him to 5 per cent. of all the oil produced and to be produced under the lease to the Texas Company. It is also true that defendant's general manager, as a witness on its behalf, testifies that the contract between him, as defendant's representative, and plaintiff, contemplated that plaintiff should receive, as a commission, 5 per cent. of the oil coming to defendant as royalty under any lease made by it to a lessee found by plaintiff. It is further true that defendant made a lease to the Texas Company under which it has received a large quantity of oil, and that the lessee was found and the lease effected through the efforts of the plaintiff. It is likewise true that plaintiff now acquiesces in the interpretation placed on the contract by defendant's representative, and prays for judgment in accordance therewith.

If, however, it results that the judgment appealed from, absolutely rejecting plaintiff's demand, must be affirmed, as contended by defendant, then, although plaintiff has unquestionably rendered valuable service to defendant, with an agreement, made in advance, that he should be compensated therefor, he can recover nothing; for, if he sues again upon the contract as interpreted by defendant's general manager, he will be met, as now, with the objection that he himself did not so understand the contract, and if he sues on quantum valebat he will be met with the objection that he can recover no more than the general manager, acting for defendant, agreed to give him. We cannot adopt a view leading to such result. If suit is brought for compensation for service rendered under contract, and defendant denies that there was any contract, and, the evidence being confined to the issues thus presented, the court finds that there was no contract, the suit must be dismissed, for lack of evidence on which to predicate a judgment, though plaintiff may then bring another suit on quantum valebat.

If, however, plaintiff sues on quantum valebat, and defendant proves that the services were rendered under a contract fixing the compensation, the amount or rate of which is also proved, we know of no reason why there should not be judgment on the basis thus established, since in such case the facts are all before the court, and the law, abhorring a multiplicity of litigation, does not readily deny to a litigant the reward of his labor or permit one person to enrich himself

at the expense of another. Where the parties come into court, each insisting that there is a contract between them, but differing as to its interpretation, the court, by the application of certain familiar rules, may find that there was a contract, as alleged by one of the parties, and notwithstanding the denial of the other.

Thus, in the absence of fraud, or of error superinduced by one to the prejudice of the other, if the contract by its terms is reasonably susceptible of but one interpretation, it will be presumed that the parties intended that it should be so interpreted; or if the terms of the contract are ambiguous, and the ambiguity can be explained by so doing, the court will impute to the parties knowledge of such extraneous facts, bearing upon the subject, as they may be presumed to have possessed, and the possession of which would, in effect, estop either to deny the correctness of a particular interpretation, as, for instance, where one, alleging that he was employed for a specified term and discharged without cause before its expiration, sues for a balance of wages, and the suit is defended on the ground that the employment was at will, it may sometimes be shown that there was a usage of the place, or business, or both, in the matter of such employment, or, where the employer is a corporation, that such contracts are regulated by its charter or by-laws, and it may be found that the parties were bound to have known of such usage, or of such regulation, and should be presumed to have contracted with reference to them. *Miller v. Gidlere & Marmonde*, 36 La. Ann. 203; *Woods v. Shumard & Co.*, 114 La. 451, 38 South. 416; *Berlin v. Cusachs*, 114 La. 744, 38 South. 539; *Dinkgrave v. Vicksburg Co.*, 10 La. Ann. 514; *Hunter v. Sun Ins. Co.*, 26 La. Ann. 13.

Upon the other hand, the court might be unable, upon any sound principle, to find that either party should be held to have concurred in the contract propounded by the other, in which case it would, of course, follow that there could have been no contract between them; but it would not necessarily follow that the suit should be dismissed, since, the rendition of the service being proved, and it appearing, from defendant's admission, or from the proof administered by him, that he had promised to pay a certain sum therefor, if plaintiff should then acquiesce in such interpretation of his supposed contract, no sufficient reason has been suggested, and none occurs to us, why, under his prayer for general relief, he should not have judgment for the sum so admitted or proved to have been promised. Thus it has been held that, under a prayer for general relief, where the evidence, admitted without objection, justifies it (and, a fortiori, where, as in this case, such evidence is introduced by defendant), plaintiff, suing in a representative capacity, may recover individually; where a lessor sues for the rescission of the lease and a penalty for delay in paying the rent, though his prayer

be not allowed, he may be entitled to judgment for rent, with interest; where a privilege, not claimed, necessarily results from defendant's admission in his answer, it will be allowed; where plaintiff claims property as owner, a privilege may be allowed him, if proved without objection, defendant not being surprised. Cross on Pleading, p. 97. and authorities there cited.

It has also been held, in cases in which no admission by defendant was involved, that under the prayer for general relief, where defendant was sued as executor on notes signed by him as such, and it was found that he had exceeded his powers as executor, he might be condemned individually; where a creditor sued to annul a wife's judgment, the court, with the necessary evidence before it, would amend the judgment of separation and adjust the respective rights of the parties, without driving them to further litigation; where, in an action on account, defendant was credited with notes erroneously supposed to belong to him, judgment would go for the whole amount, not deducting the notes, though the reduced amount alone was claimed. *Id.*, p. 98.

Whether the contract here sued on, as interpreted by plaintiff, was reasonable or unreasonable, depends on circumstances which are not fully disclosed. Defendant owned what it hoped might prove to be oil-bearing land, and was without means to develop it, and up to November 24, 1904, when its general manager proposed to plaintiff that he should find some one (preferably the Texas Company) who would be willing to take that risk, had itself failed to find such a person. It is conceded (in the testimony) that in order to do so it was necessary to offer from 25 per cent. to 50 per cent. of the oil that might be developed, and, so far as we can see, it could have made no difference to defendant whether such percentage should be given to the lessee, who would undertake the development, or to such lessee and the broker who would produce him together, and the amount to be given to either or both depended upon the urgency of the need, which may have been greater or less as the danger that the lands would be drained by wells on adjoining lands was greater or less, or the necessities of the parties interested were greater or less.

The first of the propositions between the Texas Company and the defendant, which the latter considered, was one to the effect that the Texas Company should be allowed 60 per cent. of the oil to be produced by "gushers," and say 84 per cent. of that to be produced by pumping, after being reimbursed the original cost of the wells. The proposition agreed on was that the Texas Company, after being reimbursed the original cost of the wells, should be allowed 70 per cent. of the oil to be produced "all around"; that is to say, from gushers and pumping alike. Whether, before the Texas Company was

found, defendant would have been willing to give an additional percentage for its discovery, was a matter for its officers to determine. As to what, through its officers, it did in that regard, the testimony of plaintiff is as follows, to wit: At one time he says:

"Mr. Caffery, Jr., told me that if I would agree to bring parties to lease he would guarantee me that his company would pay me 5 per cent. commission for doing so."

At another time he says that he told the president of the Texas Company that Caffery had guaranteed him "that his company would pay me [him] 5 per cent. royalty." At another time he says that Caffery said:

"That he and his father had discussed the commission matter * * * and that, in case the land should turn out to be oil-producing, it would make a large amount of money for me, and that they wanted me to reduce the 5 per cent. commission."

And at still another time he says:

"Mr. Caffery, Jr., had a thorough understanding with me about that commission. It was confirmed in this letter [referring to his letter of February 20, 1904]. Before that, when I dealt with Mr. Martel, I had an understanding with him of 10 per cent. of the output for commission, and Mr. Caffery was also aware of that, and told me he wanted me to reduce my commission to 5 per cent., and I agreed to it."

In the letter referred to (written by him to Caffery, after the interview at which the commission had been discussed, and which he was allowed to act upon, but to which Caffery made no reply) he said:

"My commission for bringing about the above deal to be 5 per cent., and, in case you should have to make concessions, whereby, for yourself and your co-owners, you should have to take less than 25 per cent. royalty, then I am to take the corresponding decrease in the amount of my commission, which is to come out of your 25 per cent."

It will be remembered, in this connection, that under the deal as made Caffery and his associates were not obliged to take less than 25 per cent. royalty, but received a royalty of 30 per cent. "all around."

Mr. J. Sully Martel, testifying as to what took place at the conference of March 29, 1904, says that the party went to dinner, leaving the stenographer redrafting the proposed contract with the Texas Company, and (to quote his language):

"When we came back, the discussion was resumed. We found Mr. Latreille here, and Mr. Crusel broached the subject of commission, and it was then that Senator Caffery became very indignant, and said he did not want to pay any such commission. * * * Mr. Don Caffery, Jr., retired to that room over there, and * * * Mr. Freeman said that he regretted the misunderstanding, * * * and about that time D. Caffery, Jr., and Mr. Crusel came back, and Crusel said to Senator Caffery that, in order to have this thing go through, I am willing to take one-half the commission. * * * Senator Caffery told his son * * * that Mr. Freeman had just told him that Mr. Crusel did not represent the Texas Company,

and that they did not have to deal through Crusel with the Texas Company. Then Mr. Caffery, Sr., declined the proposition of Mr. Crusel to accept $2\frac{1}{2}$ per cent."

At another place he says:

"Mr. Crusel asked him [Senator Caffery] about the commission, and then Senator Caffery asked him, 'What's that?' and he said, 'Five per cent.' Q. And then it was that Senator Caffery became indignant, saying that was too much? A. Yes, sir; he became indignant, and refused to give him any commission at all."

D. Caffery, Jr., as we have already seen, says:

"The idea that the 5 per cent. was to be upon the total production of the land never occurred to me until after the suit was instituted. It was presented to me when Mr. Crusel sent me his contract to be signed [at some time subsequent to March 29, 1904]. But it did not come clearly home to me until after the institution of this suit. In other words, it would be giving Mr. Crusel one-sixth of the Houssiere-Latreille Oil Company's royalty, and I am sure that Mr. Crusel would not have dared to advance any such proposition as that as a business man."

At another time he says that, whilst the letter of February 20th was ambiguous on the subject of plaintiff's commission, "there was no ambiguity in the agreement."

Upon the case as thus presented, in the absence of any acquiescence by plaintiff in the construction thus placed by defendant's representative on the supposed contract, and in the absence of any better defense than nul tiel contract, it seems to us that the court would be bound to give judgment for plaintiff, either as prayed for by him, or upon the basis of the contract as set up in the testimony of defendant's principal witness. As the matter stands (and unless there be a better defense), there is no alternative to the awarding of the smaller amount accruing to plaintiff by reason of his acquiescence in such construction.

2. There is no specific denial in the pleadings, or in the testimony adduced on behalf of defendant, of the authority of its general manager to make either the contract alleged in the petition or that set up by him in his testimony; and no suggestion that plaintiff's claim could be defeated or that defendant desired to defeat it, on that ground, appears to have been made at the conference of March 29th, when the merits of the claim were discussed by a majority, not only of defendant's board of directors, but of its stockholders. To the contrary, in addition to the testimony of the general manager himself (quoted in the statement of the case), he was interrogated and answered as follows:

"Q. You conducted a great deal of correspondence? You and Mr. Martel conducted the correspondence? A. Yes, sir. Q. You were acting for your associates, for the company, and in the interest of all concerned? A. We were all— All our associates wanted development. Q. And you were seeking it? A. Yes, sir. Q. They took no active interest? Messrs. Houssiere and Latreille did not exert themselves? A. Mr. Martel and I were the active

members of the association. Q. And then subsequently you were general manager of the company, and acted in that capacity? A. Yes, sir."

Under the circumstances as thus disclosed, and in view of the manner in which the affairs of the defendant company were conducted, with the knowledge and acquiescence of all concerned, we should consider it inequitable to hold that the obligation here sought to be enforced, incurred, as probably most of the obligations of the company were incurred, without formal previous action by the board of directors, does not bind the defendant, even if the action of its general manager in the premises had not been subsequently ratified by the corporation. But there can be no doubt that defendant's board of directors, in formal meeting, authorized the contract with the Texas Company, and in so doing accepted and appropriated to the use of the company the results of the plaintiff's labor, knowing full well the conditions upon which it had been performed.

This court has recently had occasion to quote, with approval, the following passage, applicable to the situation here presented, from a prominent writer on corporation law, to wit:

"The authority of the subordinate agents of a corporation often depends upon the course of dealings which the company, or its directors, have sanctioned. It may be established, without reference to the official record of the proceedings of the board, by proof of the usages which the company has permitted to grow up in its business and of the acquiescence of the board, charged with the duty of supervising and controlling the company's business." *Berlin v. Cusachs*, 114 La. 747, 38 South. 540.

And the Supreme Court of the United States, referring to the matter of irregular corporate action, has said:

"Courts do not look at such transactions with the microscopic eyes of a special demurrer. * * * The transaction, like all others, was made to the knowledge of the trustees individually, and they never objected. This intelligent acquiescence was a binding ratification." *Creswell v. Lanahan*, 101 U. S. 352, 25 L. Ed. 853.

Again:

"When a contract is made by any agent of a corporation, in its behalf and for a purpose authorized by its charter, and the corporation receives the benefit of the contract without objection, it may be presumed to have authorized or ratified the act of its agent." *Railway Co. v. Keokuk & Hamilton Bridge Co.*, 131 U. S. 871, 9 Sup. Ct. 773 (33 L. Ed. 157).

And again our predecessors in this court have said:

"There is no principle better settled than that he for whom a contract has been made, subject to his ratification, is presumed to ratify it, unless he, immediately on being informed thereof, repudiate it." *Lartigue v. Peet & Another*, 5 Rob. 92.

In the instant case the defendant accepted the results of plaintiff's service, knowing that he had rendered them upon the faith of an obligation, incurred in its name and behalf,

for his compensation, and the only repudiation of that obligation or of the authority by which it was incurred that has been attempted is that which is to be found in the argument of defendant's learned counsel, predicated on the "general denial" filed as a defense to this suit. We are of opinion that the obligation was authorized in the beginning, that it was ratified by the corporation in the receipt and enjoyment by it of the consideration therefor, and that the attempted repudiation for want of authority in the agent is ineffectual.

The amount of oil received by defendant under its lease to the Texas Company, less the amount required to pay its share of the cost of sinking the wells, appears to have been 588,916.89 barrels, and the value of the oil, at the date of the trial in the district court, is shown to have been 70 cents per barrel. Plaintiff is therefore entitled to judgment for 29,345.84 barrels of oil (being 5 per cent. of 588,916.89 barrels) or its value, at 70 cents per barrel, say \$20,542.08.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that there now be judgment for plaintiff, condemning defendant to deliver to him, as his commission upon oil received by defendant, up to February 1, 1908, 29,345.84 barrels of such oil, and, in default of such delivery within 30 days from the date at which this judgment shall become final, condemning defendant to pay plaintiff the sum of \$20,542.08, with legal interest from said date. It is further decreed that plaintiff's right to recover his commission on oil received by defendant since February 1, 1908, and that may hereafter be received by defendant, under its contract with the Texas Company of March 29, 1904, be reserved. It is further decreed that defendant pay all costs.

(122 La. 339)

No. 17,344.

HUMPHREY v. MIDKIFF.

In re OIL CITY IRON WORKS, Limited.

(Supreme Court of Louisiana. Jan. 18, 1909.
Rehearing Denied Feb. 15, 1909.)

1. **PROCEDURE—IN GARNISHING GARNISHEE.**
Interrogatories were propounded. They were answered by an officer of the corporation. They were not satisfactorily answered. They were successfully traversed.

2. **GARNISHMENT (§ 87*)—UNEARNED SALARY.**
Although traversed and shown incorrect, it remained that the plaintiff [creditor] was not entitled to the amount claimed.

[Ed. Note.—For other cases, see Garnishment, Dec. Dig. § 87.*]

3. **GARNISHMENT (§ 110*)—UNEARNED SALARY—SERVICE.**

The writ of garnishment has the effect of seizing the property in esse at the date of the service, and it does not reach out and seize un-

earned salary at the date the order to answer is served.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 231; Dec. Dig. § 110.*]

4. **GARNISHMENT (§ 164*)—EVIDENCE—DEBT.**

The testimony does not show that anything was due by the garnishee at the date the proceedings were instituted and service was made.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 302; Dec. Dig. § 164.*]

5. **AUTHORITIES—UNEARNED SALARY.**

Decision cited by plaintiff considered and distinguished from the case. The salary cannot be reached by anticipation. Work to be performed cannot be drawn upon through process of garnishment.

(Syllabus by the Court.)

Action by A. H. Humphrey against H. K. Midkiff. Judgment for plaintiff, and the Oil City Iron Works, Limited, was garnished. Judgment for plaintiff against the garnishee was affirmed by the Court of Appeal, and the Oil City Iron Works, Limited, applied for certiorari or writ of review. Reversed, and judgment against plaintiff annulling the proceedings.

Cline & Cline, for applicant. Gorham & Gorham and Williams & Williams, for respondent.

BREAUX, C. J. This is a garnishment process, in which the plaintiff seeks to hold the garnishee liable for an amount he avers the garnishee owes to the defendant.

The facts are that plaintiff obtained a judgment against the defendant, Midkiff, and in his proceedings to garnishee the indebtedness he alleged that he propounded interrogatories to the defendant, "the Oil City Iron Works, Limited," that were answered by Midkiff, secretary of the company, who was defendant in the original suit of Humphrey v. Midkiff, in which a judgment was rendered against the latter for the amount which plaintiff seeks to recover from the garnishee, alleged debtor of Midkiff.

He was not a disinterested witness, as he was the judgment debtor.

Among other questions propounded, he was asked to say whether defendant paid him (Midkiff, secretary, and plaintiff's debtor) any salary for his services to the company. He answered briefly enough, "No," to each interrogatory, and denied all indebtedness of the company.

Plaintiff, on rule filed by him, traversed the answers, and on the trial of this rule the secretary testified substantially that he was president of the company garnished, that his indebtedness to the company was large, and that in accordance with an agreement entered into some time before the suit he gave his services to the company and credited his indebtedness to the company at the rate of \$125 per month, less his actual living expenses, that at the date of the service of the interrogatories the contract was

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in force, that he has never received any salary from the company except in accordance with the terms of the contract, that his family expenses were paid directly by the company, and at the end of each month the balance remaining between such expenses and the credited sum of \$125 was credited on his indebtedness to the company.

The alleged agreement was a subterfuge. It had not been entered into with the company.

The testimony on the traverse impeaches the answer originally given by plaintiff in answer to the interrogatories.

The contention of the garnishee is that the company cannot be held liable in a sum larger than the amount due Midkiff, defendant, by it, the garnishee, at the date of the service of the interrogatories, or, at the most, at the date of the answers of the garnishee.

There does not appear to have been due to Midkiff anything at the date of the service. The claim is exclusively for unearned salary.

The district court decided that the garnishee was liable for the amount for which it became indebted to the defendant after the answers had been made to the interrogatories and up to the time of the trial of the rule to traverse.

The garnishee does not state that the answers were originally proper answers. The garnishee company concedes their incorrectness.

The ground of the garnishee is that they cannot be penalized by rendering a judgment for a larger amount than that due at the date of the service of the interrogatories, and that, as nothing was due at that date, plaintiff has no right to a judgment.

It follows the decree of the district court condemned the garnishee to pay a sum which became due after the writ of garnishment had been served.

The Court of Appeal affirmed the judgment.

The usual preliminary order was issued by this court on the application for a writ of certiorari and review.

The case is now before us on the issues as made up between the parties on the application.

The writ of garnishment in this case was issued in aid of an execution. The purpose of plaintiff in matter of this writ was to seize and apply to the payment of his claim the credits of the debtor in the hands of the garnishee company. The petition, moreover, indicated that it was the intention to garnishee the amount due at the date that the writ was issued.

In the petition plaintiff, judgment creditor, alleged that there "*was in possession of or under the control of the Oil City Iron Works Company, Limited, rights or credits belonging to the defendant.*" (Italics ours.)

This referred to an existing right, and not one to be earned by the plaintiff after the petition and interrogatories had been served.

If the plaintiff be held to his allegation, he would not have a right to unearned salary on the face of the papers. As the garnishee's answers were evasive and untrue, it had the effect of driving plaintiff to the conclusion, we imagine, that he was entitled to the amount earned after the interrogatories had been served.

Unearned salary does not come within the grasp of the writ of garnishment, issued to have salary earned retained in the hands of the garnishee for the benefit of the creditor.

The right of the creditor who seeks to recover the amount of wages is fixed from the moment the garnishee makes answer to the interrogatories. The writ of garnishment cannot be made to do service in securing salaries not earned at the time of the service. If it could be held otherwise, the writ might be held in suspense over the debtor's head for an indefinite time while he is at work.

In any event, the garnishment process should not be used as an agent to collect future earnings. That is not the intention of the law.

We have examined the decisions to which learned counsel for plaintiff invited our attention.

In *Buddig v. Simpson*, 33 La. Ann. 377, it was decided that property of the debtor falling into possession of the garnishee after notice of garnishment is affected by the seizure. In that decision, different from the present case, the property was in esse at date of service.

In the other case cited the raw material in esse belonging to the debtor in the hands of the garnishee was seized.

The court held that the garnishee must account for the price after it had been manufactured.

This is an extreme case, and it will not always meet with approval as a precedent.

In the pending case it is different. The right to the property was not in esse, and the whole was to be earned by human labor.

Another, and the only other, decision is not, as to the page, correctly cited, and only figures are given.

It would add very much to the certainty of finding a decision, if there be error in the reference to pages in writing or printing briefs, if the title of the case were inserted in citing it, as well as the number.

Plaintiff can gain nothing by the contention that he was entitled to have the interrogatories taken pro confesso.

Though plaintiff, according to article 264, Code Prac., successfully contradicted the answers of the garnishee, none the less the article interposes its authority, and fixes the amount of the liability of the garnishee to the amount proved against him.

It is otherwise if he fails to answer at all. Then the interrogatories are taken pro con-

fessis, and the party becomes liable for the whole amount demanded. *Marks v. Reinberg*, 16 La. Ann. 349.

Here the liability falls within the terms of the first-cited articles of the Code of Practice.

For reasons assigned, and the law and the evidence being in favor of the garnishee, it is ordered, adjudged, and decreed that the judgment of the Court of Appeal be avoided, annulled, and reversed. It is further ordered, adjudged, and decreed that the judgment of the district court be avoided, annulled, and reversed. It is further ordered, adjudged, and decreed that there be judgment against plaintiff, annulling all proceedings, and that he pay all costs of all courts. The rule nisi is affirmed, and the demand of applicant is granted and made perpetual, at the costs of A. H. Humphrey, plaintiff, respondent.

(122 La. 945)

No. 17,257.

HICKMAN v. WASHINGTON.

(Supreme Court of Louisiana. Feb. 1, 1909.)

1. VENDOR AND PURCHASER (§ 44*)—RESCISION OF SALE—LESION BEYOND MOIETY.

This action is to rescind a sale "for lesion beyond moiety." The district court set aside the sale. *Held* error.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Dec. Dig. § 44.*]

2. VENDOR AND PURCHASER (§ 44*)—RESCISION OF SALE—BURDEN OF PROOF.

The judge's estimate of the value of the property, under his appreciation of the evidence, was too high. The burden was on the vendor to prove lesion beyond moiety by evidence peculiarly strong and convincing, and of such a nature as to exclude speculation and conjecture.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Dec. Dig. § 44.*]

(Syllabus by the Court.)

Appeal from Sixteenth Judicial District Court, Parish of St. Landry; Edward Taylor Lewis, Judge.

Action by George W. Hickman against Mary Stella Washington. Judgment for plaintiff, and defendant appeals. Reversed, and suit dismissed.

John Nash Ogden and Gilbert Louis Dupré, for appellant. Garland & Harry, for appellee.

Statement of the Case.

NICHOLLS, J. The plaintiff alleged: That on the 1st day of April, 1907, Kenneth Baillo, of whose succession he was the administrator, sold to Mary Stella Washington, then a feme sole, but at the institution of the suit the wife of Benjamin Strickney, by act under private signature authenticated on the same day by Lucius Dupré, notary public, and duly recorded, certain property described in the petition. That the consideration

of said sale was the sum of \$1,800, of which \$200 was paid in cash, and for the balance said purchaser executed eight promissory notes, secured by mortgage and vendor's privilege on the land so sold, and maturing six, seven, and eight years from date, each for the sum of \$200, and bearing 8 per centum interest from maturity until paid, which, after being signed by Mary Stella Washington, vendor acknowledges to have received. That none of said notes are yet due; but, notwithstanding that none of them have ever been paid, said notes are now in the possession of said vendee, Mary Stella Washington, who took illegal possession thereof after the death of said Kenneth Baillo, and refuses to deliver to your petitioner possession of said notes, which are still the property of the estate of said decedent.

That the property sold by said decedent, and herein described, for and in consideration of the sum of \$1,800, was fully worth, at the time it was so sold, the sum of \$4,200, or more than twice the amount for which it was sold. That said sale should be rescinded, annulled, and set aside for lesion beyond moiety, upon petitioner reimbursing to said vendee the amount of \$200 paid by her as aforesaid.

That he cannot tender the notes executed by the vendee herein in payment of said property, because of their illegal detention by said vendee. That, in the event said sale be not rescinded and annulled for lesion beyond moiety, then and in that alternative petitioner avers that said notes as herein above referred to have never been paid and are still due; that at the death of said decedent, who some time prior to his death had a room at the house of the defendant herein, where he was in the habit of going, said notes were illegally taken possession of by said defendant, who refuses to deliver the same to petitioner; that said defendant has paid no part of said notes, and still retains illegal possession of the same, notwithstanding amicable demand; and petitioner was entitled to demand and recover possession of said notes.

In view of the premises, petitioner prays that said Mary Stella Washington, wife of Benjamin Strickney, and said Benjamin Strickney, individually and to authorize his said wife, both residents of St. Landry parish, be cited; that there be judgment in favor of petitioner and against said defendants, rescinding and annulling the sale made by the late Kenneth Baillo on the 1st day of April, A. D. 1907, of the property described, upon plaintiff paying to her the sum of \$200, the amount paid by her in cash as part consideration of the purchase price of said property, and the cancellation of the notes executed by her, and ordering and directing said defendants to deliver to petitioner possession of said property.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

In the event said contract of sale be not rescinded and annulled as herein set forth, then and in that event petitioner prayed that there be judgment decreeing said notes to be the property of the estate of said Baillio, and ordering and directing said defendants to deliver to petitioner possession of said notes, to be collected in due course of administration, and in the event said notes be destroyed, or not produced, that petitioner be reserved the right to proceed on said notes as on lost notes. Petitioner further prayed for costs and for all general relief.

Defendant excepted that plaintiff's petition disclosed no cause of action; but, if it did (which he denied), plaintiff was estopped from prosecuting this action in the manner and form herein sought to be done; that as administrator of the estate he represents he caused to be inventoried as the property of said succession the notes in suit, claiming their ownership and in this way affirming the sale; that he cannot now be permitted to disavow ownership of said notes and shift his position to a contrary one.

In view of the premises, exceptor prays for maintenance of this exception and for dismissal of this suit, at plaintiff's costs, and for general relief.

This exception being overruled, defendant answered. After pleading a general denial, defendant admitted the purchase of the property in suit, and the payment of \$200 on account of the price, as is therein set out, and the execution of her notes for the credit portions, but specially denied that she illegally took possession of the notes then in her possession, or that she illegally detained the same, and averred that the allegations in said petition to this effect were without foundation in fact; that the deceased handed to her in person the said notes, at the time stating to respondent they were paid; that respondent never questioned for a moment this declaration of the said deceased, other than to ask him what else was to be done in relation thereto, when he replied, "Nothing, beyond the cancellation of the mortgage which was given to secure their payment," which matter he would himself attend to.

In view of the premises, respondent prayed for maintenance of the sale made to her by the said deceased, Kenneth Baillio, and to be hence dismissed, with costs, and for general relief.

The district court rendered judgment decreeing that the contract of sale entered into by the late Kenneth Baillio and the defendant herein, on the 1st day of April, A. D. 1907, of the property herein described, be annulled, rescinded, and set aside, upon the plaintiff herein paying to the defendant the sum of \$200, and that the notes executed by said defendant, for the unpaid balance of the purchase price of said property, be canceled and annulled, and the mortgage securing the same be effaced from the mortgage records of

this parish; that defendant deliver to the plaintiff herein possession of the property described in said contract of sale, to be by him disposed of in due course of the administration of said estate of the late Kenneth Baillio.

It further ordered that defendant pay all costs of this suit, to be taxed.

The district judge assigned written reasons for his judgment. The following is an extract taken from these reasons:

"From the circumstances attending the sale of this property, and the rather peculiar conditions under which the defendant alleges to have acquired possession of the notes executed by her in consideration of the credit portion of her purchase, the court is free to admit that, had the issue been thus presented, it would have considered said transaction in the light of a donation subject to nullity for want of form.

"But by the pleadings the issue presented must be limited to a rescission of the contract for lesion beyond moiety; and for a proper judicial consideration of that issue the contract must be treated as a real contract, and that it is what it purports to be—a sale.

"Viewing the issues from this standpoint, the court is confronted with three cardinal principles governing actions of rescission of contracts of sale for lesion beyond moiety.

"First. Where the vendor has been aggrieved for more than half of the value of the immovable estate by him sold, he has the right to demand a rescission of the sale. Civ. Code, art. 2589.

"Second. To ascertain whether there is lesion beyond moiety, the immovable must be estimated according to the state in which it was and the value which it had at the time of the sale. Civ. Code, art. 2590.

"Third. The proof of the value of the property at the time of the sale, to sustain an action of lesion, must be strong and satisfactory. *Beale v. Ricker*, 7 La. Ann. 667; *Demaret v. Hawkins*, 8 La. Ann. 484; *Parker v. Talbot*, 37 La. Ann. 22.

"Applying these principles to the case at bar, the court has reached the following conclusions:

"The circumstance that the deceased vendor was in the habit of visiting the house of the vendee weekly, though their social status differed so widely, and his peculiar conduct with reference to the notes executed by the vendee, convinces the court that the vendor, by reason of some weakness not disclosed by the evidence, was imposed upon to the extent of selling his property at a price far less than its real value. It becomes, therefore, now the duty of this court to ascertain how far the evidence adduced in behalf of the plea of lesion sustains the demand of the plaintiff that the sale be rescinded, because the value of the property at the time of the sale was more than double the amount mentioned as the consideration in the deed.

"Summarizing the testimony of the various witnesses sworn in behalf of the plaintiff, the court comes to the conclusion that the value of the property, before the improvements were placed thereon, in so far as the 50-arpent tract is concerned, be fixed at \$50 per arpent, or \$2,500, apart from the improvements, and that the improvements, completed but a few days prior to the sale at a cost of \$1,750, would scarcely be considered to be worth less than \$1,000, which, together with the woodland mentioned in the deed, and shown to be worth \$120, makes an aggregate value of \$3,620.

"But, assuming that the value of the property described as the 50-arpent tract should be estimated at \$40 per arpent, and the improvements thereon, due to the fact that they had just been completed at the contract price of \$1,750, at \$1,500, as fixed by the defendant's witness Thibodaux, and the woodland at \$120,

the court finds that still the real value of the property is more than double the price mentioned in the deed.

"The court, therefore, is of opinion that the contract of sale of the property herein described should be annulled, rescinded, and set aside, upon the plaintiff's paying to the defendant the sum of \$200, the amount mentioned in the deed as having been paid by the defendant in cash on day of sale."

Defendant has appealed.

Opinion.

The present action is one for rescission of a contract of sale from Kenneth Baillio to the defendant, Mary Stella Washington, a feme sole, on the ground of a lesion beyond moiety.

The action is not brought by the vendor himself, but by the administrator of his succession. The trial judge was evidently disposed to consider the act between the parties "in the light of a donation subject to nullity for want of form," but declared that "by reason of the pleadings he had to deal with it as a real contract, and that it was what it purported to be—a sale."

Acting from that standpoint, he rescinded the sale upon application of the testimony adduced on the trial, as he appreciated its weight, to the law governing actions for rescission of sales for lesion beyond moiety embodied in articles 2589 and 2590 of the Civil Code. He recognized that, as announced in *Beale v. Ricker*, 7 La. Ann. 667, *Demaret v. Hawkins*, 8 La. Ann. 484, and *Parker v. Talbot* 37 La. Ann. 22, the evidence in support of the right to a rescission must be strong and satisfactory.

The last expression of opinion by this court on that subject will be found in *Succession of Witting*, 121 La. 501, 46 South. 606, and *Girault v. Feucht*, 120 La. 1070, 46 South. 26. In the first of these two mentioned cases this court declared that:

"The burden is on the vendor to prove lesion beyond moiety by evidence peculiarly strong and convincing, and of such a nature as to exclude speculation and conjecture. The highest estimation, under the rule cannot be adopted as the true measure of value. The court referred, in making this declaration, to a prior announcement to the same effect in *Girault v. Feucht*."

In the present instance the property was unquestionably sold to the defendant for a price below its actual value; but, unless and until it has been shown that the price stipulated falls short of the actual value of the property to the extent required by law to raise the presumption of fraud, that presumption does not arise.

Defendant's counsel, referring to Mr. Baillio, urge that:

"The vendor was an able man and a great lawyer as well. For years he stood in the front rank of the profession, and this fact entitles us to presume that he knew what he was doing when he disposed of the property for \$1,800. Certain it is he was not being imposed upon."

We have no idea that Mr. Baillio would have brought this suit himself; but it is brought by his administrator, whose right to bring it is not disputed. Should he have sustained his demand by sufficient evidence under the rule announced in *Succession of Witting*, the judgment appealed from will necessarily have to be affirmed.

We have examined the evidence with care with reference to that rule. The estimates of the value as made by the trial judge, upon testimony of character proverbially uncertain, pass the legal deficiency line by an exceedingly narrow margin; but those estimates themselves are too high under the evidence.

For the reasons herein assigned, it is ordered, adjudged, and decreed that the judgment appealed from be, and the same is, annulled, avoided and reversed, and plaintiff's suit is dismissed, at his costs.

(122 La. 952)

No. 17,041.

Succession of WATT.

(Supreme Court of Louisiana. May 25, 1908.
On the Merits, Jan. 18, 1909.)

On Motion to Dismiss.

1. APPLICATION FOR ADDITIONAL TIME TO COMPLETE TRANSCRIPT.

The application, with the clerk's certificate, for further time within which to file the transcript of appeal, was received and filed.

2. APPEAL AND ERROR (§ 506*)—PROCEEDINGS FOR TRANSFER—MAKING OF TRANSCRIPT—TIME FOR—EXTENSION.

On the first day's session thereafter the court acted upon the application. The delay is computed from the day that the application was filed.

The transcript was filed in time.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2626; Dec. Dig. § 596.*]

On the Merits.

3. APPEAL AND ERROR (§ 792*)—DISMISSAL ON COURT'S OWN MOTION—GROUNDS.

The appeal will not be dismissed *ex proprio motu*, save for very good reasons in the mind of the court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3137-3141; Dec. Dig. § 792.*]

4. AGREEMENT AMONG HEIRS.

The heirs undertook to settle their differences regarding their respective shares. Agreements were entered into, to which they are held, and which restrict the issues to an amount stated.

5. EXECUTORS AND ADMINISTRATORS (§ 506*)—FINAL ACCOUNTING—EVIDENCE—SUFFICIENCY.

The *ex parte* letters contain nothing of a convincing character. The other testimony, after these many years, is not certain as to facts and throws very dim light upon the issues. It presents nothing sufficient upon which to predicate a judgment.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2177; Dec. Dig. § 506.*]

6. EXECUTORS AND ADMINISTRATORS (§ 506*)—FINAL ACCOUNTING—OBJECTIONS—BURDEN OF PROOF.

There is a dearth of pleading and of proof. It was incumbent upon opponents to prove their demand.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2170-2175; Dec. Dig. § 506.*]

7. CORROBORATION AGAINST OPPONENTS.

The transactions of years ago, although shown only by *ex parte* statements, have a tendency to confirm certain testimony of opponents' only witness against their position as opponents.

8. DESCENT AND DISTRIBUTION (§ 109*)—COLLATION—PERSONS LIABLE TO MAKE.

There is reason to infer that the father of the claimants (opponents) had received his inheritance. If he had not, the situation does not enable them to insist upon collation.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. §§ 419, 420; Dec. Dig. § 100.*]

9. APPEAL AND ERROR (§ 170*)—PRESENTATION AND RESERVATION OF GROUNDS OF REVIEW—QUESTIONS NOT CONSIDERED BELOW—PRESCRIPTION.

If opponents are entitled to anything, it is as creditors. Their claim from that point of view is prescribed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1035; Dec. Dig. § 170.*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Thomas C. W. Ellis, Judge.

In the matter of the succession of Mrs. H. L. Watt. From a judgment rejecting the demand of certain heirs, and ordering that a certain sum left on deposit be distributed among other heirs, John Watt and others appeal. Amended, and, as amended, affirmed.

Dinkelspiel, Hart & Davey, for appellants. Benjamin Rice Forman and Horace Roberts, for appellees Lewis and the Howcott children. Cage, Baldwin & Crabites, for appellees Wheeler children.

On Motion to Dismiss the Appeal.

BREAUX, C. J. The appeal was returnable here on March 16, 1908.

On that day the time was extended by the court to the 6th of April.

On the 6th of April appellant presented a motion, with accompanying affidavit of the clerk of the district court, setting out that additional time (15 days) was necessary to enable him to complete the transcript.

This motion was filed by the clerk of this court, as is usual, at the time it was presented.

On the 13th of the month of April the motion was called in open court and the 15 days' delay applied for was granted.

As the court was not in session, no action could be taken in court before the last-mentioned date.

The question is whether filing the applica-

tion for time within which to prepare the transcript in the clerk's office and bringing the motion to the clerk's attention as one to be acted upon in open court was sufficient to obtain the delay.

In the case which counsel for appellee cites in support of his motion to dismiss the appeal the legal delays had already elapsed and it follows that the time within which to apply for delay had already expired.

It is not the case here.

The application was timely, but it had not been acted upon by the court, as it was not in session.

The following is in point:

"The court was not in session. The application was received and filed later. On the first day's session, the court acted upon the application and computed the delay from the day that the application was filed."

In other words, the court declined to dismiss the appeal on a motion similar to the one filed by the appellee in this case. *State ex rel. Fairchild v. Stillman*, 31 La. Ann. 162; *Chretien v. Poincy*, 33 La. Ann. 132; *La-croix v. Bonin*, 33 La. Ann. 119.

For reasons stated, the motion is overruled.

On Application to Dismiss the Appeal.

The appellees in their brief on other grounds urge that the order of appeal is not such as required and that the appeal bond is fatally defective.

The complaint is that the appeal was taken by John Watt "and others," not named in the motion or bond.

No motion has been made to dismiss the appeal upon that ground. There was a motion interposed for the purpose of amending the judgment upon another ground, which is now before us.

In any case, whether the "and others" include the four heirs or not, the appeal of John Watt is before us. No motion being made to dismiss, we still have the issues before us for decision. *State v. Callac*, 45 La. Ann. 27, 12 South. 119.

There was an agreement entered into between counsel to the end of reducing the bulkiness of the transcript, and in order that the clerk would copy only such documents as are needful to a decision of the issues. It is as broad as any agreement of the kind can be made. It has the appearance of conclusiveness as relates to the appeal itself.

The appellees must aver specially the informality in the order of the appeal or in the bond. The grounds to dismiss will not be supplied by the court on suggestion in the brief, particularly when the parties have entered into an agreement to facilitate the appeal; and, besides, the appellee without the least reserve moved to amend the judgment. As he asks for the amendment of the judg-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ment, he has scant ground to ask for the dismissal of the appeal.

The court in substance held that there must be a special plea filed to dismiss, to justify a dismissal of the appeal on the ground stated in this case. *State v. Callac*, 45 La. Ann. 27, 12 South. 119; *Webb v. Keller*, 39 La. Ann. 55, 1 South. 423.

We therefore take up the statement of facts.

Statement of Facts—On the Merits.

The purpose of this suit is to have it determined who is entitled to \$6,000, not yet disposed of, forming part of the assets of the succession of the late Mrs. Harriet L. Watt.

Four of the heirs of the late Charles B. Watt, who was her son, claim the whole amount, in opposition to the claim of other heirs.

Mrs. Harriet L. Watt died in the year 1900. A few days after her death her succession was opened. An inventory was taken the same year, showing assets to the amount of \$23,700.92. She left a will. With the exception of a few special legacies, she left her property to her children, all of whom were grown at the time.

The heirs were to receive under the will equal portions, per stirpes, and not per capita.

Mrs. Harriet E. Watt, her daughter, wife of Charles J. Lewis, was named executrix of the will. She qualified and administered the property.

The predeceased husband of Mrs. Harriet L. Watt, to wit, John Watt, also left a will, dated March, 1867, bequeathing his property to his wife and his five children.

The children were Eliza De Lesane, Anne Louisa Clarisa, Harriet Emily, Edith, and Charles B. Watt, when the father died in the 60's.

In this will the testator named his son, Charles B. Watt, and others, his executors, and named this son his residuary legatee, after having disposed of nearly all of his property to his children, the daughters named in the will.

Anne Louisa Clarisa Watt, also a major, died some years afterward. Her succession was never opened.

In the year 1882 Robert J. Lewis sold the undivided half of a cotton press and its appurtenances to William Lynd for an amount over \$50,000. Part of the consideration was paid cash. In satisfaction of the remainder of the price, the property remained mortgaged in favor of Mrs. Harriet L. Watt and of her daughter, Mrs. Lewis.

The amount due to the daughter, who had departed this life, was \$24,000. The indebtedness to her dated from the year 1877. The remainder, also secured by mortgage on the cotton press, was due to the mother.

The Watt claims in matter of this sale at this time were represented exclusively by Mrs. Harriet L. Watt and Hattie Watt, wife of Lewis. None of the heirs (except Mrs.

Lewis) signed the deed. The name of Anne Louisa Clarisa Watt appears, as before stated; but the deed was signed exclusively by the persons just named. Anne had departed this life, as before stated.

In the year 1896, before Andry, notary public, William Lynd, Jr., sold the property that he had bought from Henry N. Lewis in 1882 back to Mrs. Harriet L. Watt, widow of John Watt, and Mrs. Harriet Emily Watt, the parties before named.

The four mortgage notes described in the act of 1882 are again described in the act of 1886, and the obligation before referred to of \$15,000 is also again referred to as owned by the two ladies just named.

After deducting the indebtedness of Mrs. Watt to her daughter Harriet Emily, it is stated in the deed of sale by Lynd to them that Mrs. Harriet L. Watt and Mrs. Harriet Emily Watt are the only creditors and owners of the mortgage. They surrendered the notes and canceled them as owners, and also canceled the mortgages.

In the year 1892, before Preot, notary public, Mrs. Harriet L. Watt and Mrs. Harriet Emily Watt sold the same property to Lynd.

In these transactions the name of Anne Watt is not referred to as owner.

In July, 1900, Mrs. Harriet Emily Watt, wife of Chas. J. Lewis, executrix of Mrs. Harriet L. Watt, who departed this life in the early part of 1900, filed a provisional account.

The debts in this account amounted to \$1,281.85; special legacies, \$3,600; and \$2,679.43 were credited to each of the heirs. Total, \$10,717.92 to the heirs.

Charles B. Watt; his sister, Mrs. Sorette Watt, wife of Wallace; Maggie Watt, wife of O. Stockett, another sister; Leonard B. Watt; the minor, Henderson, heir at law of Charles B. Watt; and Daniel Wheeler, together with the Wheeler heirs, children of Eliza De Lesane Watt, wife of Josiah Wheeler, and a daughter of Mrs. Harriet L. Watt—alleged owners of one-half, opposed the account on a number of grounds.

Some time after this opposition had been filed, the account was homologated in so far as not opposed, and thereafter the matter of partition was referred to Mr. Lamar C. Quintero, attorney at law and notary public. The opposition to the principal account before referred to remained of record and never was tried.

There was no partition made. While the matter of partition was before the notary, petitions were addressed to the notary by the opponents, who claimed certain rights.

We will state here that in one of the papers addressed to the notary petitioners (the opponents just above named) state: That Mrs. Harriet L. Watt held mortgage notes belonging to her late daughter, Anne Louisa Clarisa Watt, upon which she collected \$24,000, by purchasing an interest in the Vir-

ginia Cotton Press, the cotton press in question.

That one-fourth of the amount was the property of the children of Charles B. Watt, and that in consequence her succession is indebted to the succession of Charles B. Watt for \$6,000, its share in the mortgage notes; the shares of the other heirs having been paid to them by Mrs. Watt in the year 1892. And that if it should be claimed that the \$24,000 mortgage notes were the property of Mrs. Harriet L. Watt, and not of Anne Louisa Clarisa Watt, then that Mrs. Lewis and Mrs. Howcott had received an amount in excess of their respective shares.

The position taken by the executrix through counsel is that these papers addressed to the notary are not a judicial demand addressed to a court, and that they cannot interrupt prescription, nor form the basis of a judgment.

We will state here that these petitions before the notary and addressed to him can scarcely be considered as part of the pleadings here, although they have at times been referred to in that light.

On April 17, 1907, parties in interest made the following agreement:

"It is agreed that there is on hand for distribution \$25,499.97, with 2 per cent. interest thereon from November 1, 1902.

"It is agreed that the first six items of the final account, March 31, 1903, are correct, aggregating \$2,076.85. It is agreed that all other items shall be stricken from the account, including the collation claimed from the heirs of Charles B. Watt and heirs of Mrs. Eliza Watt Wheeler, and including the two items, of \$10,275 each, for which Mrs. H. E. Lewis and the heirs of Mrs. Mary Edith Watt Howcott are placed on the account as creditors.

"It is agreed that the amount on hand, less the above-recited charges, amounting to \$2,076.85, and less the sum of \$6,000, shall be immediately distributed as follows: To heirs of Mary Edith Watt Howcott, one-fourth; to Mrs. Hattie E. Watt Lewis, one-fourth; to heirs of Eliza Watt Wheeler, one-fourth; to heirs of Chas. B. Watt, one-fourth.

"The amount of \$6,000, above referred to as not to be distributed, is to remain in court to await the decision of the claims of the heirs of Chas. B. Watt. Therefore the right of the heirs is reserved to offset this claim for \$6,000 by any legal claim for collation which they may have against the heirs of Chas. B. Watt; but it is distinctly agreed and understood that in no case shall such claims for collation exceed the aggregate amount of \$6,000, which is the same \$6,000 above referred to."

On the same day judgment was rendered and signed, carrying the agreement into effect.

In November following Harley A. Howcott, Edith Howcott, Wm. H. Howcott, Jr., and Wm. H. Howcott, Sr., tutor of Gladys Howcott, heirs of deceased Mrs. Watt Howcott, by right of representation of their predeceased mother, Mrs. Edith Watt Howcott, and Daniel Wheeler, Joseph Wheeler, Jr., Vivian Bradford Wheeler, Hattie De Lesane Wheeler, and Bessie Watt Wheeler, heirs of deceased, Mrs. Harriet L. Watt, by representation of their predeceased mother, Mrs. Jo-

slah Wheeler, and Mrs. Harriet Lewis, individually, as heir of Mrs. Harriet L. Watt, and as executrix, filed an exception to the claim of John B. Watt and the other heirs of Chas. B. Watt, who claimed to be the creditors of the succession in the sum of \$6,000, and interposed the plea of prescription to this claim of three, five, and ten years.

On March 31, 1903, the final account and tableau of distribution was filed by the executrix.

On April 14th of the same year John Watt, his sister, and two brothers filed opposition to the final account. They did not pray to be recognized on the account as creditors, nor did they bring up the question of collation in this opposition.

On the trial of the opposition to the final account, only one witness, the husband of one of the heirs deceased, W. A. Howcott, was called by John Watt and those of the heirs of Charles B. Watt, who jointly opposed the final account.

A number of letters written by this witness are copied in the transcript and are before us. Learned counsel for opponents state that the testimony of this witness, read in connection with these letters, leaves no doubt of the incorrectness of the judgment appealed from. We have not found either or both as conclusive as stated. This witness stated that Anne Watt's money was lost in speculation and that she left nothing—had no succession to open.

It is said on the part of the opponents that, if the loss took place as stated by this witness, it was after the death of Anne Watt, and after her mother had taken possession of her property, and converted it into money, and loaned the money to one of her sons-in-law; that it did not affect the liability of Mrs. Watt; and, in addition, it appears that the money returned into her funds when real estate was sold.

Learned counsel for opponents also take the position that the \$6,000 given by Mrs. Watt to each of her daughters was not part of their estate, and that this is shown by the emancipation proceedings of record; that the partition of the estate to her two daughters was given at a certain amount, and that this they received, and more, from Mrs. Watt, independently of the \$6,000 advances; that children must be treated alike.

The witness among other things testified that he knew that Charles B. Watt, the ancestor of the opponents, received it, referring to the \$6,000, before the year 1892.

This witness also testified that each heir was to receive \$25,000, and that his own wife received under her father's will—that is, under John Watt's will—and that the \$6,000 and other sums which he collected were amounts due on this amount of \$25,000, part of which amount was from the father's estate.

The commercial firm with which Charles

B. Watt was connected failed, and left him in embarrassed circumstances, we gather.

The witness states, further, that Mrs. Harriet L. Watt gave her son, Charles B. Watt, \$50 per month for several years to enable him to support his family; that he was largely indebted to his mother; that a great many judgments were paid by the mother for him. He refers to a number of debts that were paid. Funeral expenses and other expenses all were paid by Mrs. Harriet L. Watt.

Discussion and Judgment

It is made evident by the agreement in question among the heirs that the issue is limited to the claim for \$6,000.

The contention of the opponents is that about the year 1882 the late Harriet L. Watt had \$24,000 for her daughter, Anne Watt.

The proof is not conclusive upon this point.

We have given some attention to the different amounts constituting the assets of her succession. These, together with the sales and resale of the cotton press property, are a fair criterion of her means. Harriet L. Watt was not worth over \$40,000; even less. On this subject we began by taking note of the inventory, also of the amount of the succession as shown by the provisional account, and the amount of the assets as shown by the final account. We have also considered the cotton press deals. They do not prove that they were very profitable. They added little to her stores.

If the will of the late John Watt is to be taken as a basis (and it certainly should, as it is copied in the transcript as evidence in the case), it was not possible for Mrs. Harriet L. Watt to pay very much of the legacies her husband left. He by this will bequeathed his property to his daughters, five in number, in equal shares. He gave nothing to his son; but in a subsequent clause of the will he named him the residuary legatee.

The witness before named, the only witness for the opponents, testified that \$25,000 was the legacy of each heir. Doubtless his son, the residuary legatee, received an equal amount. It follows that the estate must have amounted to at least \$150,000.

Manifestly this large amount was paid from the property of that succession, and not by Mrs. Harriet L. Watt.

It may be—indeed, there is no doubt—that there were balances left which she partially met from time to time as best she could. When the cotton press was sold, she paid something on these legacies. We infer that before that time there had been something paid on these legacies. It appears that when the cotton press was sold \$6,000 was paid one of the heirs, to wit, Mrs. Howcott.

It does not appear with sufficient certainty that at that time the representatives of Charles B. Watt were entitled to a similar amount.

Upon this theory, Anne Watt must have

received about \$25,000 from the succession of her father.

But it seems that she had spent all of it. The witness in question testified that she lost this sum in a cotton venture.

If she did, and that is the testimony, as it was not shown that she had other property, it is not to be presumed that Mrs. Harriet L. Watt was indebted to her at the date that the cotton press property was sold. Not being indebted, the representatives of Charles B. Watt had no claim against her for the amount. It is not because other heirs received \$6,000 partly or entirely from the proceeds of the cotton press property that it can be inferred that these opponents were entitled to a similar amount from these proceeds.

Price of the Cotton Press.

In the first of these sales—that is, to Lynd, Jr.—the deed secured the amount due to the heirs of Anne Watt. In the second and third sales of this valuable property, Mrs. Watt and her daughter, Eliza Lewis, alone appear as parties to the deed. If the heirs had been concerned, it is not probable that they would have allowed her to sell this property and not account to them for some of the amount due. Moreover, in this deed Mrs. Watt positively declares that the whole amount referred to in the mortgage, including the mortgage originally in favor of Anne Watt, was her property, which confirms the statement of the witness before named that Anne Watt had lost her heritage and that her mother owed her nothing.

It may well be that the money was paid to Anne Watt, either by the representative of the succession of her husband, John Watt, or by Mrs. Watt, and that she lost it, and that the mortgage in question, evidenced by negotiable notes, transferable by delivery, passed to Harriet L. Watt.

This is not the only corroborating evidence. It appears that Charles B. Watt was not successful in business. He was overtaken by misfortune. His firm failed, and he was in extremely embarrassed financial circumstances. A number of debts were paid for him by his mother. She, in addition, gave money to his family to aid them in their struggling poverty. It is not probable that these amounts would have been looked upon as gifts (as they were) if the mother had been indebted to her son in the amount of \$6,000. It evidently, considered from every point of view, was not an inheritance due by the mother. It never was claimed as such, save in argument and in the petitions addressed to the notary public, who was directed to make a partition of the property; petitions that can scarcely be considered as part of the pleadings, as they were not addressed to any court.

Onus of Pleading and Proof.

This rested, under the facts of the case and the issues as presented, with the opponents. They were not complete. The testimony having

been admitted without objection, the issues may to an extent be considered; but it remains that the evidence does not sustain the claim. All the testimony copied in the transcript of a date anterior to the last trial on the application to homologate the final account is favorable to the executrix and her coheirs; that is, those coheirs who do not oppose the final account.

The only witness of the opponents leaves the issues, to say the least, in a condition of doubt. In other words, the opposition is not sustained by it.

Collation.

We do not think that in this case it would be possible to order the heirs to collate. We are not of opinion that they are entitled at all to collation, for the obligation as to collating is confined to children or grandchildren succeeding to their mothers and fathers and other descendants. Rev. Civ. Code, art. 1227.

The mother does not fall within the terms of the article, even if she received the amount, which is not conceded, in view of the testimony to which we have before referred.

Prescription.

Learned counsel for opponents states that prescription was not passed upon by the district court.

Be that as it may, it may be considered before this court, even as an original question, if there is no cause to remand the case in order that countervailing proof of acknowledgment, suspension, or interruption might be shown. That objection has no merit. We pass it without further comment.

Appellee joined issue on appeal, and asked for an amendment of the judgment by substituting the name of Harriet E. Lewis to the name of Harriet E. Watt, and that the judgment be accordingly amended.

By reason of the law and the evidence and the foregoing reasons being in favor of the executrix and her coheirs who do not oppose the homologation of the account, it is ordered, adjudged, and decreed that the judgment appealed from be amended in accordance with the prayer of appellee, and that, as amended, the judgment appealed from is affirmed.

Costs of appeal to be paid by the appellant.

(122 La. 906)

No. 17,149.

ALLOPATHIC STATE BOARD OF MEDICAL EXAMINERS v. WILLIAMS.

(Supreme Court of Louisiana. Jan. 18, 1909.)

Appeal from Civil District Court, Parish of Orleans; Fred Durieue King, Judge.

Action by the Allopathic State Board of Medical Examiners against Leon Williams. Judg-

ment for plaintiff, and defendant appeals. Affirmed.

Rolla A. Tichenor, for appellant. Ernest Touro Florance, for appellee.

PROVOSTY, J. This is a suit to enjoin defendant from practicing medicine in this state without his having first obtained a certificate as required by section 2, Act No. 49, p. 58, of 1894, and also to recover from him \$150, penalties provided for by said statute. Judgment was rendered as prayed. On the evidence, this judgment is obviously correct; and we assume defendant so recognizes, since he has not appeared in this court, either in oral argument or by brief.

Judgment affirmed.

(158 Ala. 143)

ALABAMA GROCERY CO. v. FIRST NAT. BANK OF ENSLEY.

(Supreme Court of Alabama. June 30, 1908. Rehearing Denied Jan. 14, 1909.)

1. PLEADING (§ 180*)—REPLICATION—DEPARTURE.

Where plaintiff declared on bill of exchange as payee, replications alleging that plaintiff purchased the bill after its acceptance were demurrable as a departure.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 369; Dec. Dig. § 180.*]

2. BILLS AND NOTES (§ 356*)—"BONA FIDE HOLDER"—BANKS.

A bank, which discounts paper for a depositor and gives him credit for the proceeds, is not a "bona fide holder" for value, so as to be protected against infirmities in the paper unless some other consideration passes, such transaction merely creating the relation of debtor and creditor between the bank and the depositor; and so long as that relation continues and the deposit is not withdrawn the bank is subject to the equities of the prior parties, though the paper is taken before maturity and without notice.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 908; Dec. Dig. § 356.*]

For other definitions, see Words and Phrases, vol. 1, pp. 823, 824.]

Appeal from Circuit Court, Madison County; D. W. Speake, Judge.

Action by the First National Bank of Ensley against the Alabama Grocery Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Cooper & Foster, for appellant. Brickell & Smith, for appellee.

HARALSON, J. Action on bill of exchange drawn by Steel City Produce Company on Alabama Grocery Company, payable to First National Bank of Ensley (plaintiff) and accepted by Alabama Grocery Company (defendant).

The defendant in the court below (appellant here) filed three special pleas, numbered 2, 3 and 4, setting up that it was a corporation, that the acceptance of the bill by it was for the accommodation of the drawer, and that such acceptance was ultra vires; and, further, that there was no consideration for the acceptance. To these special pleas, the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

plaintiff (the bank), in addition to the general replication, filed two special replications, setting up that it purchased the bill of exchange for value to the drawer, without notice that the acceptance was for the accommodation of the drawer. Demurrers were interposed to these special replications on the ground of departure, and overruled. In this the court was in error.

The plaintiff in its complaint declared on the bill of exchange as payee of one of the parties thereto. It was not good pleading to set up in the replication that it purchased the same after acceptance. The pleader probably intended to claim that plaintiff was a bona fide holder for value without notice.

The bill of exceptions purports to set out all of the evidence, and the court gave the general affirmative charge for the plaintiff, evidently on the theory that plaintiff proved his special replications. One of the material allegations of the replications was, that plaintiff paid value to the drawer. The only evidence on this point was that of the witness Du Bose, the president of the plaintiff, who testified that "being notified by the Bank of Huntsville that said bill of exchange had been accepted by the defendant, he, for the plaintiff, gave credit for the amount of the same to said Steel City Produce Company, who kept a regular account at plaintiff bank; * * * that he either paid the cash to the said drawer or placed the amount of said bill to the credit of the drawer. His best recollection was that he placed it to the credit of the drawer, subject to be checked out." For all that appears, the money may have been in plaintiff's bank at the time of the trial.

Where a bank discounts paper for a depositor who is not in its debt, and gives him credit upon its books for the proceeds of said paper, it is not a bona fide holder for value, so as to be protected against infirmities in the paper, unless in addition to the mere fact of crediting the depositor with the proceeds of the paper, some other and valuable consideration passes. Such a transaction simply creates the relation of debtor and creditor between the bank and the depositor; and so long as that relation continues, and the deposit is not drawn out, the bank is held subject to the equities of the prior parties, even though the paper has been taken before maturity and without notice. *Central National Bank v. Valentine*, 18 Hun (N. Y.) 417; *Manufacturers' National Bank v. Newell*, 71 Wis. 309, 37 N. W. 420; *Bank v. Huver*, 114 Pa. 216, 6 Atl. 141; *Dougherty v. Central National Bank*, 93 Pa. 227, 39 Am. Rep. 750; *Dresser v. Missouri, etc., Co.*, 93 U. S. 92, 23 L. Ed. 815; *First National Bank v. Nelson*, 105 Ala. 180, 16 South. 707.

The court erred in giving the affirmative charge for the plaintiff, and under the pleadings and evidence should have given the af-

firmative charge for the defendant. *Noble v. Walker*, 32 Ala. 459.

Reversed and remanded.

DOWDELL, DENSON, and McCLELLAN, JJ., concur.

(153 Ala. 65)

RICHARDSON et al. v. MCCREARY & CO.
(Supreme Court of Alabama. Nov. 12, 1908.
Rehearing Denied Jan. 14, 1909.)

1. EXEMPTIONS (§ 74*)—SUBJECTS—TORTS.

There is no exemption against an execution on a judgment for tort.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 91; Dec. Dig. § 74.*]

2. ACTION (§ 27*)—NATURE—CONTRACT OR TORT.

An action to recover for the removal, pending disaffirmance of a mortgage sale and redemption thereunder, of timber from the mortgaged premises by the purchaser, is *ex contractu*, and not *ex delicto*.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 161; Dec. Dig. § 27.*]

Appeal from Circuit Court, Monroe County; John T. Lackland, Judge.

Contest of claim of exemptions between Jesse Richardson and others and McCreary & Co. From a judgment overruling the claim of exemptions, said Richardson appeals. Reversed and rendered.

Jesse Richardson and others sued McCreary & Co. in the following action: (1) Money had and received. (2) Same. (3) "Plaintiff claims of defendant \$515, for, to wit, 515 trees cut or caused to be cut by defendants on the following lands, during the years 1902 and 1903: [Here follows description of the land.] And plaintiff avers that said trees have been sold by defendant, and that defendants had no right to cut or cause to be cut said trees, and defendants had no right to sell said trees; that said trees *et sequo et bono* belonged to plaintiff, and plaintiff sues to recover the value." The fourth count sets up that McCreary & Co. purchased the land particularly described in count 3 at a mortgage sale, and that the land was sold to McCreary under a mortgage given by Allen Richardson and wife to one De Loach; that De Loach is dead, and Wiggins, his administrator, foreclosed the mortgage; that after the execution of said mortgage, but before its foreclosure Allen Richardson and his wife died, and that Jesse Richardson and the others are the heirs of Allen Richardson; that Jesse Richardson and the others redeemed said land from McCreary & Co. on or about the 4th of August, 1902, but that before the redemption, and after the purchase by McCreary & Co., of the lands, on January 7, 1902, the exemptioners cut or caused to be cut the trees for which suit is brought. The trial court held the action under the third and fourth counts *ex delicto*, and disallowed the claim of exemptions.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

J. N. & J. B. Miller, for appellant. C. J. Torry, McClelland & McDuffie, and Barnett & Bugg, for appellees.

MCLELLAN, J. This contest of claim of exemptions under Code 1896, § 2046, was in fact and on the merits tried and determined upon the sole issue, viz., whether the original action, in consequence of which the execution against appellants was issued, was *ex delicto* or *ex contractu*, and, if the former, no exemptions could, of course, be allowed. A consideration of the original and amended complaint demonstrates, we think, that the action was not *ex delicto*, but *ex contractu*; the cause thereof being, as averred, the removal, pending disaffirmance of the sale and redemption thereunder, of timber from the mortgaged premises by the purchaser. If tortious consequences may infect the conduct of one so related to and in possession of real estate, a question unnecessary to be decided, the pleader in this instance clearly elected to waive it, and to attempt to hold the defendants for a liability to satisfy the redemptioner for the waste (if so) committed by the defendants.

The judgment is therefore reversed, and, the trial being without jury, a judgment will be here rendered sustaining the claim of exemptions as against this demand, upon the ground stated and controlling the decision below.

Reversed and rendered.

TYSON, C. J., and DOWDELL and ANDERSON, JJ., concur.

(158 Ala. 125)

CITY OF MOBILE v. FACTORS' & TRADERS' INS. CO.

(Supreme Court of Alabama. Nov. 19, 1908. Rehearing Denied Jan. 14, 1909.)

1. MUNICIPAL CORPORATIONS (§ 978*)—TAXES—ACTION TO RECOVER—PLEADING—SUFFICIENCY.

A complaint by a city to recover taxes was sufficiently definite in alleging a levy and assessment, where it stated that it claimed of defendant a specified sum, "being the taxes due and unpaid upon the assessment and levy of said taxes duly made by the proper authority of the city; * * * said tax levy being made on" a specified date on specified property in the city, owned by defendant and duly assessed at specified sums.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 978.*]

2. MUNICIPAL CORPORATIONS (§ 958*)—ORGANIZATION—STATUTES.

The Municipal Code (Act Aug. 13, 1907; Acts 1907, p. 790) by its terms did not become effective until September, 1908, except as to such municipality as availed itself of section 199, authorizing organization thereunder at once; and hence the city of Mobile, which did not avail itself of that section, properly levied and assessed taxes in January, 1908, under its charter of 1901.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 958.*]

Appeal from City Court of Mobile; O. J. Semmes, Judge.

Action by the City of Mobile against the Factors' & Traders' Insurance Company to recover city taxes. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

The complaint is as follows: "The city of Mobile, a municipal corporation organized and existing under and by virtue of the laws of the state of Alabama, claims of defendant, the Factors' & Traders' Insurance Company, existing under and by virtue of the laws of the state of Alabama, four hundred and twenty dollars and eleven cents (\$420.11), being the taxes due and unpaid upon the assessment and levy of said taxes duly made by the proper authority of the city of Mobile, said tax levy being made on January 27, 1908, upon the property of said defendant lying and being within the corporate limits of the city of Mobile, owned by the defendant; that is to say, upon that certain building known as No. 7 St. Michael street, between Commerce and Water streets, and duly assessed at \$15,000, also upon money in stock of incorporated companies, vessels or steamboats or any description of property not otherwise taxed, all of the property of defendant being assessed in accordance with law at \$52,900, and said sum of \$420.11 being the taxes due and unpaid upon said property. Plaintiff avers that said city of Mobile taxes are past due and unpaid and are taxes for the years 1907-1908." There were demurrers interposed, raising the question decided in the opinion.

B. B. Boone, for appellant. Pillans, Hanaw & Pillans, for appellee.

PER CURIAM. The complaint as amended is sufficiently definite and certain in its averments as to the levy and assessment of the taxes claimed to be due. No penalties are claimed, but simply the taxes alleged to have been duly levied and assessed. The complaint shows that the alleged levy and assessment was made in January, 1908. The validity of this levy *vel non* is raised by the demurrer. The contention of the defendant is that the levy is invalid, for that it was made at a time not authorized by law; and this contention is based upon the further contention that the act known as the "Municipal Code Act," approved August 13, 1907 (Acts 1907, p. 790), fixed a time for the levy and assessment of municipal taxes different from the time of the present levy and assessment. This involves the question as to when the Municipal Code act went into effect.

The court is of the opinion, and so holds, that the Municipal Code act did not go into effect until September, 1908, except as to such municipality as availed itself of the provisions of section 199 of said act. Such was the effect of the ruling in *Ward v. State ex*

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

rel. Parker (Ala.) 45 South. 655. It does not appear that the city of Mobile did this, and hence continued to exist as a municipality under the provisions of the charter of its incorporation of 1901, and until the Municipal Code act became operative September, 1908. And so far as appears from the record it was under the provisions of the charter that the taxes in question were levied and assessed in January, 1908, and they were therefore not invalid for the reasons assigned in the demurrer.

It follows that the judgment appealed from must be reversed, and the cause remanded.

Reversed and remanded.

(158 Ala. 16)

STATE v. LAOY.

(Supreme Court of Alabama. Jan. 12, 1909.)

1. HABEAS CORPUS (§ 122*)—SUSPENSION—EFFECT OF RIGHT OF STATE TO REVIEW.

Code 1907, § 6245, providing that when a person held in custody under an indictment charging him with a capital offense is admitted to bail on habeas corpus proceedings, the prosecuting officer may appeal in behalf of the state, and the judgment shall be suspended pending the appeal, is not violative of the constitutional provision forbidding suspension of the writ of habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 123; Dec. Dig. § 122.*]

2. HABEAS CORPUS (§ 113*)—APPEAL—FINDING ON CONFLICTING EVIDENCE.

Where there is a conflict in the evidence in habeas corpus proceedings to obtain admittance to bail, and the trial judge sees and hears the witnesses, his findings of fact will not be disturbed on appeal, unless contrary to the great weight of evidence; and the rule applies, though one of the witnesses did not personally appear, but his evidence was in writing.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 114; Dec. Dig. § 113.*]

Appeal from Probate Court, Shelby County; A. P. Longshore, Judge.

Habeas corpus by Jake Lacy against the State to compel petitioner's admittance to bail. From an order admitting petitioner to bail, the State appeals. Affirmed.

Alexander M. Garber, Atty. Gen., Thomas W. Martin, Asst. Atty. Gen., and Borden H. Burr, for the State. Estes, Jones & Welch and McMillan & Haynes, for appellee.

ANDERSON, J. That the state has the right to appeal in this case there can be no doubt. Section 6245 of the Code of 1907. It has also been held that this right given the state does not violate the Constitution. *State v. Towery*, 143 Ala. 48, 39 South. 309.

As has been repeatedly held by this court, where there is a conflict in the evidence and the judge below sees and hears the witnesses, his conclusion on the facts will not be disturbed, unless his finding is contrary to the great weight or preponderance of the evidence. It is insisted, by the state's counsel that this rule should not apply in the case

at bar, because the main witness for the state did not appear in person before the probate judge and his evidence was in writing. If all of the evidence considered by the probate judge was in writing, then there might be merit in counsel's insistence; but all the witnesses save Piper did appear and testify in person, and the probate judge saw and heard them, and we are not prepared to reverse his order admitting the petitioner to bail.

Affirmed.

HARALSON, SIMPSON, and DENSON, JJ., concur.

(158 Ala. 109)

KYLE et al. v. SLAUGHTER.

(Supreme Court of Alabama. Nov. 17, 1908. Rehearing Denied Jan. 14, 1909.)

EJECTMENT (§ 95*)—EVIDENCE—PROVISIONS OF DEED.

Evidence in ejectment held insufficient to sustain a finding that the deed under which plaintiff's claim contained a clause of reversion, afterwards destroyed by the grantor, in case of grantee dying before the grantor.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 281; Dec. Dig. § 95.*]

Appeal from Law and Equity Court, Lee County; Albert E. Barnett, Judge.

Ejectment by Emma Kyle and others against Frances E. Slaughter. Judgment for defendant, and plaintiffs appeal. Reversed and remanded.

Both parties claim from common source; plaintiffs as the heirs at law of P. J. Slaughter, the first wife of A. H. Slaughter, now deceased. The defendant claims under a subsequent deed from A. H. Slaughter, and assert that the first deed was never delivered, and, if delivered, contained the following clause. "Provided, in case I shall outlive said P. J. Slaughter, the title shall revert back to me." The tendencies of the evidence as to these matters sufficiently appear in the opinion. Plaintiffs made motion in the lower court for a new trial, which was refused, and they assigned this as one of the errors, among others.

George P. Harrison, for appellants. Lum Duke, for appellee.

ANDERSON, J. That A. H. Slaughter executed and delivered to the plaintiffs' mother, before her death, a deed to the property involved, there can be little or no doubt. Indeed, the defendant admits this fact in her evidence, but contends that said deed contained a reversionary clause, in case of the death of the first Mrs. Slaughter, the grantee, before the grantor. It is true this clause is testified to by the defendant, who is more largely interested than any one else; but she is contradicted by every witness who knew anything about the deed, some of whom are

absolutely disinterested and are not shown to be even related to any of the parties. Kennedy, the draftsman and one of the subscribing witnesses, was positive that the deed did not contain the clause contended for by the defendant. Lockhart, the other subscribing witness, says he read it over twice and it contained no such clause. Mrs. Kyle testified that she had read the deed and it contained no such clause. True, Mrs. Kyle is interested in the suit; but her interest is not near so great as that of the defendant. We also have evidence by Holly and Mrs. Kyle that A. H. Slaughter set up no claim to the property after the death of his former wife, except a life estate in same as her surviving husband.

Again the inquiry arises: If the deed contained the proviso claimed, why did A. H. Slaughter, who was the sole beneficiary under said proviso, destroy the document upon executing the deed to his second wife? If the deed contained this clause, its preservation by A. H. Slaughter would have established beyond dispute his title to the property and his right to convey it to his second wife. Sane and reasonable people do not, as a rule, destroy evidence favorable to the establishment of their own title. A party who destroys the evidence by which his claim or title may be impeached thereby raises a strong presumption against the validity of his claim. Greenleaf on Evidence, §§ 31, 37; Thompson v. Thompson, 9 Ind. 323, 68 Am. Dec. 638; Jones v. Knauss, 31 N. J. Eq. 609; James v. Blon, 2 Sim. & Stu. Eng. 600.

We fully recognize and sanction the often-repeated rule of this court: "The decision of the trial court, refusing to grant a new trial on the ground of insufficiency of the evidence, or that the verdict is contrary to the evidence, will not be reversed, unless, after allowing all reasonable presumptions in favor of its correctness, the preponderance of the evidence against the verdict is so decided as to clearly convince the court that it is wrong and unjust." We think the great preponderance of evidence in this case is so contrary to the verdict as to clearly convince us that an injustice has been done the appellants, and that it is our imperative duty to reverse this cause because of the refusal of the trial court to grant a new trial.

Reversed and remanded.

TYSON, C. J., and DOWDELL and McCLELLAN, JJ., concur.

(158 Ala. 47)

HEARN v. STATE.

(Supreme Court of Alabama. Jan. 12, 1909.)
LARCENY (§ 40*)—VARIANCE—OWNERSHIP OF PROPERTY.

There is a fatal variance; the indictment for larceny averring the property was that of the "M. Street Railway, a corporation," and the evidence showing it was that of the M.

Traction Company, and the two not being connected by the evidence.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 102-126; Dec. Dig. § 40.*]

Appeal from City Court of Montgomery; W. H. Thomas, Judge.

Albert Hearn appeals from a conviction. Reversed and remanded.

Hill, Hill & Whiting, for appellant. Alexander M. Garber, Atty. Gen., for the State.

McCLELLAN, J. The indictment avers the property, alleged to have been larcenously taken, to have been that of the "Montgomery Street Railway, a corporation." The evidence shows, without dispute, that the property involved was that of the Montgomery Traction Company. There is no testimony tending to connect the "Montgomery Street Railway, a corporation," with the subject of the alleged larceny, nor to show the identity of the two entities. The variance present between the allegation of ownership of the property and the proof thereof is, of course, fatal.

The affirmative charge requested for the defendant should have been given. It is unnecessary to treat other exceptions reserved. The judgment is reversed, and the cause is remanded.

Reversed and remanded.

SIMPSON, ANDERSON, and DENSON, JJ., concur.

(158 Ala. 182)

McVAY v. FRANK S. WHITE & SONS.

(Supreme Court of Alabama. Nov. 25, 1908.
Rehearing Denied Jan. 14, 1909.)

1. TRIAL (§ 252*)—REFUSAL OF REQUESTS—IGNORING ISSUES.

In an action by attorneys against a husband for services rendered in securing his wife's discharge from criminal charges, based upon an original promise of defendant to pay, where the only question for the jury was whether the promise was made, charges that, if the wife was responsible for the attorney's fee, defendant would not be liable for it, and if plaintiff was employed to defend the wife, and accepted the employment before defendant promised to pay the fee, plaintiff could not recover of defendant, were properly refused as being without foundation in the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 604, 606; Dec. Dig. § 252.*]

2. TRIAL (§ 248*)—REFUSAL OF REQUESTS—ABSTRACT CHARGES.

The charges were also objectionable as being abstract.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 582; Dec. Dig. § 248.*]

Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge.

Action by Frank S. White & Sons against W. R. McVay. Judgment for plaintiff, and defendant appeals. Affirmed.

The facts are sufficiently stated in the opinion of the court. The charges therein referred to are as follows: "(2) If the jury

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

believe from the evidence that Mrs. McVay was responsible for the attorney's fee for defending her, defendant would not be liable for said fee. (3) If the jury believe from the evidence that plaintiff was employed to defend Mrs. McVay, and accepted said employment before defendant made any promise to pay said fee, plaintiffs could not recover of defendant in this case."

Allen & Bell, for appellant. Frank S. White & Sons, pro se.

DENSON, J. This action is one in assumption, by the plaintiffs against the defendant, to recover the value of services rendered as attorneys at law in and about securing the discharge of defendant's wife from criminal charges lodged against her. Among other defenses interposed the defendant pleaded the statute of frauds as prescribed by subdivision 3 of section 4289 of the Code of 1907.

There is no conflict in the evidence in respect to the rendition of the services by the plaintiffs, nor as to their value. The bill of exceptions sets out all of the evidence, and in the view we take of it there is absolutely no foundation therein upon which to predicate charges 2 and 3, requested by the defendant. The plaintiffs' cause of action, according to the evidence, rests upon an original promise of the defendant. He denied making it, and the only question in the case for submission to the jury was whether the promise was made. Charges 2 and 3, requested by the defendant, are abstract; and charge 1 is an invasion of the province of the jury. All of them were well refused.

Appellant's counsel, in his brief, complains of a charge which he says was given at the request of the plaintiffs; but the bill of exceptions fails to disclose any charge given at plaintiffs' request.

We have discussed all the assignments of error insisted upon in appellant's brief; and, having determined them against him, the judgment of the trial court will be affirmed.

Affirmed.

TYSON, C. J., and SIMPSON and McCLELLAN, JJ., concur.

(153 Ala. 117)

TOWN OF COTTONWOOD et al. v. H. M. AUSTIN & CO.

(Supreme Court of Alabama. Nov. 19, 1908. Rehearing Denied Jan. 14, 1909.)

1. CONTRACTS (§ 138*)—ILLEGAL CONTRACTS—RELIEF.

The law leaves all who share in an illegal contract where it finds them, and will neither aid to enforce the contract while executory nor to rescind it and recover back the consideration when executed.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 681-700; Dec. Dig. § 138.*]

2. INTOXICATING LIQUORS (§ 328*)—ILLEGAL SALE—RIGHTS OF SELLER.

Under the statute providing that the dispenser shall buy and sell liquors for cash only, a sale of intoxicating liquors to a town dispensary on account, on the understanding that any part of the liquor not sold or not paid for may be returned by the dispensary and that it may claim credit to that extent, is illegal, and the seller cannot sue in detinue for liquors delivered under such contract and not paid for.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 466; Dec. Dig. § 328.*]

Appeal from Circuit Court, Houston County; H. A. Pearce, Judge.

Action by H. M. Austin & Co. against the Town of Cottonwood and others. From a judgment for plaintiffs, defendants appeal. Reversed and remanded.

Espy & Farmer, for appellants. Wilson & Martin, for appellees.

McCLELLAN, J. Action of detinue by appellees against appellants to recover described kinds of intoxicating liquors. The facts, as necessary to be here stated, shown by the bill of exceptions, were that the town of Cottonwood, through its mayor and council, composed of the persons named as defendants along with the corporate entity, was engaged in the conduct of a dispensary; that one of the provisions of the act authorizing such enterprise was that "the dispenser shall buy and sell (spirituous, vinous and malt liquors) for cash only"; that the plaintiff, on the 11th day of May, 1907, "sold the Cottonwood Dispensary (i. e., the municipality) \$635.54 worth of whiskey and beer, which was shipped in different lots, May 17th, 18th, and 27th, and June 29th, and charged the same to it on account; * * * that said town of Cottonwood, through and by its mayor and its said councilmen, * * * bought in the month of May the sum of \$635.54 worth of liquor from the plaintiff on account, *with the understanding that if any part of said goods were not sold, or were not paid for, the dispensary might return them and claim credit to that extent* [Italics supplied]; * * * that when said dispensary was closed down in July, 1907, it had on hand and undisposed of \$375.86 worth of whiskey and other stuff embraced in the sale by the plaintiff to the dispensary in said sale in May, 1907; * * * that the items of goods sued for and embraced in the complaint of [in] this suit were items embraced in the sale by plaintiff to the said Cottonwood Dispensary in the sale in May, 1907; * * * that the goods sued for were worth the sum of \$375.86; that the property was in the possession of defendant when this suit was brought." It also appears from the bill that a part of the aggregate purchase price for the liquors so sold and bought in May, 1907, was paid to plaintiff by the municipality.

In Bluthenthal & Bickert v. Town of Head-

land, 132 Ala. 249, 31 South. 87, 90 Am. St. Rep. 904, where the action was for money had and received—an action equitable in nature—to recover the proceeds of sales of liquors by the municipality, which liquors had been delivered to the municipality by the plaintiffs as upon an attempted contract of purchase of said liquors by the municipality from the plaintiffs on a credit, in violation of the provision of the authorizing act that forbade sales and purchases otherwise than for cash, this court ruled that such attempted undertaking was void, because prohibited by law, not merely ultra vires, and that the courts could not be availed of, in any way, to relieve either of the parties in pari delicto. The principle announced and enforced in the case of Bluthenthal & Bickert v. Town of Headland is decisive of this appeal. This principle has been stated in varying forms by this court. In *Clark v. Colbert*, 67 Ala., at page 96, it is thus stated: "That the law will leave all who share in the guilt of an illegal or immoral transaction where it finds them, and will neither lend its aid to enforce the contract while executory, nor to rescind it and recover back the consideration when executed." In *Hill v. Freeman*, 73 Ala., at page 201, 49 Am. Rep. 48, the principle is thus stated: " * * * Where a contract, based on a consideration contrary to law, immoral, or opposed to public policy, has been fully and voluntarily executed, if the parties are in pari delicto, the courts will not interfere to disturb the acquired rights of either at the instance of the other. The result is the same as if the contract had originally been legal and valid, and neither can recover the consideration which he has thus voluntarily parted with." In *Thornhill v. O'Rear*, 108 Ala., at page 301, 19 South., at page 382 (31 L. R. A. 792), it is said: "All the decisions of this court are in line with these authorities, holding, as to suits upon executory contracts founded upon immoral or illegal considerations, they may always be defended on the ground of their invalidity, but that when executed, unless controlled by statute to the contrary, the law will not interfere at the instance of either party to undo that which it was originally employed to do, for the reason that, being equally at fault, the law will help neither." *Long v. Railroad*, 91 Ala. 522, 8 South. 706, 24 Am. St. Rep. 931.

From the elaborate quotation made from the bill, and there was no conflict in the testimony, it is seen that in the eyes of the law both the buyer and the seller of the liquors sought to be recovered were in pari delicto in respect of the prohibition, expressed in the enactment, against the purchase of liquors "for cash only." In the very process of the dealing involved this prohibition was violated. In order for the plaintiffs to recover in this action, it was essential that they trace their alleged right to retake the liquors, voluntarily

delivered by them to the buyer, through the stated violation of the prohibition against a purchase on a credit. *Clark v. Colbert*, 67 Ala. 94. Having voluntarily and in violation of the provision placed these chattels in another's possession and power, the courts will not lend themselves to the plaintiffs' relief. That this contract was executed there can be no doubt. Nothing remained but to pay the price agreed upon, and this payment was not executed upon delivery of the chattels, but was in fact avoiding the contract under the letter of the prohibition quoted, on credit. The price of the liquors was agreed on and the liquors were delivered "with the understanding that if any part of said goods were not sold, or were not paid for, the dispensary might return them and claim credit to that extent." In *Allen v. Maury*, 66 Ala., at page 17, an announcement approvingly quoted in *Foley v. Felrath*, 98 Ala. 176, 18 South. 485, 39 Am. St. Rep. 39, it is said: "Where, however, goods are sold and delivered, the terms of sale being specified, and the vendee reserves the right to reject or return, the title passes, liable to be divested by the exercise of the option to rescind, expressed within a reasonable time." The option reserved by the municipality in this instance was, not to rescind pro tanto the contract, operating thereby to reinvest the seller with the title to the chattels not sold or paid for, but to return the property as that of the municipality, and thereby secure credit, payment pro tanto, on the indebtedness attempted to be created by the May, 1907, dealing between the parties.

We premit consideration of a preliminary question, not necessary, in the light of the views expressed, to be decided. The judgment is accordingly reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, SIMPSON, and ANDERSON, JJ., concur.

(158 Ala. 225)

ADAMS v. ADKISON.

(Supreme Court of Alabama. Dec. 17, 1908.
Rehearing Denied Jan. 14, 1909.)

PARTNERSHIP (§ 311*)—PRIVATE ACCOUNTING AND SETTLEMENT—CONCLUSIVENESS.

Where third persons appointed by a partner "to make final settlement of the partnership affairs" went over the business of the firm with the copartner, adjusted the accounts, paid the firm debts, assigned to one of the partners all debts due to the firm in the settlement, divided the goods, and executed an instrument reciting that they had divided the goods of the firm and had made satisfactory settlement of the same, the firm business was conclusively settled, in the absence of fraud, accident, or mistake, or a showing that a part of the firm business remained unsettled.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 721-723; Dec. Dig. § 311.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Chancery Court, Barbour County; Lucian D. Gardner, Chancellor.

Suit by J. A. Adams against D. G. Adkison. From a decree of dismissal, complainant appeals. Affirmed.

P. A. McDaniel and J. A. Adams, for appellant. Peach & Thomas, for appellee.

SIMPSON, J. The bill in this case was filed by the appellant against the appellee for the settlement of a partnership. The answer sets up the defense that a settlement of the partnership had been made, and the only reply of the complainant is that said settlement was merely a division of the goods on hand and did not settle the partnership business.

The answer does not point out, or designate particularly, any part of the partnership business which is left unsettled, and the evidence shows that certain parties were appointed by the complainant "to make final settlement of the partnership affairs"; that they consumed eight days in going over the business with the defendant; that they reported from time to time to the complainant; that they adjusted the accounts between the partners; that they paid off the debts of the firm; that all of the debts due to the firm were assigned to one of the partners in the settlement, and the goods were divided; and that they signed and delivered the written evidence of their work in the following words, to wit: "This is to show that R. W. Brown and A. R. Adams have this day divided the goods of the firm of D. G. Adkison & J. M. Adams, factor for J. A. Adams, and made satisfactory settlement of the same."

We think the chancellor correctly decided that the settlement was a settlement of the partnership business, and that, there being no evidence of fraud, accident, or mistake, nor of any part of the partnership business still remaining unsettled, the bill was properly dismissed. *Harris v. Harris*, 132 Ala. 208, 211, 31 South. 355; *Scheuer v. Berringer*, 102 Ala. 216, 220, 14 South. 640; *Cowan v. Jones*, 27 Ala. 317, 325; *Desha & Sheffield v. Smith*, 20 Ala. 752.

The decree of the court is affirmed.

TYSON, C. J., and HARALSON and DENSON, JJ., concur.

(158 Ala. 48)

ECHOLS v. STATE.

(Supreme Court of Alabama. Jan. 13, 1909.)

1. EMBEZZLEMENT (§ 14*)—AGENTS—THE RELATION.

The relation of principal and agent did not exist, so as to sustain a conviction for embezzlement, under Code 1907, § 6831, punishing any agent, etc., who embezzles money deposited with him, where accused agreed to make a suit of clothes for a sum, part of which was to be paid in advance and the rest in the future, but refused to deliver the clothes after the cash pay-

ment was made, except upon additional payments, and also refused to return the payment made; the relation of the parties being that of buyer and seller.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. § 13; Dec. Dig. § 14.*]

2. PRINCIPAL AND AGENT (§ 1*)—WHAT CONSTITUTES AN "AGENT."

An agent is one who undertakes to transact some business or to manage some affair for another by the authority of the latter and to account to it; and the word "agent," as employed in the statute punishing embezzlement by an agent, imports a principal and implies employment, service, delegated authority to do something in the name and stead of the principal.

[Ed. Note.—For other cases, see *Principal and Agent*, Dec. Dig. § 1.*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 262-270; vol. 8, p. 7569.]

Appeal from City Court of Bessemer; William Jackson, Judge.

Sam Echols was convicted of embezzlement, and he appeals. Reversed and remanded.

Matthews & Matthews, for appellant. Alexander M. Garber, Atty. Gen., and Thomas W. Martin, Asst. Atty. Gen., for the State.

SIMPSON, J. The appellant was convicted of the offense of embezzlement; the affidavit charging that he, "being an agent, servant, or clerk of affiant, embezzled or fraudulently converted to his own use money to about the amount of \$18, or fraudulently secretes, with intent to convert to his own use, or to the use of another, \$18 in money which has come into his possession by virtue of his office or employment." The evidence for the state, in its strongest light against the defendant, is that the defendant, being a tailor, agreed to make a suit of clothes for the prosecutor for a certain amount of money, part of which was to be paid in cash and the remainder to be paid in the future; that the prosecutor made the cash payment and demanded his suit of clothes; that defendant refused to deliver it without the payment of more money, and also refused to return his money.

This court said, in discussing a former statute (which was identical with section 6831 of the Code of 1907, in so far as the point involved is concerned), that an agent is "one who undertakes to transact some business or to manage some affair for another, by the authority and on account of the latter, and to render an account of it"; also that "agent," as employed in this section, imports a principal, and implies employment, service, delegated authority to do something in the name and stead of the principal." *Pullam v. State*, 78 Ala. 31, 34, 56 Am. Rep. 21. The relation of principal and agent did not exist between the prosecutor and the defendant, but the relation of seller and purchaser. The defendant did not undertake to do anything in the name and stead of the prosecutor. The money was not placed in his hands to be used or cared for, and accounted for to the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

prosecutor, but was paid to him in part settlement for a suit of clothes, and thereby became the money of the defendant, to use as he pleased. Whatever other liability or penalty the defendant may have incurred, he could not be convicted of embezzlement on the facts of this case. Consequently the defendant was entitled to the general charge, as requested and refused.

The judgment of the court is reversed, and the cause remanded.

HARALSON, ANDERSON, and DENSON, JJ., concur.

(158 Ala. 30)

FRANKLIN v. STATE.

(Supreme Court of Alabama. Dec. 17, 1908.
Rehearing Denied Jan. 14, 1909.)

INTOXICATING LIQUORS (§ 99*)—DISTILLER'S LICENSE—RIGHTS CONFERRED.

Under Code 1896, § 4122, imposing licenses in different amounts for distilling and for selling liquor, a license to distill implies no authority to sell, and a distiller's license gives no authority to sell in a prohibited district created by an election under Gen. Laws 1907, p. 200, as amended by Gen. Laws 1907, p. 626 (Code 1907, §§ 492-511).

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 99.*]

Appeal from Circuit Court, Chambers County; S. L. Brewer, Judge.

Durward Franklin was convicted of selling spirituous liquor without a license, and he appeals. Affirmed.

R. B. Barnes and Hill, Hill & Whiting, for appellant. Alexander M. Garber, Atty. Gen., for the State.

DOWDELL, J. The defendant was indicted for selling spirituous liquor without a license and contrary to law. The trial was had on an agreed statement of the facts, which is set out in the transcript, and by which it was shown that the defendant had a distiller's license, but no license to sell, and that he did sell spirituous liquor. The sale was made in the county of Chambers during the year 1908. The county of Chambers was at the time a prohibition district by virtue of an election held under Act Feb. 26, 1907 (Gen. Laws 1907, p. 200), as amended by Act Aug. 7, 1907 (Gen. Laws 1907, p. 626), which said act has been adopted into the Code of 1907 as sections 492-511, art. 25, p. 373, vol. 1, and by which said act the issuance of a license to sell liquor in said county was forbidden.

The insistence by counsel for appellant is that the license to distill implied the right to sell the product of the distillery. There is no merit in such contention. Apart from the prohibition statute against selling, the statute under which the defendant obtained his license to distill (section 4122 of the Code of 1896), regulating license tax, provided for

a separate license in different amounts for distilling and selling, clearly separating the two businesses. So under the old statute as it then stood, prior to the act of August, 1907, a license to distill implied no authority to sell. A fortiori there could be no implied authority to sell under a license to distill, in the face of a statute positively prohibiting a sale.

The judgment appealed from is affirmed. Affirmed.

TYSON, C. J., and SIMPSON and DENSON, JJ., concur.

(158 Ala. 633)

BURGIN v. MARX.

(Supreme Court of Alabama. Jan. 14, 1909.
Rehearing Denied Feb. 5, 1909.)

1. EVIDENCE (§ 353*)—DOCUMENTARY EVIDENCE—EXECUTION OF BILL OF SALE—SUFFICIENCY.

A bill of sale of an automobile, manufactured by a corporation authorized to manufacture automobiles, executed in the name of the corporation by its president and general manager, having the general control and supervision of the business affairs of the corporation, is sufficiently executed to render it admissible in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1418; Dec. Dig. § 353.*]

2. EVIDENCE (§ 113*)—RELEVANCY—VALUE OF PERSONALTY—ATTEMPTS TO SELL.

Since the measure of recovery, in trespass for seizing and selling personalty, is the value of the property at the time of the seizure, evidence of efforts to sell the personalty several months after the seizure is inadmissible to fix value.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 113.*]

3. LANDLORD AND TENANT (§ 252*)—LIEN FOR RENT—SALES IN REGULAR COURSE OF TRADE.

A sale in the regular course of trade by a tenant engaged in the business of manufacturing displaces the lien of the landlord for rent on the goods manufactured and sold.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1002; Dec. Dig. § 252.*]

4. APPEAL AND ERROR (§ 1027*)—HARMLESS ERROR.

Where a cause was fairly submitted to the jury on a single issue, which determined the rights of the parties, erroneous rulings involving other issues were without injury to the defeated party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4033; Dec. Dig. § 1027.*]

Appeal from Circuit Court, Jefferson County; A. A. Coleman, Judge.

Action in trespass by Otto Marx against A. W. Burgin. From a judgment for plaintiff, defendant appeals. Affirmed.

The case made by the facts is that the Birmingham Electric & Manufacturing Company was indebted to Mrs. L. L. McConnell for rent for a storehouse or place of business, and that she sued out an attachment to enforce the claim, which was levied on an automobile and other property. At the time

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of the levy the automobile was in the house occupied by the corporation as its place of business, and was seized by Burgin as sheriff under the writ. The plaintiff, Marx, claimed that the machine was his, of which notice was given to the sheriff after the levy and before the sale, and that it was sold on venditioni exponas under order of the city court on judgment in the attachment proceedings. The bill of sale was executed on September 3, 1903, and was as described in the opinion. Attachment was sued out on March 31, 1904.

Joel F. Webb and James A. Mitchell, for appellant. L. C. Dickey and George L. Smith, for appellee.

DOWDELL, J. The plaintiff, Otto Marx, claimed title to the automobile in question under a purchase from the "Birmingham Electric & Manufacturing Company," a private corporation. The charter, among other things, authorized the corporation to engage in the business of manufacturing automobiles. The one in question was manufactured by said corporation. There was evidence tending to show that one J. M. Lansden was the president and general manager of the corporation, and "the active financial agent of the company, with general charge, control, and supervision of all its business affairs." The bill of sale of the automobile to Marx was executed in the name of the corporation by its president and general manager, J. M. Lansden. Under this showing we think there can be no doubt of the correctness of the ruling of the trial court in admitting the bill of sale in evidence. *Jlawright v. Nelson*, 105 Ala. 404, 405, 17 South. 91.

There was no error in excluding the evidence of the witness Roscoe McConnell as to the efforts made to sell the automobile after the purchase by Mrs. McConnell at the sheriff's sale. It was not made known to the court for what purpose this evidence was offered. The time was several months after the seizure by the sheriff, and, if the purpose was to fix the value, the answer is: If the plaintiff was entitled to recover for the trespass, he was entitled to recover the value of the property at the time of the seizure.

The real issue in the case was whether the plaintiff was a purchaser of the automobile from the Birmingham Electric & Manufacturing Company in the regular course of trade. It clearly appears from the record that the court, in the instructions given to the jury, both ex mero and at the request in writing of the defendant, limited the right of recovery by the plaintiff to this issue. There was evidence both for and against the plaintiff on this question, and the jury found for the plaintiff. If the plaintiff purchased in the regular course of trade, the lien of the

landlord for rent of the premises on which the business was carried on by the seller, and on which the goods was kept, was thereby displaced. *Andrews Mfg. Co. v. Porter*, 112 Ala. 381, 20 South. 475; *Well v. McWhorter*, 94 Ala. 540, 10 South. 131; 18 Am. & Eng. Ency. of Law (2d Ed.) p. 846.

On this view of the case as tried below, other questions here presented by the assignments of error become immaterial, and the rulings of the court in respect to such questions, if erroneous, were without injury to the defendant. The cause having been fairly submitted to the jury on the single issue above stated, and no reversible error appearing of record, the judgment will be affirmed.

Affirmed.

TYSON, O. J., and SIMPSON, ANDERSON, DENSON, and MAYFIELD, JJ., concur.

(158 Ala. 563)

WESTERN UNION TELEGRAPH CO. v. McMORRIS.

(Supreme Court of Alabama. Dec. 17, 1908.)

1. TELEGRAPHS AND TELEPHONES (§ 68*)—NONDELIVERY OF TELEGRAM—MENTAL ANGUISH.

Mental anguish, alone and unaccompanied by physical injury, occasioned by the negligent failure of a telegraph company to deliver a message, furnishes ground for recovery of damages.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 69, 70; Dec. Dig. § 68.*]

2. DAMAGES (§ 163*)—MENTAL ANGUISH—EVIDENCE.

Where mental anguish forms an element of recoverable damages, direct proof of such suffering is not as a general rule necessary; but it may be inferred by the jury from circumstances attending the particular breach of duty or contract.

[Ed. Note.—For other cases, see *Damages*, Dec. Dig. § 163.*]

3. DAMAGES (§ 23*)—BREACH OF CONTRACT.

Damages for breach of contract are such as may reasonably be considered as arising naturally from the breach, or as may reasonably be supposed to have been in the contemplation of the parties at the inception of the contract as the possible result of a breach.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 58, 59; Dec. Dig. § 23.*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1816, 1817; vol. 8, pp. 7625, 7626.]

4. TELEGRAPHS AND TELEPHONES (§ 68*)—NONDELIVERY OF MESSAGES—DAMAGES FOR MENTAL ANGUISH.

A sender of a telegraph message may recover for mental anguish proximately caused by a failure to deliver the message.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 69, 70; Dec. Dig. § 68.*]

5. TELEGRAPHS AND TELEPHONES (§ 68*)—NONDELIVERY OF MESSAGES—MENTAL ANGUISH—RELATIONSHIP.

The mental anguish which may be said to arise naturally and proximately from the breach

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of a contract to transmit a telegram is limited to certain degrees of relationship, and that of brothers falls within the degree.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 69, 70; Dec. Dig. § 68.*]

6. TELEGRAPHS AND TELEPHONES (§ 66*) — NONDELIVERY OF MESSAGES—DAMAGES FOR MENTAL ANGUISH—EVIDENCE.

Plaintiff delivered to a telegraph operator a message reciting: "Caldwell died last night. Will be down with remains this evening. Open grave on our lot." The operator knew that plaintiff and the deceased person referred to were brothers. The message was not delivered, and when plaintiff reached the town with the remains there was no one to meet him, and no arrangements had been made for the funeral. *Held* that, since the message suggested that the sendee would make arrangements for the funeral and notify friends and relatives to meet plaintiff at the train, the jury might infer the fact of plaintiff's mental suffering, though there was no direct proof thereof.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 66.*]

7. TELEGRAPHS AND TELEPHONES (§ 66*) — NONDELIVERY OF MESSAGES—DAMAGES FOR MENTAL ANGUISH—EVIDENCE.

Where there was no evidence that the sendees were at home or at their places of business the day the message ought to have arrived, or that, if they had received the message promptly, they would have made arrangements for the funeral and have notified friends and relatives of the arrival of the remains, there could be no recovery for mental anguish.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 66.*]

8. TELEGRAPHS AND TELEPHONES (§ 66*) — NONDELIVERY OF MESSAGES—DAMAGES FOR MENTAL ANGUISH—EVIDENCE.

In such case evidence that the funeral was postponed, and that it rained on the day of the funeral, was inadmissible.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 66.*]

9. TRIAL (§ 206*)—INSTRUCTIONS—ABSENCE OF EVIDENCE.

The trial court need not give charges which instruct the jury that there is no evidence of a fact.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 500; Dec. Dig. § 206.*]

10. TELEGRAPHS AND TELEPHONES (§ 67*) — NONDELIVERY OF TELEGRAMS — NOMINAL DAMAGES.

A sender of a telegram requesting the sendee to make arrangements for the funeral of the deceased brother of the sender is, on the failure of the company to promptly deliver the telegram, entitled to nominal damages at least.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 64-68; Dec. Dig. § 67.*]

11. TELEGRAPHS AND TELEPHONES (§ 65*) — NONDELIVERY OF TELEGRAMS — DAMAGES — TOLL PAID—PLEADING.

The amount paid by the sender of a telegram for the transmission thereof is not special damages, and need not be specifically claimed in the complaint in an action against the company for failure to deliver the telegram; but, where it is averred in the complaint as having been paid, the proof and recovery thereof are authorized under the general sum claimed as damages.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 45-60; Dec. Dig. § 65.*]

12. TELEGRAPHS AND TELEPHONES (§ 61*) — FAILURE TO DELIVER TELEGRAMS—DEFENSES — STRIKE OF EMPLOYÉS.

Where a telegraph operator accepted the toll from the sender of a telegram and informed the sender that he had gotten the message off, without mentioning any limitation on the liability of the telegraph company, the fact that some of the company's employes were on a strike was not available as a defense for the nondelivery of the message.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 61.*]

Appeal from City Court of Gadsden; John H. Disque, Judge.

Action by B. Y. McMorris against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The facts are sufficiently stated in the opinion of the court. To the following counts demurrers were interposed and overruled: (4) "Plaintiff claims of defendant corporation the sum of \$1,950 for the breach of the following agreement made by plaintiff with defendant on, to wit, the 7th day of September, 1907, by the terms of which the defendant undertook to transmit and deliver within a reasonable time a message in words and figures substantially as follows: [Here follows the message set out in the opinion.] That defendant was engaged in the business of transmitting and delivering telegraphic messages for hire between said Rock Springs and Clanton, which hire or reward was paid by plaintiff to defendant. That 'Caldwell,' mentioned in said message, was plaintiff's brother, which fact was known to defendant's agent making said contract at Rock Springs for and on behalf of defendant. That if defendant had carried out his said agreement the plaintiff with said remains would have been met at Clanton on their arrival by friends of himself and said brother. That the grave would have been opened and the arrangements made for the funeral. That plaintiff, relying on said agreement, started with said remains from Rock Springs and arrived at Clanton on the night of September 7, 1907. That defendant had failed to deliver said message within a reasonable time, and in fact it was not delivered until, to wit, September 10, 1907, and as a proximate consequence of the breach of said contract there was no one to meet him and his brother's remains at Clanton, the grave had not been opened, nor had any funeral arrangements been made, thereby delaying said funeral and causing plaintiff great mental pain and anguish, to his damage as aforesaid." (6) "Plaintiff claims of defendant corporation the sum of \$1,950 damages, for that on, to wit, the 7th day of September, 1907, plaintiff delivered at Rock Springs, Ala., to defendant's agent, for transmission from Rock Springs, Ala., to A. Kanter or P. C. Dennis, at Clanton, Ala., a message in

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

words and figures substantially as follows: [Here follows telegram set out in opinion.] And defendant contracted and undertook for a certain sum of money, which plaintiff paid to defendant, to deliver said message within a reasonable time to said A. Kanter or P. C. Dennis at Clanton. Plaintiff avers that defendant was engaged in the business of transmitting telegraphic messages for hire between said two places. Plaintiff further avers that defendant broke said contract in this: That it failed to deliver said message within a reasonable time, and on plaintiff arriving at Clanton with said remains there was no one there to meet him, the grave had not been opened, and the funeral was delayed, causing plaintiff to suffer great mental pain and anguish as the proximate consequence of the breach of said agreement. That 'Caldwell,' mentioned in said message, was plaintiff's brother, which fact was known to said defendant." Count 7 is substantially the same as count 4.

There was a general demurrer to the whole complaint on account of misjoinder, and the following grounds of demurrer were assigned to counts 4, 6, and 7: "(1) Said count claims damages for the breach of what the pleader designates as the following agreements made by plaintiff with the defendant, and fails to set out any contract or agreement with any such certainty that an action can be maintained thereon. (2) Said count fails to show any pecuniary damage or loss to which the mental pain and anguish alleged to have been suffered can be superadded. (3) Said count fails to show any damage from the breach of contract which were within the contemplation of the parties. (4) Said count fails to show any foundation for a recovery for mental pain and anguish."

The following charges were refused to defendant: "(8) The court charges the jury that they cannot assess damages in favor of plaintiff for any mental distress occasioned by any delay or postponement of the funeral. (9) The court charges the jury that plaintiff in this case is not entitled to recover damages for mental pain or anguish. (10) The court charges the jury that there is not evidence that any failure to make arrangements for the funeral proximately resulted from the failure to deliver the telegram." (11) Affirmative charge to find for defendant. "(12) The court charges the jury that there is no evidence that the plaintiff suffered any mental distress which is the proximate result of the failure to deliver the telegram, growing out of the fact, if it be a fact, that none of the friends of deceased met the body at the depot upon the arrival of the train. (13) The court charges the jury that there is no evidence tending to show that the addressees, or either of them, would have made any arrangements for the funeral, other than opening the grave, prior to the arrival of the train on which plaintiff traveled; and the question as to whether they would have

opened the grave or not is a question to be determined by the jury from all the facts and circumstances in the case. (14) The court charges the jury that the only mental pain or anguish for which plaintiff is entitled to recover in this case, in any event, would be such mental pain and anguish as he may have suffered by reason of the fact that the grave was not opened as requested in the telegram. (15) The court charges the jury that there is no evidence tending to show that plaintiff suffered any mental pain or anguish growing out of placing the body in the hands of strangers. (16) The court charges the jury that they cannot assess in favor of plaintiff any damages for mental pain or anguish suffered by plaintiff for and on account of the failure of the sendee to meet plaintiff at the depot upon the arrival of the train upon which he was traveling with the corpse. (17) The court charges the jury that they cannot assess damages in favor of plaintiff for any failure to have funeral arrangements made at or prior to the arrival of train at Clanton on which plaintiff traveled." (19) Affirmative charge as to the fifth count.

The following portions of the oral charge were excepted to: (1) "Now, you examine the evidence in this case, gentlemen of the jury, and determine from this evidence reasonably whether upon the receipt of this telegram the people to whom it was addressed would have met that train, would have prepared or made the funeral arrangements, would have dug the grave—in other words, would have made all the funeral arrangements necessary for the purpose of burying this corpse. And you will determine this proposition, gentlemen, from all the facts and attending circumstances in evidence before you, the relationship existing between the parties, their intimacy, and all these matters are directed to you in determining the proposition as to whether or not they would have done these things in the event they had received this telegram." (2) "If it does and it was, and their not being there was the proximate result of the telegram not having been delivered, then this plaintiff would be entitled to recover for mental anguish." (3) "If you become reasonably satisfied from the evidence in this case that from the language of this telegram, the nature and character of it in announcing the death of this man Caldwell, that his friends would have been there to have met that train, and that funeral arrangements would have been made, and the grave dug, then I say, gentlemen of the jury, if you come to that conclusion from the evidence in the case, you have a right to consider what the plaintiff had to do after he got there in order to make these preparations, in determining, not a matter of compensation for what he did, but for the purpose of determining the mental anguish, if any, that he suffered in consequence of that particular thing; that is, in consequence

of having to do these particular things because his friends were not there, and because his friends did not do these things, provided, gentlemen of the jury, as I remarked a moment ago, you are satisfied from the evidence in this case his friends would have done these things."

There was judgment for plaintiff in the sum of \$300.

Goodhue & Blackwood, for appellant. Cull & Martin, for appellee.

DENSON, J. The appellee, as plaintiff in the court below, recovered of the appellant, Western Union Telegraph Company, a judgment in the sum of \$300 for mental anguish alleged to have been suffered on account of breach of contract to promptly transmit and deliver a telegraphic message in the following words and figures: "Rock Springs, Ala. 9/7/1907. Mr. A. Kanter and P. C. Dennis, Clanton, Ala. Caldwell died last night. Will be down with remains this evening. Open grave on our lot. [Signed] B. Y. McMorris." The principal facts of the case may be summarized as follows:

Plaintiff boarded a Louisville & Nashville Railroad train at 11:47 a. m., Saturday, September 7, 1907, at Rock Springs, in Etowah county, Ala., with his deceased brother's remains, carrying them to Clanton, in Chilton county, Ala., for interment in the family burial ground; the brother having died Friday night. Plaintiff and his brother had formerly lived at Clanton and were well known there, and at this time a sister of theirs and their stepmother were residing at that place; the sister being the wife of a son of P. C. Dennis. Kanter had been a friend of the McMorris family for a long time, and he and the deceased had been roommates for a year or two. When plaintiff arrived at Clanton with the remains of his brother, at 6:00 p. m., Saturday, he found no one at the station to meet him, and that no one knew of his coming or was expecting him. The grave had not been opened, nor had the funeral arrangements been made. The funeral and interment did not occur until about 4 o'clock Sunday afternoon. After plaintiff got off the train at Clanton, Mr. Curry approached plaintiff and was informed by him that his brother's remains were on the train. Then plaintiff, with Curry, Van Derveer, and "one or two others," took the remains out of the express car, placed them on the express truck, and carried them up in front of the depot, where plaintiff stood by the remains 20 or 30 minutes, until P. C. Dennis got to the depot. Dennis and plaintiff then went to a livery stable and procured a wagon, and carried the remains to a hotel, where plaintiff's stepmother was boarding, about 100 yards from the depot. Forty-five minutes elapsed from the time the remains arrived at the depot before they were deposited at the hotel. On Sunday morning about 9 o'clock the funeral arrangements were made, and at 11 o'clock they

were announced at church services in Clanton. On the same morning plaintiff and P. C. Dennis obtained the necessary material and had it carried to the cemetery, and employed a negro man to open the grave and line it with brick, as desired by plaintiff. The remains of the deceased brother were carried to the grave, where funeral services were held, and the interment took place at 4 o'clock in the afternoon; a minister of the gospel officiating.

The plaintiff testified: "A good many people were at the funeral. We had such carriages and such open vehicles as could be obtained on Sunday morning in the town of Clanton." It was raining when the burial took place, but no rain had fallen in the morning. The body was in a good state of preservation at the time of the burial. Deceased had died of inflammatory rheumatism, and decomposition did not set in quickly. The plaintiff is a man, being at the time of the death of his brother 29 years of age, and the deceased was a man 34 years of age. Neither Kanter nor Dennis were related to plaintiff or deceased, but had been acquainted with them for 10 years. The message was not delivered until Monday, the day subsequent to that on which the burial took place; nor had the sendees any notice of the death of the deceased until after the plaintiff, accompanying the remains, reached Clanton Saturday afternoon. At the time the defendant company's agent received the telegram for transmission (9:10 a. m., Saturday) he knew that "Caldwell," referred to in the message, was the brother of plaintiff, the sender of the message. Plaintiff paid defendant's operator at Rock Springs about 40 cents toll for the transmission of the message. The message was delivered to the Rock Springs operator, for the plaintiff, by a Mr. Howard, at said hour and date, and within 20 minutes it was transmitted to Anniston; the usual route of messages to Clanton being via Anniston and Birmingham, Ala.—that is to say, from Anniston the messages were repeated to Birmingham, and from the latter point to Clanton—and the time usually necessary for the transmission of a message over said route being 20 minutes.

Phillips, the operator at Rock Springs, testified: "While the gentleman who delivered the message for transmission was in the office, I said: 'You tell Mr. McMorris I got the message off; but it is going to be subject to delay, I think, on account of the strike.'" Howard testified that, when he delivered the message to Phillips, he told him that McMorris said to get it off as quickly as he could, and that Phillips replied, "Certainly." The plaintiff testified that when he went to the station at Rock Springs to take the train, about 11 o'clock Saturday morning, he asked Phillips if he got the message off, and that he replied: "Yes, I tried to get it off as soon as Howard delivered it to me; but the wires were busy, and I did not get it off

right then, but did get it off a few minutes later."

While it is probably in accordance with the decisions of a majority of the state courts that mental anguish and wounded feelings, alone and unaccompanied by personal injury, do not furnish ground for recovery of damages, yet in this jurisdiction the contrary view prevails, as it does in a number of other states. *Western, etc., Co. v. Henderson*, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148; *Western, etc., Co. v. Haley*, 143 Ala. 586, 39 South. 386; *Western, etc., Co. v. Whitson*, 145 Ala. 426, 41 South. 405; *Western, etc., Co. v. Merrill*, 144 Ala. 618, 39 South. 121; *Western, etc., Co. v. Long*, 148 Ala. 202, 41 South. 965. Perhaps the strongest and most satisfactory reasoning in support of the doctrine that mental anguish without accompanying personal injury affords ground for recoverable damages is to be found in the case of *Mentzer v. Western Union Tel. Co.*, 93 Iowa, 752, 62 N. W. 1, 28 L. R. A. 72, 57 Am. St. Rep. 294. The appellant, conceding that the law in this state is settled as above stated, yet contends that the undisputed testimony in the present case does not afford basis for a reasonable inference that the plaintiff suffered mental anguish. It is true no witness—not even plaintiff himself—testified directly that plaintiff suffered mental pain or anguish. So we have for determination the question: Was that an indispensable prerequisite to the right of the plaintiff to have the jury consider mental suffering as an element of recoverable damages?

In cases of physical injury it has been held that mental suffering cannot be dissociated from physical pain, and where the latter is found the former is implied. *Montgomery, etc., Co. v. Mallette*, 92 Ala. 209, 217, 9 South. 363. Therefore in that class of cases direct proof of mental suffering is not required, to entitle a plaintiff to recover for such. *International, etc., Co. v. Mitchell* (Tex. Civ. App.) 60 S. W. 996. And it may be stated to be the rule generally, in Alabama, that, in cases where wounded feelings or mental pain form an element of recoverable damages, direct proof of such suffering is not necessary, but it may be inferred by the jury from circumstances attending the particular breach of duty or contract (*City Nat. Bank v. Jeffries*, 73 Ala. 183, 193; see, also, *Trinity, etc., R. Co. v. O'Brien*, 18 Tex. Civ. App. 690, 46 S. W. 389; 13 Cyc. 205); although in a telegraph case it has been held that the natural utterances and expressions indicative of pleasure, displeasure, pain, or suffering are competent original evidence that may be received in proof of the physical or mental state they signify, whenever that state is a pertinent inquiry. *Western, etc., Co. v. Henderson*, supra.

In recognition of the well-established rule that "when two parties have made a contract, which one of them has broken, the damages which the other ought to have for such breach should be such as may fairly and rea-

sonably be considered as arising naturally from such breach, or as may reasonably be supposed to have been in the contemplation of the parties at the inception of the contract as the possible result of a breach of it," this court said: "When the sender of a message has the right to sue a telegraph company for breach of contract in failing to deliver the message, he can also recover damages for mental anguish of which said failure was the proximate consequence." *Western, etc., Co. v. Henderson*, supra. Under this rule the mental anguish which may be said to arise naturally and proximately from the breach of contracts to transmit telegraphic messages is limited to certain degrees of relationship; and, without here stopping to define the extent of the limitation, it suffices to say that that of brothers falls within the degree recognized by the rule. *Western, etc., Co. v. Haley*, 143 Ala. 586, 39 South. 386.

Here, when the message was received for transmission, the defendant's operator knew the relationship existing between the sender (plaintiff) and the deceased person referred to in the message was that of brotherhood; and we cannot doubt that the perusal of the message naturally suggested that the purpose was, not only that a grave might be opened and adequate preparations for the funeral made, but that the friends and relatives of the sender might be notified to meet him at the train; and it is likewise not to be questioned that it was a natural presumption therefrom that plaintiff would suffer mental pain should he find, on his arrival at Clanton, that by reason of failure to deliver the message all these objects had miscarried. *Western, etc., Co. v. Long*, 148 Ala. 202, 41 South. 965; *Western, etc., Co. v. Coffin*, 88 Tex. 94, 30 S. W. 896; *Western, etc., Co. v. Broesche*, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843; *Western, etc., Co. v. Carter*, 85 Tex. 580, 22 S. W. 961, 34 Am. St. Rep. 826; *Cashlon v. Western, etc., Co.*, 123 N. C. 267, 31 S. E. 493. The injury in such a case may be said to be the natural result of a failure to deliver the message, and must have been in the contemplation of the parties when the contract for the transmission of the message was made. Then, if the facts showing liability are proved, we believe it is the settled law that the jury may infer the fact of mental suffering, because it is recognized as a common result under such circumstances, and the direct proof is not indispensable to show that mental suffering did ensue. *Western, etc., Co. v. Crocker*, 135 Ala. 492, 33 South. 45, 59 L. R. A. 398; *Western, etc., Co. v. Merrill*, 144 Ala. 618, 39 South. 121, 113 Am. St. Rep. 66; *Willis v. Western, etc., Co.*, 69 S. C. 531, 48 S. E. 538, 104 Am. St. Rep. 828, 2 Am. & Eng. Ann. Cas. 52, and notes, and cases cited therein.

But we notice, in this evidence, the lack of a link which we deem indispensable to a case of liability against the defendant for damages for mental suffering. While the tea-

timony shows that Kanter and P. C. Dennis, the sendees of the message, resided within a fourth of a mile of defendant's office in Clanton, and that their places of business were probably within 150 yards of defendant's office, there seems to have been no effort to prove that they were at home or at their places of business during Saturday, except that it is shown that plaintiff, after the train arrived, found Dennis at his place of business; nor is there any evidence to show that the sendees, if they had received the telegram promptly Saturday, would have made arrangements for the funeral, and have had the grave prepared, any earlier. These were facts involved in the issues, provable by the sendees, and we know of no rule of evidence which authorizes the presumption that the sendees were at home or at their places of business, or that they could or would have notified the relatives and friends of the plaintiff and of deceased of plaintiff's expected arrival on the train, or that they could or would have made arrangements for the funeral and a grave, at an earlier hour. *Bright v. Western, etc., Co.*, 132 N. C. 326, 43 S. E. 841; *Hancock v. Western, etc., Co.*, 137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403.

On these considerations, charges 8, 9, 16, 17, and 18, assert correct principles and should have been given; while charge 14 is subject to criticism if at all, merely for being more favorable to plaintiff than warranted under the facts.

For the same reasons, evidence that rain fell Sunday afternoon was improperly admitted.

Some portions of the oral charge of the court excepted to (in view of what has been said above) are abstract.

A trial court is under no duty to give charges which instruct the jury that there is no evidence of a fact, and therefore no error is involved in the refusal of charges 10, 12, 13, and 15 in defendant's series. *Mobile, etc., Co. v. Walsh*, 146 Ala. 295, 40 South. 560.

Charge 11 was properly refused as plaintiff, under the facts, was entitled to nominal damages at least.

The amount paid by the plaintiff as toll for the transmission of the message is not special damages, necessary to be specifically claimed in the complaint as a condition of its recovery; but, if it is averred in the complaint as having been paid, this authorizes proof and recovery thereof under the general sum claimed as damages. 5 Ency. Pl. & Pr. 748; *Wilkinson v. Searcy*, 76 Ala. 176; *Dowdall v. King*, 97 Ala. 635, 12 South. 405. It follows, therefore, that the demurrers to counts 4, 6, and 7, insisted by appellant as being well taken were properly overruled; and for the same reasons the affirmative charges, requested by the appellant in respect to these counts, based upon the theory

that the toll paid is not claimed as a part of the damages, were properly refused.

According to Phillips' (the transmitting operator's) own evidence, he said nothing to Howard (who delivered the message for the plaintiff) in regard to the message being subject to delay on account of the strike until after he had accepted same and transmitted it to Anniston; and what he said did not amount to a contract limiting defendant's liability for failure to transmit, or for delay in transmitting, on account of a "strike," or of any other cause. Then, too, the undisputed testimony shows that Phillips accepted the toll from plaintiff, and informed him he had gotten the message off, without mentioning any limitation on the liability of the company. Under these conditions, the fact that some of the company's employes were on a strike was not available as a defense to the defendant, and the court committed no error in refusing to allow proof of that fact. 27 Am. & Eng. Ency. 1026, 1050.

We have considered all the grounds of error which have been pressed upon our attention; and for the errors pointed out the judgment of the city court must be reversed, and the cause remanded.

Reversed and remanded.

TYSON, C. J., and SIMPSON and ANDERSON, JJ., concur.

(158 Ala. 263)

TALLASSEE FALLS MFG. CO. v. COMMISSIONERS' COURT OF TALLAPOOSA COUNTY.

(Supreme Court of Alabama. June 30, 1908. Rehearing Denied Jan. 14, 1909.)

1. BRIDGES (§ 33*)—CORPORATIONS—RIGHT TO PRESCRIBE TOLLS—STATUTES—CONSTRUCTION—"TAKE."

Act Feb. 11, 1893 (Loc. Laws 1892-93, p. 491), empowering in section 1 a certain corporation to construct a bridge, and authorizing it to "take" reasonable tolls, did not by implication grant the power to prescribe tolls, though the act was silent respecting the fixing of tolls and there was no express reservation of the power to the Legislature.

[Ed. Note.—For other cases, see *Bridges*, Dec. Dig. § 33.*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 6846-6848; vol. 8, p. 7812.]

2. BRIDGES (§ 33*)—CORPORATIONS—RIGHT TO PRESCRIBE TOLLS—STATUTES—CONSTRUCTION.

Nor did Act Feb. 11, 1893 (Loc. Laws 1892-93, p. 491) § 2, empowering the corporation to establish all regulations deemed expedient for the management of traffic over the bridge, imply a grant of power to prescribe tolls.

[Ed. Note.—For other cases, see *Bridges*, Dec. Dig. § 33.*]

3. BRIDGES (§ 33*)—REGULATION OF TOLLS—STATUTES—CONSTRUCTION.

Act Aug. 6, 1907 (Loc. Laws 1907, p. 758), authorizing in section 1 the commissioners' court of Tallapoosa county to regulate and fix the rate of toll to be charged by the owner of a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

certain bridge, was to be construed as though the limitation of prescribing reasonable tolls was written in it; and hence the act did not confer on the court the power to deprive the owner of the right to receive reasonable tolls.

[Ed. Note.—For other cases, see *Bridges*, Dec. Dig. § 33.*]

4. CONSTITUTIONAL LAW (§ 61*)—DELEGATION OF LEGISLATIVE POWER — REGULATION OF BRIDGE TOLLS.

Act Aug. 6, 1907 (Loc. Laws 1907, p. 758), authorizing in section 1 the commissioners' court of Tallapoosa county to regulate and fix the rate of toll to be charged by the owners of a certain bridge, is not unconstitutional, as delegating legislative power to the court.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 108; Dec. Dig. § 61.*]

Appeal from Chancery Court, Tallapoosa County; W. W. Whiteside, Chancellor.

Bill by the Tallassee Falls Manufacturing Company against the Court of County Commissioners of Tallapoosa County. From a decree dismissing the bill, complainant appeals. Affirmed.

Chilton & McKenzie, for appellant. Lackey & Bridges, for appellee.

DOWDELL, J. The bill in this case is filed by the Tallassee Falls Manufacturing Company, a corporation organized under the general law in 1878. The cause was heard on motion of respondent to dismiss the bill for want of equity, and also upon demurrer assailing the bill for want of equity. From the decree of the chancellor, sustaining the motion and demurrer and dismissing the bill, the appeal is prosecuted.

In 1893 an act of the Legislature was passed and approved, entitled "An act to authorize the Tallassee Falls Manufacturing Company to construct a bridge across the Tallapoosa river at or near Tallassee" (Loc. Acts 1892-93, p. 491), which is as follows:

"Section 1. Be it enacted by the General Assembly of Alabama, that the Tallassee Falls Manufacturing Company, a general corporation, incorporated under the general laws of the state of Alabama, be, and they are (it is), hereby authorized and empowered to construct, erect and keep a wagon, foot passenger and railroad bridge, or a bridge for any one or more of these purposes, spanning the Tallapoosa river at or near Tallassee, in the county of Elmore, said bridge to extend across the said river from the county of Elmore to the county of Tallapoosa; and said corporation are (is) hereby authorized to take reasonable tolls for the use of said bridge by passengers and for vehicles, and they (it) shall have power to purchase, hold, sell, convey or otherwise acquire or dispose of real or personal property, or any other kind of property, to issue bonds and pledge or mortgage the said bridge, or the incomes thereof, for the same, to borrow money and secure the same by a mortgage upon the said bridge or the incomes, one or both.

"Sec. 2. Be it further enacted, that said corporation, by its board of directors, shall have power to adopt and establish all rules and regulations which shall be deemed expedient for the management of the traffic over and across the said bridge, not inconsistent with the Constitution and laws of this state and of the United States: Provided, that Tallapoosa county shall be entitled to all the taxes of the bridge that is over Tallapoosa territory, both of land and water."

On the 6th of August, 1907, the following act was passed and approved (Loc. Acts 1907, p. 758), omitting here the title to the act:

"Section 1. Be it enacted by the Legislature of Alabama, that the commissioners' court of Tallapoosa county are authorized and empowered to regulate and fix the rate of toll that shall be charged by the owners of the bridge by passengers and for vehicles, and for traffic and for whatever may pass over the same, and said commissioners' court may from time to time alter said rates of toll, when in the judgment of the court the same shall be necessary and proper.

"Sec. 2. After the rates of toll to be charged for the use of said bridge shall have been fixed by said court of county commissioners it shall be unlawful for the owners or keeper of said bridge to demand or receive from any persons a larger rate of toll than that prescribed and fixed by said court of county commissioners, and for each violation of this act by the owners of said bridge shall forfeit to the persons from whom exclusive (excessive) toll shall have been demanded or received, twenty dollars recoverable before any justice of the peace of said county."

In pursuance of the above last-named act the court of county commissioners of Tallapoosa county, at its regular term in November, 1907, made and entered an order fixing the rate of tolls to be charged by the owners for the use of said bridge by the public. It is not claimed by the bill that the rates so fixed by the court of county commissioners are in their nature confiscatory, or otherwise than just, fair, and reasonable. Indeed, it is conceded in argument that no such contention is made. The contention is that the act of August 6, 1907, is invalid, and that consequently the proceedings had in the court of county commissioners in pursuance of said act are without authority of law and therefore void. The purpose of the bill, and such is the special prayer of the bill, is to have said act of August 6, 1907, declared unconstitutional.

The main contention is that by said act the complainant is deprived of its property without due process of law. This is predicated upon the further contention that by the act of February 11, 1893, hereinabove set out, the complainant corporation was granted the right to prescribe the tolls for the use of its

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

said bridge by the public, and that the franchise or privilege so granted became a vested property right, beyond legislative interference. The argument of counsel based upon this contention is faulty in its premise, in assuming the grant of such franchise or privilege by the act in question. It is admitted in argument that there is no express grant of the franchise claimed by the complainant contained in the act; but it is insisted that the grant exists by implication. The argument is that the right to take reasonable tolls being given the complainant, and the act being silent in respect to the fixing of tolls, and no express reservation of the power to the Legislature, it results by implication that the power was granted to the complainant.

This is opposed to the well-established rule of construction in such cases. The right to "take"—that is to receive—reasonable tolls, cannot, but by a very strained construction, in a grant by the state, imply the power to prescribe the tolls. In *Grand Lodge of Alabama v. Waddill*, 36 Ala. 313-318, it was said: "Grants of power to corporations, unlike the grants of individuals, are to be strictly construed, in favor of the government and against the grantee. Corporations can claim nothing that is not clearly given. Ambiguities operate against them. 'In the construction of every charter, to be in doubt is to be resolved; and every resolution which springs from doubt is against the corporation.'" This case has often been cited in subsequent cases by this court, and the rule of construction there stated adhered to. The act of February 11, 1893, authorizing the construction of the bridge, etc., must be taken as an extension of the chartered powers and rights of the complainant corporation, and in effect to that end an amendment of its charter. In other words, the subject under consideration is to be treated as though the act in question had been incorporated in the original charter. The principle of construction in the grant by the state of powers to the corporation is the same.

That which is claimed by the complainant, by whatever term designated, whether a right, privilege, or franchise, is in character a power. There being, then, no express grant of the power, can it be said that it is clearly given by implication—not by bare implication, but necessary implication? Applying the rule of strict construction against the grantee, as is required to be done in respect to the act in question, under the well-established principle in such cases, we are unable to see how a right given to receive reasonable tolls necessarily implies the grant of power to prescribe such tolls. The fact of the exercise of the power by the corporation in having prescribed rates and received the tolls lends nothing to argument in favor of the grant of the power. Nor does the failure in the act to expressly reserve the power in the state necessarily imply the grant of the power. To so hold would be

to construe the grant in favor of the corporation and against the government, which is opposed to the cardinal rule of construction in such cases.

The failure in the act to prescribe the tolls, or to designate by whom the tolls were to be fixed, implies no grant of the power to the corporation; nor was it thereby deprived of the right of taking or receiving reasonable tolls, a right conferred by the act. The general statute, section 2501 of the Code of 1896, the same as section 1445 of the Code of 1886, which was of force at the date of the passage of the act in question, afforded the means by which the complainant was enabled to fully enjoy the right conferred of receiving reasonable tolls. Under that section the complainant had only to apply to the court of county commissioners to have such tolls fixed. There is nothing in section 2 of the act that we are able to discover which would necessarily imply a grant of power to prescribe tolls. This section merely relates to the establishing of rules and regulations, deemed expedient by the complainant's board of directors, as to the manner of using said bridge for passage and traffic over it.

Our conclusion is no grant of the power claimed can be taken by necessary implication in the act. This conclusion renders it unnecessary to consider the question discussed by counsel relative to the inhibition contained in section 23, art. 1, of the Constitution of 1875, against making irrevocable grants of special privileges or immunities by the Legislature, and of force at the time of the passage of the act of February 11, 1893, since this line of decisions involves the assumption that there was a grant of the power claimed, which we hold was not the case.

It is to be remembered, that it is not claimed or pretended that by the act of August 6, 1907, or by the action of the court of county commissioners under said act, the right of the complainant to take and receive reasonable tolls for the use of its said bridge has been denied to it or interfered with, but merely a denial of the power of the complainant to prescribe the tolls. Nor does the act of August 6th, by any reasonable construction, confer upon the court of county commissioners the power to deprive the complainant of its right to have and receive reasonable tolls for the use of its said bridge by the public. The act of August 6th is to be construed, if possible, so as to uphold its constitutionality and that it is susceptible of such construction we have no doubt, and to that end it is to be construed as though the limitation of prescribing reasonable tolls were written in it.

Nor is this act open to the constitutional objection of a delegation of legislative power to the court of county commissioners. The right of the Legislature to delegate such powers to the courts of county commissioners

without offending any constitutional provision has been too well established in our jurisprudence to admit of question at this time. *Standhill v. Court of County Com'rs of Dallas Co.*, 80 Ala. 287; *Askew v. Hale Co.*, 54 Ala. 639, 25 Am. Rep. 730; *Edmondson v. Ledbetter*, 114 Ala. 477, 21 South. 989.

We find no error in the record, and the decree of the chancellor will be affirmed.

Affirmed.

TYSON, C. J., and ANDERSON and McCLELLAN, JJ., concur.

(158 Ala. 596)

**SOUTHERN HARDWARE & SUPPLY CO.
v. STANDARD EQUIPMENT CO.**

(Supreme Court of Alabama. Dec. 17, 1908.
Rehearing Denied Jan. 14, 1909.)

1. TRIAL (§ 191*)—INSTRUCTIONS—INVADING PROVINCE OF JURY.

In an action for injuries to plaintiff's mule from defendant's runaway team, alleged to have been left unattended in the street in violation of a city ordinance, conceding that a violation of the ordinance would be negligence per se, a charge assuming and instructing that defendant's wagon was left unattended and that the driver was negligent was erroneous; the question whether the ordinance had been violated being for the jury.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 191.*]

2. MUNICIPAL CORPORATIONS (§ 703*)—USE OF STREET—VIOLATION OF ORDINANCE—"LEAVING."

The word "leaving," as used in an ordinance forbidding the leaving of a horse, etc., unattended in the street, means to desert, to abandon, to forsake; hence to give up, to relinquish.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 703.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4050-4053; vol. 8, p. 7703.]

3. MUNICIPAL CORPORATIONS (§ 705*)—USE OF STREET—ORDINANCE—VIOLATION—LEAVING TEAM UNATTENDED IN STREET.

Where a team was attended by a driver, who was loading the wagon, the fact that nobody was actually holding the team would not amount to a violation of a city ordinance forbidding the leaving of a horse, etc., unattended in the street.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 705.*]

4. MUNICIPAL CORPORATIONS (§ 706*)—USE OF STREET—LEAVING TEAM IN STREET—NEGLIGENCE.

The driver was not negligent per se, regardless of the ordinance, simply because he was not holding the bridle or lines.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 706.*]

5. DAMAGES (§ 105*)—MEASURE—DESTRUCTION OF PERSONAL PROPERTY.

As a general rule the measure of damages for property destroyed or rendered valueless is its market value at the time of injury or destruction, with interest.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 266; Dec. Dig. § 105.*]

6. DAMAGES (§ 44*)—ELEMENTS—INJURY TO ANIMAL—EXPENSES INCURRED.

Where an animal is injured, but not so seriously as to indicate an improbable recovery,

the owner owes a duty to the person liable for the injury to resort to all prudent means to save the animal and reduce the damages; and he can recover the expenses reasonably incurred to that end, in addition to the animal's value, if it subsequently dies as the proximate cause of the injury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 90; Dec. Dig. § 44.*]

7. MUNICIPAL CORPORATIONS (§ 706*)—NEGLIGENCE IN USE OF STREET—INSTRUCTIONS.

In an action for the value of an animal killed by a collision in the street, where defendant specially pleaded that plaintiff allowed its animal to stand in the street unattended, in violation of an ordinance, and that its negligence proximately contributed to the loss of the animal, it was error to refuse to charge that if plaintiff's animal was left in the street unattended and unhitched, and if the injury would have been averted had there been an ordinarily prudent attendant, then the injury would have been due to plaintiff's negligence, since the facts hypothesized corresponded with those specially pleaded.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 706.*]

Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge.

Action by the Standard Equipment Company against the Southern Hardware & Supply Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The allegations of the complaint are, substantially, that a team of defendant was left standing in the streets of Mobile unhitched, in violation of an ordinance of the city against leaving a team unhitched or unattended, and that the team ran away, injuring a mule of plaintiff. Damages are claimed for medical attention for the mule, and for the value of the mule, and for the rent and hire of a mule to take the place of the one injured.

Defendant filed the general issue and the following special plea: "(2) It is true, as alleged in the second count of the complaint, that the city of Mobile had in force, at the time of the alleged injuries to plaintiff's mule, the ordinance mentioned in said second count; and defendant avers that plaintiff itself was guilty of negligence, in this: That it allowed its mule, the injury and death of which is the subject of this suit, to be and stand on the public streets of said city of Mobile unattended and without being hitched, in violation of said ordinance, and said negligence of plaintiff in having no attendant in charge of the mule at the time proximately contributed to the injuries received by the said mule."

The assignments of error as to evidence are as follows: "(1) The court erred in sustaining plaintiff's objection to defendant's question to the witness Christian as to why he did not say to defendant that he wanted it to take charge of the mule before he sent it to Edwards Hospital. (2) The court erred in sustaining plaintiff's objection to defendant's question to the witness New as to

whether a driver in charge of plaintiff's mule would or would not have been able to get the mule out of the way of the runaway team. (3) The court erred in sustaining plaintiff's objection to the defendant's question to the witness Herzog as to whether a reasonably prudent driver or attendant in charge of plaintiff's mule could have gotten him out of the way of the approaching runaway team."

The court, in its oral charge, instructed the jury that it was negligence per se to leave the wagon there unattended. Exception was reserved to this, as was an exception to the following oral charge: "Now, it seems from the evidence that plaintiff was also guilty of leaving his animal, the mule that was injured, unattended in the street. I think I can charge you as a matter of law that plaintiff is guilty of negligence in that respect. But you must look to see whether that was the proximate cause of the injury, or whether the original negligence of defendant was the proximate cause; and if you believe that this wagon of plaintiff was standing there unattended, and that there was a driver near, and that the driver saw this runaway team coming towards him, and if this driver negligently failed to draw aside and let the runaway team pass, then, of course, that would be contributory negligence, which would defeat this recovery."

The following charge was refused to defendant: "(4) The court charges the jury that if you believe, from all the evidence, that the mule and team of plaintiff was standing on the street unhitched and unattended, and if you further believe, from all the evidence, that if it had been attended by an ordinarily prudent person, the injury would have been averted, then the injury to said mule would have been due to the contributory negligence of the plaintiff in not having said mule attended by such prudent person, and your verdict should be for the defendant."

McIntosh & Rich, for appellant. R. W. Stoutz, for appellee.

ANDERSON, J. Conceding that the violation of the ordinance in question would be negligence per se, the trial court invaded the province of the jury in so much of the oral charge as assumed and instructed the jury that the wagon of defendant was left unattended and that the defendant's driver was in effect guilty of negligence. The ordinance prevents the "leaving of a horse," etc., "unattended in the street." "Leaving," as used in this ordinance, means to desert, to abandon, to forsake; hence to give up, to relinquish. It was therefore a question for the jury as to whether or not the defendant's driver violated the ordinance. The witness West testified: "The team was attended by the driver, and being loaded by him, and also by the man who helps to load; but nobody was holding the mules. The driver was right

there, and he grabbed the bridle before they had gone 10 feet, and before they struck the mule of the Standard Equipment Company." It is true the witness stated that no one was actually holding the mules; but this did not, of itself, amount to a violation of the ordinance. Nor can it be said that the driver was guilty of negligence per se, regardless of the ordinance, simply because he was not holding the bridle or lines at the time the team started.

The general rule as to the measure of damages for property destroyed or rendered valueless is the market value of same at the time of the injury or destruction, and the interest. *Southern Ry. v. Gilmer*, 143 Ala. 490, 39 South. 265. While this is the general rule, and it affords full compensation in case of the total destruction of the property or its value, yet there is good authority to the effect, especially in case of injury to animals, that, if the animal is not killed or so injured as to indicate an improbable recovery, the owner has not only the right, but it is his duty, to resort to all prudent and reasonable means to save the animal, and thereby reduce the damages. This is done for the benefit of the defendant, and the owner is entitled, as an element of damages, to the reasonable expense, prudently incurred, in his efforts to save the animal. It is insisted that, while this may be the rule in case of a mere injury, it does not obtain where there is a total destruction or death of the animal, and when the plaintiff gets the value of the animal he gets full compensation. We are inclined to follow the authorities that hold that the plaintiff is entitled to recover the expenses reasonably and prudently incurred by him in his efforts to save the animal, in addition to the value thereof, in case of the subsequent death of same as the proximate result of the defendant's wrong. 13 Cyc. 61; *Ellis v. Hilton*, 78 Mich. 150, 43 N. W. 1048, 6 L. R. A. 454, 18 Am. St. Rep. 438; *Watson v. Lisbon Bridge Co.*, 14 Me. 201, 31 Am. Dec. 49.

It is also argued that it would be dangerous to permit a recovery for expenses in attempting to cure or restore the animal, in addition to the value thereof, in case of death, as the expenses would exceed the value of the animal. The answer to this is: The law only allows reasonable expenses prudently incurred to save the animal. If the expense exceeded the value of the animal, or is for treating one whose condition was such as to make it apparent that a recovery was hopeless, then it would not be reasonable, and would not be sanctioned. The trial court did not err in not charging out the claim for medicine and treatment of the mule as an element of damages.

Charge 4, requested by the defendant, should have been given. It did no more than to instruct a finding for the defendant, if the jury believed, from the evidence, the facts therein hypothesized, and which cor-

responded with those relied upon in special plea 2.

The trial court committed no reversible error in ruling upon the evidence.

The judgment of the law and equity court is reversed, and the cause is remanded.

Reversed and remanded.

TYSON, C. J., and SIMPSON and DENSON, JJ., concur.

(158 Ala. 278)

CLARK et al. v. BIRD.

(Supreme Court of Alabama. Dec. 17, 1908.
Rehearing Denied Feb. 5, 1909.)

1. HOMESTEAD (§ 117*)—SPECIFIC PERFORMANCE (§ 55*)—CONTRACTS ENFORCEABLE—CONVEYANCE OF HOMESTEAD NOT SIGNED BY WIFE.

A bond given by a husband, obligating himself to convey part of his homestead, not signed and separately acknowledged by his wife, was void as an obligation to convey, and could not be specifically enforced by the purchaser.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 191; Dec. Dig. § 117; * Specific Performance, Dec. Dig. § 55.*]

2. HOMESTEAD (§ 122*)—BY DEED—TRANSFER NOT IN CONFORMITY TO STATUTE.

A conveyance by a husband of his homestead, which does not conform to Code 1907, § 4161, requiring the signature of the wife and her separate acknowledgment, is a nullity for all purposes, and does not operate as an estoppel against the husband, though he was paid a valuable consideration therefor.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 19; Dec. Dig. § 122.*]

3. HOMESTEAD (§ 163*)—ABANDONMENT—RENTING PART OF HOMESTEAD.

Renting part of a homestead, the owner at the time residing on the other portion, does not operate as an abandonment of the homestead, or affect its character.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 834; Dec. Dig. § 163.*]

4. HOMESTEAD (§ 132*)—TRANSFER BY VOID CONVEYANCE—RECOVERY—CONDITIONS PRECEDENT—REFUNDING OF PURCHASE PRICE.

Under Const. 1901, § 205, exempting the homestead from debts except those arising from mortgage or other alienation with the voluntary assent and signature of the wife, and Code 1907, § 4161, prescribing the method by which the wife may give her consent, a contract for the sale of a homestead being void because not assented to by the wife, the court could not require the money paid on the price to be refunded as a condition precedent to recovering the homestead, since that would be equivalent to creating a lien or incumbrance.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 244; Dec. Dig. § 132.*]

5. HOMESTEAD (§ 131*)—TRANSFER BY VOID CONVEYANCE—RECOVERY—PAYMENT FOR IMPROVEMENTS.

The court could not, as a condition precedent to a judgment for the recovery of the homestead, fasten a lien on the homestead for improvements made by the person in possession under a void contract of sale, on the theory of an equitable estoppel growing out of the owner's acquiescence.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 236; Dec. Dig. § 131.*]

Appeal from Chancery Court, Limestone County; W. H. Simpson, Chancellor.

Bill by Charles Bird against John A. Clark and another. From an order denying a motion to dismiss the bill and overruling demurrers, and decree for complainant respondents appeal. Reversed and rendered.

The contract sought to be enforced was as follows: "Know all men by these presents, that I, J. A. Clark, as principal, am held and firmly bound to Charles Bird in the penal sum of \$500, for payment of which, well and truly to be made, I bind myself, my heirs, executors, and administrators by these presents. Signed and sealed by me this the 4th day of November, 1899. The condition of this obligation is such that, whereas, said J. A. Clark has bargained and sold to the said Charles Bird, to wit, certain tracts of land as follows: N. $\frac{1}{2}$ of W. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of Sec. 31, T. 8, R. 4 W., for the sum of \$500, payable in five notes, with interest after maturity. Said J. A. Clark shall by deed alien and convey to the said Charles Bird the land above described in fee simple, with general warranty, then this obligation to be null and void; otherwise, to remain in full force and effect." Then follows the five notes executed by Bird to Clark. Four of the notes were paid, and payment of the fifth note refused, and ejectment brought, which action the bill was brought to reform.

W. R. Walker, for appellants. W. T. Sanders, for appellee.

ANDERSON, J. The 40 acres in controversy was at the time of the attempted sale a part of the homestead, and the bond executed by John A. Clark, not being signed and separately acknowledged by his wife, was void as an obligation to convey, and was not the subject of a specific enforcement. *Moses v. McCain*, 82 Ala. 370, 2 South. 741; *McGhee v. Wilson*, 111 Ala. 619, 20 South. 619, 56 Am. St. Rep. 72. Nor does a conveyance of the homestead which does not conform to the statute (section 4161 of the Code of 1907) operate as an estoppel against the husband, notwithstanding he has been paid a valuable consideration. It is simply void—a nullity to all intents and purposes. *Halso v. Seawright*, 65 Ala. 431; *Alford v. Lehman*, 76 Ala. 526; *Crim v. Nelms*, 78 Ala. 604. The renting of these 40 acres, which was a part of the homestead, the owner at the time residing on the other portion, did not operate as an abandonment or affect its character as a homestead. *Bailey v. Dunlap*, 138 Ala. 415, 35 South. 451; *Metcalf v. Smith*, 106 Ala. 301, 17 South. 537. The chancellor therefore properly decreed that the contract was a nullity and not the subject of a specific performance.

The Constitution of 1901 (section 205) expressly exempts the homestead from the payment of any debt, except by a mortgage or other alienation, with the voluntary assent and signature of the wife; and section 4161

of the Code of 1907, provides the method of giving the assent. The only exception made for bidding the homestead for a debt, except as specially provided for, is under section 207 of the Constitution, in favor of laborers' and mechanics' liens. To require the refunding of the purchase money, paid under a void contract of purchase, as a condition precedent to the recovery of the homestead, would be but the fastening of a lien or incumbrance on the same, directly in the teeth of the Constitution, thus creating upon the homestead, by way of estoppel, a charge or lien, which could not be placed thereupon by the direct and voluntary act of the owner, except in the manner and form required by the Constitution and statute. Nor can we understand how a court of equity can fasten a lien on the homestead for improvements, made by one in possession under a void contract of purchase, upon the theory of an equitable estoppel, thus doing, through the machinery of a court indirectly, what the parties could not have done directly, except in a certain manner. The chancery court cannot fasten a lien on the homestead, growing out of the acquiescence by the owner, upon the idea that it amounts to an implied obligation to pay for the improvements, when an express promise and obligation to do so could not operate as a charge, unless made in the manner and form prescribed by law, or unless it was for labor and material, and even in that event a compliance with the statute would be essential to the enforcement of same.

We, of course, have decisions where the court has required the repayment of the purchase money as a condition precedent to a recovery of land; but they did not involve the homestead. So, too, are owners of land required, under certain conditions, to pay for improvements as a condition precedent to an eviction of an adverse holder, and we have a statute on the subject. Section 384 of the Code of 1907. Whether or not this section would apply to suits for the homestead we need not decide, since the complainant in the case at bar is not an adverse holder, not having paid all the purchase money. On the other hand, if he was, he could get the benefit of the statute in the pending action of ejectment.

The case of *Cowan v. Southern R. R.*, 118 Ala. 554, 23 South. 754, and which is relied upon by counsel, is no authority estopping the plaintiff (Clark) from recovering his homestead, because of the erection by Bird, with the knowledge of Clark, of improvements, until first paying for said improvements. It is true this *Cowan Case*, supra, lays down the general rule of an estoppel from evicting a railroad whose track was laid with the knowledge of the owner, and cites authorities on the subject. But the homestead was not involved in a single case cited, and while the land in said *Cowan Case*,

supra, was the homestead, what was said as to the estoppel was not decisive of the case. There was no attempt to evict the railroad, as the bill simply sought compensation for the right of way and that the company be enjoined from using the same until complainant was compensated under the Constitution and statutes pertaining to the exercise of the right of eminent domain. Moreover, we can see how the doctrine of estoppel might be invoked against the eviction of a railroad going over the homestead, and yet not have any application to property not condemned or taken under the doctrine of eminent domain. The Constitution makes provision for taking property for certain purposes, whether it be the homestead or not, by compensating the owner, and which can be done independent of obtaining a conveyance. Yet when a conveyance is relied upon, instead of condemnation proceedings, the conveyance to the right of way, if over the homestead, is null and void, unless it is separately acknowledged by the wife. *McGhee v. Wilson*, 111 Ala. 619, 20 South. 619, 56 Am. St. Rep. 72. But whether or not the doctrine of estoppel can be invoked in these railroad cases, as against the homestead, we need not decide, as it would have no bearing upon the case at bar, there being no railroad or right of condemnation involved. Nor should what we here say bear upon the railroad cases, as none of them involved the homestead, except the *Cowan Case*, supra, and we have attempted to demonstrate that it is not an authority in support of the estoppel set up in the case at bar.

While we hold that the bond of John A. Clark is void as an obligation to convey the homestead, we do not wish to intimate that he would not be personally liable for a breach of same.

The chancellor erred in not dismissing the bill of complaint, and the decree is reversed, and one is here rendered dismissing same.

Reversed and rendered.

TYSON, C. J., and SIMPSON and DENSON, JJ., concur.

(158 Ala. 73)

MILLER et al. v. STATE.

(Supreme Court of Alabama. Jan. 14, 1909. Rehearing Denied Feb. 5, 1909.)

1. BAIL (§ 74*)—DISCHARGE—OFFICER'S CUSTODY OF ACCUSED.

When accused is taken into custody by the proper officer, he is no longer in the custody of his bail, who are thereby discharged.

[Ed. Note.—For other cases, see *Bail*, Cent. Dig. §§ 289-291; Dec. Dig. § 74.*]

2. BAIL (§ 74*)—DISCHARGE OF BAIL—JUDGMENT OF CONVICTION—VACATION.

Where accused was in court at the rendition of a verdict and judgment against him for a felony, he thereby immediately passed from the custody of his bail to that of the sheriff under an implied order of the court by which his

ball were discharged; nor could they be again bound by the subsequent vacation of the judgment and the granting of a new trial, and an order that defendant be held on his former bond until discharged by due process of law.

[Ed. Note.—For other cases, see Bail, Dec. Dig. § 74.*]

Appeal from Circuit Court, Walker County; T. L. Sowell, Special Judge.

Proceeding by the State against J. M. Miller and others. Judgment for the state, and defendants appeal. Reversed and rendered.

J. D. Acuff and A. G. & E. D. Smith, for appellants. H. C. Selheimer and N. L. Miller, for the State.

DENSON, J. This is a proceeding by *scire facias* against bail on a forfeited recognizance. The defendants, in answer to the *scire facias*, showed that their principal, at the term of the court previous to the one at which the judgment nisi was entered, was tried and convicted of the offense against which, for his enlargement, the bond was given. The principal was present in court when the verdict of guilty was returned and the judgment of conviction thereupon was entered, and at that time he was taken into custody by the sheriff and placed in jail under said conviction. At a subsequent day during that term, and while he was so in custody, the court, on the defendant's motion, set aside the verdict and judgment of guilt, and granted defendant a new trial, at the same time ordering that defendant be held under his former bond (the one here in question) until discharged by due process of law. The sureties on the bond knew nothing of the order of the court, and took no part in procuring it. The court held that these facts presented no sufficient reason for setting aside the judgment nisi, and made it absolute. The sureties appeal, and assign this ruling as one of the grounds of error.

In *Ex parte Williams*, 114 Ala. 29, 22 South. 446, it was held that upon the reversal of a judgment of conviction the defendant, who at the time of his conviction and sentence was out on bond, was not entitled to release from custody by virtue of that bond; and a petition for habeas corpus to be released on the bond was refused. In the course of the opinion in that case the court said: "Whenever a party is convicted and sentenced, he is no longer in the custody of his bail, but is in the custody of the proper officer of the law, and the bail are thereby discharged by the operation of law without a formal order to that effect." Upon the word "sentenced," or upon the fact that the court pronounced sentence on the defendant, it is sought by the Attorney General to differentiate that case from the one in judgment. The court, further on in that opinion, said: "The mere appearance of the defendant at court for trial, or his presence during trial, will not op-

erate to discharge the bail. The obligation of a proper bail bond binds the sureties, at least, until after the verdict of the jury; but, when the sentence of the law is pronounced, the officer of the law is charged with its due execution. The bail have no further control over the custody of their principal, and cannot be longer held responsible." It was also said: "The bail bond became functus by the trial and sentence."

Hawk's Case, 84 Ala. 466, 4 South. 690, was one where the defendant in a criminal case, on bond, absconded during the progress of the trial and before the jury returned a verdict. It was there said that the statute "declares that the undertaking of bail binds them for the appearance of the defendant until he is discharged by law. The discharge can take place after the trial is begun, in the absence of a surrender by the sureties, only by an order of discharge based on a nolle prosequi of the indictment, a verdict of acquittal, or a verdict of conviction, followed by the sheriff's taking custody of the defendant by the implied or express order of the court, which includes any necessary custody taken to prevent his escape. The obligation, therefore, ordinarily binds the sureties for the continued appearance of the defendant during every stage of the trial, from the time it is entered on at least until the rendition of the verdict of the jury." Hawk's Case, 84 Ala. 466, 4 South. 690. In Cook's Case, 91 Ala. 53, 8 South. 686, the defendant appeared and continued his presence in court until the jury retired to consider their verdict in his case, whereupon he absconded; and it was sought by his bail to avoid a judgment absolute. The court said of the pleas setting up these facts: "The pleas were fatally defective. Disclosing that the trial had been entered upon, they should have disclosed, further, that the defendant had remained in attendance to respond to the judgment that should result therefrom, or that the sureties were discharged by reason of the defendant's being taken in custody." By these authorities it seems to be established, beyond cavil, that when the principal is taken into custody by the proper officer he is no longer in the custody of the bail, and the bail are discharged.

In this case the principal was convicted of a felony. He was present at the rendition of the verdict and judgment of the court on the verdict; and, this being true, it was the duty of the sheriff to take him into custody. While there was no express order of the court that he should do so, there is, under such circumstances, always an implied order that the sheriff shall take custody of the defendant; and the defendant was as legally in the custody of the sheriff as if the bail had delivered him, under the statute (Code 1907, § 6351), into such custody. It is the surrendering of the defendant into the custody of the sheriff that exonerates bail under the statute, and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

if, under a judgment of conviction of the offense charged, the sheriff rightfully secures custody of the defendant, it must follow that the defendant is as rightfully withdrawn from the custody of his bail, so far as that offense is concerned, as if they had surrendered him. *Ex parte Chandler*, 114 Ala. 8, 22 South. 285. From these considerations it is manifestly true that, if the defendant, after his conviction and before the granting of the new trial, had escaped from the jail or the custody of the sheriff, no liability would have attached to the sureties on the bond.

The defendant having been legally withdrawn from the custody of his bail, the question then is: Did the granting of a new trial and the making of the order by the court that he be held under the bond revive the sureties' liability? We can see no difference in principle between the status of sureties on a bail bond after the judgment of conviction against their principal has been reversed, and that after the judgment has been annulled on motion for new trial. The judgment in either case is set aside and held for naught. *State v. Glenn*, 40 Ark. 332; *State v. Murphy*, 10 Gill & J. (Md.) 365. It was the taking of the prisoner from the custody of the bail, and transferring him to that of the sheriff, that released the sureties (*State v. Murmann*, 124 Mo. 502, 28 S. W. 2); and, being released, the court could not, without their consent, revive their liability by simply ordering that "the defendant be held under his present bond." That would be the making of a contract, for the sureties and without their consent, by the court.

There is, under the facts of this case, no liability against the sureties on the bond, and the circuit court erred in not so holding. The judgment of the circuit court is reversed, and judgment will be here rendered for the defendants.

Reversed and rendered.

HARALSON, SIMPSON, and ANDERSON, JJ., concur.

(158 Ala. 627)

CORONA COAL & IRON CO. v. WHITE.
(Supreme Court of Alabama. Nov. 26, 1908.
Rehearing Denied Feb. 5, 1909.)

1. MASTER AND SERVANT (§ 304*)—DRIVERS—DUTY.

A driver, having custody of his employer's team, was bound to see that it was not left unattended in a street, so that it was apt to run away and injure persons rightfully on the street.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1226-1227; Dec. Dig. § 304.*]

2. MASTER AND SERVANT (§ 332*)—INJURY TO THIRD PERSONS—EMPLOYER'S AUTHORITY—JURY QUESTION.

In an action for injury caused by defendant's driver leaving a team unattended in a street, held under the evidence a jury question whether the driver was acting according to his

usual custom in using the team, and with defendant's acquiescence.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 332.*]

3. MUNICIPAL CORPORATIONS (§ 705*) — STREETS — UNATTENDED HORSES — NEGLIGENCE.

It is negligent for an owner of a team of horses to leave them untied and unattended in a street, and he is liable for any damage caused by their running away.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1515; Dec. Dig. § 705;* *Highways*, Cent. Dig. § 468.]

4. MUNICIPAL CORPORATIONS (§ 705*) — STREETS—PEDESTRIANS—RIGHTS.

One traveling in a street can assume that horses moving therein are under control, and it is not contributory negligence to walk on the sidewalks and to cross the street without looking up and down the street, though it would be negligent to walk in front of a moving team; the rule requiring persons crossing railroad tracks to look and listen being inapplicable to persons crossing a street.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1515, 1517; Dec. Dig. § 703.*]

Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge.

Personal injury action by Nora White against the Corona Coal & Iron Company. From a judgment for plaintiff, defendant appeals. Affirmed.

W. C. Davis and S. D. & J. B. Weakley, for appellant. Bowman, Harsh & Beddow, for appellee.

SIMPSON, J. The appellee sued in this case for damages caused by being struck and knocked down by a wagon and team belonging to the defendant. It is not disputed that the wagon and team were left by the driver, while he went into the house to get a trunk belonging to the shipping clerk of defendant company to take the same to the depot, and that, while left unattended, the team ran away and came in collision with the plaintiff, who was walking on the street of Corona. The contention of the appellant is that it was entitled to the general affirmative charge, because, first, it was not within the scope of the driver's duties to carry a trunk of one of the employes to the depot; and, second, that the plaintiff was guilty of contributory negligence, in not turning to look when she heard the wagon and team coming down the street.

The evidence is without conflict that this team was under the care and control of Mac Kimbrell, the driver, all of the time, whether he was hauling coal for the defendant or not. He fed, hitched, and unhitched the team; and, whether it was before 7 o'clock in the morning (the hour for regular work) or not, he had charge of the team as the servant and agent of the defendant, and it was his duty not only to care for it, but to see that it was not left unattended on the street, so as to incur the danger of its run-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ning away and injuring those who had a right to be on the street.

The evidence in this case is not so clear as to authorize the court to take away from the jury the right to determine whether or not the driver of the team was acting in accordance with the usual custom in the use of the team, and with the acquiescence of the master.

It is negligence for the owner of a horse to leave a team of horses unhitched and unattended on a public street, and he thereby becomes liable for any damage caused by their running away. *Dolfinger & Co. v. Fishback*, 12 Bush, 474, 1 Am. Neg. Cas. 288; *Doherty v. Sweetser*, 82 Hun (N. Y.) 556, 1 Am. Neg. Cas. 333; *Shearman & Redfield on Neg.* (3d Ed.) p. 235, § 194; 26 Cyc. 1529, 1530.

A person traveling on the public streets has a right to presume that horses moving on said streets are under the control of their owners, and it is not contributory negligence to walk on the sidewalks and to cross the streets without looking up and down the street, although, of course, it would be negligence to walk right in front of a moving team. Merely hearing the team coming was not notice to the plaintiff that it was running away. The rule with regard to looking and listening, before crossing a railroad, has no application to a person crossing a street. *Moebus v. Herrmann*, 108 N. Y. 349, 15 N. E. 415, 2 Am. St. Rep. 440.

There was no error in the refusal of the court to give the general charge in favor of the defendant; and, this being the only point argued by counsel for appellant, the judgment of the court is affirmed.

Affirmed.

TYSON, C. J., and DENSON and McCLELLAN, JJ., concur.

(158 Ala. 301)

ALABAMA CENT. R. CO. v. LONG.

(Supreme Court of Alabama. Jan. 14, 1909.
Rehearing Denied Feb. 5, 1909.)

1. EMINENT DOMAIN (§ 268*)—REMEDIES OF OWNERS OF PROPERTY—EJECTMENT—INJUNCTION.

Where an owner contracted in writing to convey to a railroad company land for a right of way, and the railroad constructed at great expense its road over the land under the contract with the knowledge and consent of the owner, the railroad, offering to do equity and make compensation for the land, could restrain the owner from suing in ejectment.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 739; Dec. Dig. § 268.*]

2. SPECIFIC PERFORMANCE (§ 8*)—REMEDY—JUDICIAL DISCRETION.

The remedy of specific performance rests largely in judicial discretion, regulated by defined rules.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 17, 18; Dec. Dig. § 8.*]

3. SPECIFIC PERFORMANCE (§ 25*)—CONTRACTS ENFORCEABLE.

To justify specific performance of a contract, the contract must be just, fair, and reasonable, reasonably certain in respect to the subject-matter, terms, and stipulations, and must be founded on a valuable consideration.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 56; Dec. Dig. § 25.*]

4. FRAUDS, STATUTE OF (§ 106*)—CONTRACTS FOR SALE OF REAL ESTATE—REQUISITES.

Under the statute of frauds, a contract for the sale of land must express a valuable consideration, describe the subject-matter directly, or make reference to something outside of the writing by a resort to which certainty may be established.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 211; Dec. Dig. § 106.*]

5. FRAUDS, STATUTE OF (§ 106*)—CONTRACTS FOR SALE OF REAL ESTATE—REQUISITES.

A contract in writing, whereby an owner of land agrees to convey to a railroad such lands as may be in actual use or occupied by the railroad on the completion of its roadbed over quarter sections described, is, on the completion of the road, absolute, and fixes on the owner the duty of making a deed to such land as is in the actual use and occupancy of the railroad in the quarter sections, and is not within the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Dec. Dig. § 106.*]

6. SPECIFIC PERFORMANCE (§ 49*)—CONTRACTS—CONSIDERATION.

A contract for the conveyance of land to a railroad for a right of way in consideration of \$1 is, in the absence of fraud or fiduciary relation, supported by a sufficient consideration to authorize its specific performance.

[Ed. Note.—For other cases, see *Specific Performance*, Dec. Dig. § 49.*]

Appeal from Chancery Court, Walker County; A. H. Benners, Chancellor.

Suit by the Alabama Central Railroad Company against Z. M. Long, as administratrix of John B. Long, deceased. From a decree sustaining a demurrer to the bill, complainant appeals. Reversed and rendered.

W. C. Davis and A. F. Fite, for appellant.
Lacy & Lacy, for appellee.

DENSON, J. This bill is filed by the Alabama Central Railroad Company, a corporation, to enjoin an ejectment suit commenced against it in the circuit court of Walker county by Z. M. Long, as the administratrix of the estate of John B. Long, deceased, to recover a strip of land 20 feet wide through the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 34, township 18, range 7 W., in said county, over or upon which complainant's road is constructed. The bill shows that the road was constructed over said land under a contract in writing made by John B. Long during his lifetime with the complainant in the words and figures following:

"Know all men by these presents, that I, John B. Long, for and in consideration of the sum of one dollar to me in hand paid by the Alabama Central Railroad, a corporation, do hereby agree and covenant to execute to said corporation a quitclaim deed, in

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

proper form, conveying to said corporation such lands as may be in actual use or occupancy by it on the completion of its roadbed over the following described land, together with the usual right of way privileges, said roadbed to be constructed west of the South Lowell public road and over the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 27, and the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 34, township 13, range 7 West, in Walker county, Alabama, center of track to be seventy feet or more west of the present log barn.

"Given under my hand and seal this ——— day of October, 1906.

"[Signed] John B. Long.

"Attest: N. M. Appling."

The equity of the bill is rested upon two theories: First, that the road was constructed over the land under said contract, with the knowledge and consent of the said John B. Long, and at great expense to the complainant. In this respect the complainant offers to do equity, and to pay to the estate of John B. Long, deceased, as compensation for the land or right of way, whatever sum the court might ascertain and decree the complainant to be liable for. So far as this theory is concerned, we are of the opinion that under the averments of the bill it is unassailable. *Southern Railway Co. v. Hood*, 126 Ala. 312, 28 South. 662, 85 Am. St. Rep. 32. So, indeed, the chancellor seems to have treated it, for in his opinion, as here certified in the record, he bases his decree sustaining the demurrer solely upon the grounds that were directed against the second theory or phase of the bill. This second theory or phase of the bill is an attempt to have the contract above set out specifically performed, by requiring the respondent, as administratrix, to execute the deed stipulated for. Against that part of the bill which seeks to have the written contract specifically performed, the point was made, by demurrer, that the bill "shows that the agreement made by said Long is void for want of sufficient description of the land agreed to be conveyed by him to the complainant." In other words, the respondent contends that the agreement is obnoxious to the statute of frauds.

The general principle of law in respect to the remedy by specific performance of agreements for the sale of lands is "that the equitable remedy rests largely in the judicial discretion, directed and regulated by defined rules. This contract must be just, fair, and reasonable, must be reasonably certain in respect to the subject-matter, the terms, and stipulations, and must be founded upon a valuable consideration" (*Carlisle v. Carlisle*, 77 Ala. 339, 341; *Moon v. Crowder*, 72 Ala. 79; 4 Pom. Eq. § 1404); and the statute of frauds is offended unless the contract for the sale of lands expresses a valuable consideration and describes the subject-matter directly, or makes reference to something outside of the writing, by a resort to which certainty may be established. Ala-

bama, etc., *Co. v. Jackson*, 121 Ala. 172, 175, 25 South. 709, 77 Am. St. Rep. 46. The case of *Coyne v. Warrior Southern Railway*, 137 Ala. 553, 34 South. 1004, is relied upon by the complainant to support its contention that the subject-matter is sufficiently described in the contract sought to be enforced to meet the requirements of the statute, and render the contract susceptible of specific performance. On the other hand, the chancellor, in his opinion supporting the decree, differentiates that case, on the facts, from the one in judgment. In the opinion he says: "In *Coyne v. Warrior Southern Railway*, the description held to be good in a deed was: 'The roadbed as at present located and the extension thereof in the future.' Here it is: 'Such land as may be in actual use or occupancy,'" etc.

It will be borne in mind that the terms of the agreement involved do not require that the deed shall be made until a day in the future, when and at which time the lands to be conveyed will be definitely located and ascertained with certainty. In other words, the performance of the contract by Long is postponed until the happening of a future event, to wit, the completion by the complainant of its roadbed over certain described lands and its actual use or occupancy of such lands. The bill avers the happening of this event in specific terms. Therefore, according to the terms of the contract, by resort to these facts, extrinsic of the writing, but referred to therein, those lands to which the deed is agreed to be made are rendered certain; and at the time the action of ejectment was commenced, and when the bill here was filed, they were susceptible of being accurately described. The contract was conditional until the complainant completed its roadbed over the quarter sections described therein and was in the actual use and occupancy thereof. Then it became absolute, and fixed upon the contractor, Long, the duty to make to the complainant a deed to "such land as was in the actual use and occupancy of the complainant" in the quarter sections described in the contract. These lands having been made certain, and that, too, by resort to matters referred to in the contract, the statute of frauds presents no obstacle to a specific performance of the contract. *Hovison v. Bartlett*, 147 Ala. 408, 40 South. 757; *Long v. Gill*, 80 Ala. 408; *Cottingham v. Hill*, 119 Ala. 353, 24 South. 552, 72 Am. St. Rep. 923.

The demurrer based upon the ground that the contract does not appear to be founded upon a valuable consideration is untenable. No question of fraud, or of fiduciary relations, is involved in this case; and the recital, "one dollar . . . in hand paid," is sufficient in respect to the consideration. *Bolling v. Munchus*, 65 Ala. 558, and authorities there cited.

The decree of the chancellor, sustaining the demurrer to the bill, is reversed, and a de-

cree will be here rendered overruling the demurrer. The respondent will be allowed 30 days from the certification of this decree to the chancery court in which to answer the bill.

Reversed and rendered.

HARALSON, SIMPSON, and ANDERSON, JJ., concur.

(158 Ala. 271)

HALL et al. v. ATLANTA, B. & A. R. CO.
et al.

(Supreme Court of Alabama. June 30, 1908.
Rehearing Denied Jan. 14, 1909.)

1. INJUNCTION (§ 172*)—DISSOLUTION OF PRELIMINARY INJUNCTION—ANSWER—SUFFICIENCY.

An answer denying such averments of the bill as are essential to show equity therein, but failing to deny details leading up to the main allegations, is sufficient to justify the dissolution of the preliminary injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 376-381; Dec. Dig. § 172.*]

2. EMINENT DOMAIN (§ 100*)—TAKING OF PROPERTY.

The Legislature may vacate streets, either by direct act or by act authorizing the municipal authorities to do so, subject to the limitation not to deprive property owners along the street of a convenient and reasonable outlet to neighboring thoroughfares; and a property owner does not bring himself within Const. 1901, § 235, providing that municipal corporations shall make compensation for property taken or injured by the construction of improvements, etc., unless he shows that he is an abutting owner, so that a statute vacating an alley, without depriving the property owners of a reasonable outlet, is not invalid.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 267; Dec. Dig. § 100.*]

3. INJUNCTION (§ 172*)—ANSWER—NEW MATTER.

Where a bill prays for an injunction to restrain the construction of a railroad embankment across alleys, an answer which alleges that the alleys had been vacated by legislative act and that the railroad constructing the embankment is the owner of the land may be considered on a motion to dissolve the preliminary injunction, as against the objection that the matter set up therein is new matter.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 381; Dec. Dig. § 172.*]

4. EMINENT DOMAIN (§ 100*)—INJURY TO PROPERTY.

Owners of property, who are merely deprived of the right to travel over an alley which has been vacated by legislative act, are not injured by a railroad constructing an embankment thereon.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 256-267; Dec. Dig. § 100.*]

Appeal from City Court of Bessemer; William Jackson, Judge.

Suit by John A. Hall and others against the Atlanta, Birmingham & Atlantic Railroad Company and another. From a decree dissolving the preliminary injunction, complainants appeal. Affirmed.

Estes, Jones & Welch, for appellants. Tillman, Grubb, Bradley & Morrow, for appellees.

SIMPSON, J. The bill in this case was filed by the appellants against the appellees, alleging that complainants are the owners of certain lots in Bessemer, Ala., some fronting on Arlington avenue and abutting on an alley between Arlington and Berkley avenues, and some abutting on an alley between Arlington avenue and Carolina avenue; that respondents are constructing, or are about to construct, across said Arlington avenue and said alleys, a fill or other obstruction, upon which is to be run a line of railroad, said fill to be about 30 feet high, blocking the whole of said avenue except about 30 feet in the center, and completely blocking one end of the alleys, thus causing irreparable injury and damage; and also that it will create a public and private nuisance in said public highways. The bill prays for an injunction restraining the construction of said work. The preliminary injunction was granted, and on the coming in of the answer was, on motion, dissolved. It is from this decree that the appeal is taken.

The answer, while admitting the formal parts of the bill as to names of parties, location of streets, etc., denies that there is any intention to make a fill across Arlington avenue, alleging that the purpose is to cross that avenue by a viaduct, at an elevation of 30 feet, supported by abutments on either side, on the property of respondents, but that they do propose to make a fill across one alley, about 25 feet high; but it alleges that the lots on each side of said alley, at the point of crossing, belong to respondents, and that complainants' lot (15) is 200 feet distant, and also that respondents are the owners of the lots on either side of the other alley (in block B), and also that there will be a fill at the end of this alley similar to the other, but that the abutting land belongs to respondents, and said alleys have been vacated by act of the Legislature approved July 31, 1907, which is attached as an exhibit. A plat of the various blocks and lots is attached as an exhibit, showing the line of the railroad, passing entirely through the lands of respondent, and that the lots of complainants have ingress and egress both through the other end of said alleys and through Arlington avenue. There are also general denials of the alleged injury and damage, and it is averred that the complainants will not sustain any special damage, other than that which applies to other citizens, and that said respondent railroad company is entirely solvent, and that said railroad was being constructed in accordance with authority granted by the city of Bessemer. The complainants filed exceptions to that part of the answer setting up the act of the Legislature and the ordinance of the city, claiming the same to be unconstitutional.

It is contended by appellants that the answer does not deny the material allegations of the bill, and they cite, as instances of such failure, that the answer fails to deny "the

ownership of the property," etc. The law does not require that every allegation which, in connection with others, would form a chain of materiality, must be denied; for, if that were the law, an injunction could never be dissolved on account of the denials of the answer, since in every case there are numerous details leading up to the main allegations of the complaint, which cannot be denied. If the averments, without which there would be no equity in the bill, are denied, that is a sufficient denial. 10 Ency. Pl. & Pr. 1067; *Rogers v. Bradford et al.*, 29 Ala. 474; *Moore v. Barclay*, 23 Ala. 739; *Rice v. Tobias*, 83 Ala. 348, 3 South. 670; *Howle et al. v. Scarbrough*, 138 Ala. 148, 35 South. 118. It becomes necessary, then, to consider the question of the validity of the act of the Legislature vacating the alleys; for manifestly, if that act be valid, there was no alley at the point indicated, but the property therein had reverted to the defendants, who own the abutting property on each side.

This matter has been so recently considered by this court it seems useless to cite the numerous authorities elsewhere on the subject. This court has held distinctly that the Legislature has the power to vacate streets, either by direct act, or by act authorizing the municipal authorities to do so, and that a property owner does not bring himself within the protection of section 235 of the Constitution of 1901, unless he shows that he is an "abutting owner." *Southern Ry. Co. v. Albes* (Ala.) 45 South. 234, 235; *Jackson v. Birmingham Foundry, etc., Co.* (Ala.) 45 South. 660. Beyond the abutting owner, the only limit to the power of the Legislature to abolish a street is that the property owners along the street shall not be deprived of a "convenient and reasonable outlet to neighboring thoroughfares." *Jackson v. Birmingham, etc., Co.*, supra; *Elliott on Roads & Streets* (2d Ed.) § 878. The bill in this case does not claim that complainants have been deprived of a reasonable outlet, but only that one end of the alley is obstructed. This act, then, is not violative of section 235 of the Constitution of 1901.

It cannot be said that this is new matter set up in the answer, which cannot be considered on a motion to dissolve; for the gist of the answer on this point is a denial of the allegation that said railroad crosses an alley at all, the same having been abolished by the Legislature. It follows, then, that the argument and authorities on the subject of nuisances on a public street or alley have no application in so far as the supposed alleys are concerned; for it is denied that there are any such alleys at said point.

In so far as Arlington avenue is concerned, the answer denies any intention to obstruct it.

It cannot be said that complainants' property has been in any way injured by the con-

struction of the railway, not over any alley, but simply over the land of respondents, as it is not alleged that any injury accrued to said property by the embankment, other than the deprivation of the right to travel over the property (in common with every other citizen), which had been destroyed by the vacation of the alleys.

The decree of the court is affirmed.

TYSON, C. J., and DOWDELL and DENSON, JJ., concur.

(158 Ala. 288)

CROFFORD et al. v. ATLANTA, B. & A. R. CO. et al.

(Supreme Court of Alabama. June 30, 1908. Rehearing Denied Jan. 12, 1909.)

1. MUNICIPAL CORPORATIONS (§ 693*)—OBSTRUCTION OF STREET—PUBLIC NUISANCE—STRUCTURES AUTHORIZED.

A viaduct constructed over a street, as authorized by municipal ordinance and in conformity therewith, is a structure authorized by law, and is not a public nuisance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1494; Dec. Dig. § 693.*]

2. NUISANCE (§ 65*)—ACTS AUTHORIZED BY LAW.

A structure erected under authority of law is not a public nuisance.

[Ed. Note.—For other cases, see *Nuisance*, Cent. Dig. § 158; Dec. Dig. § 65.*]

3. MUNICIPAL CORPORATIONS (§ 671*)—INJURING PROPERTY—OBSTRUCTION OF STREET.

A viaduct over a street, which arches the street overhead 30 feet, and which leaves for public travel a passway 30 feet wide in the center of the street, does not deny to abutting property owners the right of access on the street to and from their property.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1447, 1449; Dec. Dig. § 671.*]

4. EASEMENTS (§ 11*)—LIGHT, AIR, AND VIEW.

One may erect on his own land a building which will cut off the view, light, and air of the adjacent owner, since, as against an adjacent landowner, the doctrine of easement in light, air, and view is not recognized, though such right is based on a claim by prescription.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. § 34; Dec. Dig. § 11.*]

5. EMINENT DOMAIN (§ 100*)—INJURING PROPERTY.

A railroad built an embankment on its own land and constructed a viaduct over a street. The viaduct arched the street 30 feet overhead, and left in the center thereof a 30-foot passageway for public travel. The viaduct was authorized by municipal ordinance, and furnished the only feasible way of crossing the street. Held, that there was no taking of property of abutting owners, 50 feet or more distant from the construction, within Const. 1901, § 235, prohibiting the taking or injuring of property without compensation.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 257, 258, 260, 263; Dec. Dig. § 100.*]

Appeal from City Court of Bessemer; William Jackson, Judge.

Suit by J. T. Crofford and others against

the Atlanta, Birmingham & Atlantic Railroad Company and another. From a decree dismissing the bill, complainants appeal. Affirmed.

Estes, Jones & Welch, for appellants. Tillman, Grubb, Bradley & Morrow, for appellees.

DOWDELL, J. The only question which differentiates this case from that of Hall et al. v. Atlanta, Birmingham & Atlantic R. Co. et al. (decided at the present term) 48 South. 365, is the one relating to the easement of air, light, and view. Counsel for appellants in their brief say: "This case is very much like the case of John A. Hall et al. v. Atlanta, Birmingham & Atlantic Railroad Company et al., submitted with this case. In fact, the real facts in the two cases are practically the same; but the facts as shown by the two bills are different, in that the bill in this case is more elaborate, and sets out more fully the true statement of facts, and also this bill charges in positive terms the infringement of complainant's easement in the avenues and alleys of light, air, and view. His bill also attacks the constitutionality of the act of the Legislature and the ordinance of the city of Bessemer by which the closing up of the alleys is sought to be justified, and the obstruction of the avenues."

As to the constitutionality of the act of the Legislature and of the ordinance of the municipality referred to, this question was presented and passed on in the Case of Hall et al., supra, and adversely to the contention of appellants. We do not understand that there is any contention of a want of power on the part of the municipality, under the legislative grant of powers contained in the charter, to pass the ordinance in question; but the contention is that the ordinance is violative of section 235 of the Constitution of 1901, in so far as it authorizes the taking of private property for public use without first making just compensation for the property taken, injured, or destroyed, etc., as provided by law. It is admitted by the bill that the viaduct being constructed over Berkley avenue was authorized by ordinance of the municipality, and it is not denied that the same is being constructed in conformity with said ordinance. The structure, therefore, being one authorized by law, cannot be said to constitute a public nuisance. The bill shows that the viaduct arches said avenue overhead 30 feet, and that there is a passageway for public travel, left in the middle of the avenue under said arch, 30 feet wide. It is evident, from this, that the right of access of abutting property owners on said avenue to and from their property, is not, by reason of the viaduct, denied them. Moreover, we are of the opinion that the way so left open for public travel is reasonable and convenient.

This brings us to a consideration of the principal question in this case, and one not specially treated of in the Case of Hall et al., supra, and that is the one wherein it is charged in the bill: "And complainants further aver that the construction of said embankment and archway and railroad as aforesaid, upon which is to be operated the aforesaid railroad, will greatly obstruct complainants' access to view, light, and air, and would greatly cut off the circulation of air, and would place in said highway an obstruction that would be unsightly to the eye."

* * * And complainants further aver that said fill across said alley will also wholly cut off and obstruct their access to the view, light, and air over the same from toward Fourteenth street and the south, to which they are entitled." The bill shows that the complainants are the owners of lots 1, 2, 3, 4, and 5, each of said complainants owning separately and respectively one of said lots, and that the respondent the Alabama Terminal Railroad Company is the owner of lots 6, 7, and 8. All of said lots are in the same block, and front on Berkley avenue, and extend back to the alley in question, and all of said lots are of a uniform width of 50 feet. It is further shown that the railroad embankment is entirely on lots 6, 7, and 8, the private property of the respondent the Alabama Terminal Railroad Company, and connecting the fill in the alley and the viaduct or archway over Berkley avenue. The lot of the complainant Crofford is the nearest one of the abutting owners to the point where the viaduct crosses the avenue and to the point where the fill crosses the alley; the distance being not less than 50 feet. The lots of the other complainants abutting on said avenue are still further away, from 100 to 250 feet.

So far as the embankment, which is constructed on the respondent's own private property, affects the complainants' easement of view, light, and air, this is a proposition that contains no merit whatever. No one can doubt the right of a party to build on his own land, even though it entirely cuts off the view, light, and air of his neighbor on the side next to such building. As against an adjacent landowner the doctrine of an easement in light, air, and view is not recognized in this state, even though such right or title be based upon a claim by prescription. Ward v. Neal, 37 Ala. 500, which case was followed in Jesse French Co. v. Forbes, 129 Ala. 471, 29 South. 683, 87 Am. St. Rep. 71. As to the viaduct over the avenue and the fill in the alley, under the facts stated in the bill as to the distances from complainants' property and the character of the structure, it is difficult to conceive how the complainants can be affected as to air and light. The right of the respondents to cross the avenue with their railroad is not denied; nor is it denied that the manner of the cross-

ing, viz., by the overhead viaduct, is the safest for the public using said avenue, and the only feasible way of crossing. We are of the opinion that on the facts of this case there is no such taking, destroying, or injuring of the complainants' property, within the meaning of section 235 of the Constitution of 1901, as would authorize interference by a court of chancery in the exercise of its restraining powers.

Our conclusion is that the bill is without equity, and the decree dismissing the same will be affirmed.

Affirmed.

TYSON, C. J., and SIMPSON, ANDERSON, and DENSON, JJ., concur.

(158 Ala. 113)

MOBILE IMPROVEMENT & BUILDING CO. v. STEIN.

(Supreme Court of Alabama. Nov. 26, 1908. Rehearing Denied Jan. 14, 1909.)

APPEAL AND ERROR (§ 604*)—RECORD—TRANSCRIPT — NECESSITY OF SEPARATE TRANSCRIPTS ON SEPARATE APPEALS.

The parties agreed by their attorneys that six separate actions involving the same facts should be tried at the same time before the same jury, and that a separate verdict should be rendered in each case, but that all exceptions taken should be considered as taken in each case so far as possible, and if a similar verdict was rendered in each case the losing party might appeal all the cases on one transcript and one bill of exceptions, so that all questions could be considered so far as possible on one appeal. A verdict was rendered for defendant in each case, and plaintiff appealed, and brought up the six judgments in a single transcript; the citation of appeal reciting the trial of the cases and judgment for defendant, and the application and allowance of an appeal by plaintiff. *Held*, that the agreement did not amount to a consolidation of the actions, and the parties could not stipulate to bring up the six judgments in one transcript; a separate transcript being essential for each judgment, so that the appeal should be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2658; Dec. Dig. § 604.*]

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

Six actions by the Mobile Improvement & Building Company against Louis Stein. From judgments for defendant, plaintiff appealed. Appeal dismissed.

Shelton Sims and J. H. Webb, for appellant. L. H. & E. W. Faith, for appellee.

DENSON, J. The plaintiff (appellant) brought six several actions of forcible entry and detainer against the same defendant to recover as many distinct parcels of land. In accordance with sections 2147-2149 of the Code of 1896, on the application of the defendant all of said causes were removed into the circuit court. In that court they were numbered 11,488, 11,489, 11,490, 11,491, 11,492, and 11,493, respectively. Verdict and judgment

were rendered in each of said causes for the defendant. The plaintiff has appealed, and presents all of said judgments for review in a single transcript.

The point is here made by the appellee "that neither the law nor the practice in this court allows of this court's entertaining an appeal such as is presented by this record." In other words, it is insisted that six different causes cannot be presented for review in one transcript. The record fails to disclose that the actions were consolidated in the circuit court, as might have been done according to section 3318 of the Code of 1896, in which event only one judgment would have been rendered. The bill of exceptions, however, contains the following recitals: "Case 11,488 was called for trial, and there being five other cases, numbered, respectively 11,489, 11,490, 11,491, 11,492, and 11,493, between the same parties set for the same day, said six cases being for certain lots in six separate squares of land, and the facts in each case being practically the same, the attorneys of record for the parties to said suit agreed in open court, which said agreement was afterwards reduced to writing, signed by said attorneys of record for the parties, and filed in open court, that all of said cases should be tried at the same time before the same jury, and that said jury should render a separate verdict in each case; that all exceptions taken, as far as practicable, be considered as taken in each case, and that, in case of a similar verdict being rendered in each of said cases, the losing party might take all of said cases to the Supreme Court in one transcript and on one bill of exceptions, made so as to cover all of said cases; and that the successful party in said suits should have the privilege, in case of an appeal to the Supreme Court, of cross-assigning errors, so that all questions liable to arise on the subsequent trial of said cases might be settled as far as possible on one appeal." The citation of appeal reads: "Whereas, at a term of the circuit court of Mobile county held on the fourth Monday after the fourth Monday in March, 1906, in those certain causes numbered 11,488, 11,489, 11,490, 11,491, 11,492, and 11,493 in said court wherein Mobile Improvement & Building Company was plaintiff and Louis Stein was defendant, a judgment was rendered against said Mobile Improvement & Building Company, and to reverse this judgment the said Mobile Improvement & Building Company has on this day applied for and obtained from this office an appeal returnable to the present term of the Supreme Court," etc. The bond for costs and the certificate of appeal, in respect to the recitals, are in keeping with the foregoing recitals of the citation.

In *De Sylva v. Henry*, 4 Stew. & P. 409, two suits had been brought by the plaintiff against the defendant before a justice of the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

peace; judgment in each case being awarded by the justice in favor of plaintiff. An appeal was taken in each case to the circuit court. The judgment of the justice of the peace was reversed in both cases, and judgment given for the defendant. There was no order for a consolidation of the two suits, but the two were disposed of in the circuit court severally. The plaintiff embraced both cases in one writ of error, and brought both judgments to this court for review. In disposing of the case this court said: "Perhaps, on motion of the defendant, the circuit court would have consolidated the two suits. But surely it is not within the power of the plaintiffs in error to do so by embracing them in one writ. The writ of error must be dismissed." *Smith v. Hearne*, 2 Stew. 189. In *Scranton v. Ballard*, 64 Ala. 402, it was held that two distinct final judgments, each of which would support an appeal, could not be united in one appeal, with errors assigned on each. In *Cauley v. Pittsburg, etc., Co.*, 95 Pa. 398, 40 Am. Rep. 664, 666, two cases were embraced in a single writ of error. The court, speaking to this point, said: "We notice that one writ of error has been taken to the two cases. There is no authority for this. It is a practice that we will not encourage. Besides, the commonwealth loses the tax upon one writ. There should have been a separate writ of error to bring up each case." The writ was quashed. Elliott, in his work on Appellate Procedure, at section 197, says: "The rule that a transcript must cover one case and be complete in itself forbids that several cases should be included in the same transcript." *Rich v. Starbuck*, 45 Ind. 310; *Roach v. Baker*, 145 Ind. 330, 43 N. E. 932, 44 N. E. 303; *Harris v. Harris*, 2 R. I. 538; *Hollohan v. McLean (Pa.)* 1 Wkly. Notes Cas. 262. In 2 Cyc. p. 531, the law is stated thus: "Two separate and distinct causes, which have not been consolidated in the trial court, cannot be brought up for appellate review by one appeal or writ of error."

On the foregoing authorities and considerations, it seems that the contention of the appellee should prevail, and the appeal be dismissed. This would be perfectly clear, but for the recitals in the bill of exceptions in respect to the agreement of counsel. The question, then, is: Can the general rule that two or more distinct causes cannot be presented for review in a single transcript be obviated or set aside by such an agreement? We think not. First, it is manifest that the agreement is not equivalent to statutory consolidation, for the reason that, when statutory consolidation is resorted to, only one judgment is rendered, and all questions presented for review on appeal relate to the one judgment; second, to encourage such agreements would be to unbridle litigants in the virtual establishment of rules of procedure in this court, and it may be readily seen that utmost con-

fusion might follow such a practice. This may be readily demonstrated by an inspection of the present record. Other good reasons might be assigned for our conclusions, but we forbear.

It follows, from the foregoing, that the court cannot consider the errors assigned; and the appeal will be dismissed.

Appeal dismissed.

TYSON, C. J., and SIMPSON and McCLELLAN, JJ., concur.

(158 Ala. 447)

SOUTHERN RY. CO. v. WOOLEY.

(Supreme Court of Alabama. Jan. 13, 1909.)

1. CARRIERS (§ 278*)—FAILURE TO CARRY PASSENGER TO DESTINATION—NEGLIGENCE—QUESTIONS FOR JURY.

Plaintiff, a passenger, on giving her ticket to the conductor, told him that she desired to alight at A. and that she was not acquainted with the stations along the road. Thereafter defendant's flagman asked plaintiff where she was going, told her that the car she was on did not go to A., and directed her at a junction to go into another car, which proved to be the wrong car, and plaintiff was compelled to leave the train and await another; the right car having left. *Held*, that whether defendant was negligent was for the jury.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1080; Dec. Dig. § 278.*]

2. CARRIERS (§ 278*)—FAILURE TO CARRY PASSENGER TO DESTINATION—NEGLIGENCE—WANTONNESS—QUESTIONS FOR JURY.

If defendant railroad's flagman knew that the car occupied by plaintiff was the proper car to convey her to her destination, and that the car into which he directed her to remove was the wrong car, and realized that his course of conduct would probably result in inconvenience and injury to plaintiff, wantonness might be fairly attributed to him, a purpose to injure not being an ingredient of wantonness, and the question of wantonness was for the jury.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 278.*]

3. CARRIERS (§ 277*)—FAILURE TO CARRY PASSENGER TO DESTINATION—WANTONNESS—PUNITIVE DAMAGES.

Where, in an action against a railroad for leaving plaintiff, a passenger, at a station short of her destination, there was evidence justifying an inference that defendant's flagman was guilty of wantonness in directing plaintiff to remove to the wrong car, an instruction that punitive damages could not be claimed was properly refused.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1083; Dec. Dig. § 277.*]

4. CARRIERS (§ 276*)—CUSTOM—EVIDENCE.

Evidence of a witness who had traveled on a train about once a month for more than a year was not sufficient to prove custom on the part of the trainmen in calling stations or announcing change of cars.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 276.*]

Appeal from City Court of Birmingham; H. A. Sharpe, Judge.

Action by Dealy Wooley against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The following charges were refused to the defendant: "(4) Under the evidence, you cannot assert any punitive damages against the defendant. (5) Under the evidence, you cannot find defendant's servant or servants guilty of any wantonness." "(9) The jury should weigh the evidence in the light of their common knowledge and common experience, and if from the evidence, so considered, you conclude that it is improbable that the flagman or other servant of defendant should have given plaintiff the information or direction claimed by her to have been given, you would have the right, in your reasonable discretion, to reject the evidence on that point."

Weatherly & Stokeley, for appellant. Bowman, Harsh & Beddow, for appellee.

DENSON, J. This is an action by a passenger against a common carrier to recover damages consequent upon her being left by defendant's servant or agent at a station short of her destination. There are two counts in the complaint. The first counts for recovery upon simple negligence, while the second, as a basis for recovery, after stating the proper premises, avers that "defendant's servant or agent, acting within the line and scope of his authority as such on said train, wantonly or intentionally caused plaintiff not to be carried on said train to her destination, well knowing that so to do would likely or probably cause great personal inconvenience and damage, and thereby wantonly or intentionally caused plaintiff to suffer said injuries and damages." The cause was tried on these counts and the general issue. There were verdict and judgment for the plaintiff in the sum of \$250, and therefrom defendant has appealed.

The main questions for consideration arise on charges refused to the defendant, amongst them being the general affirmative charge in respect to each count of the complaint. The plaintiff, a married woman, accompanied by her two children, two and three years old, respectively, after providing herself with a ticket entitling her to passage on defendant's train to America Junction, boarded one of defendant's trains at Birmingham, on April 25, 1906, en route to said point, which was a station on defendant's road. Plaintiff had traveled the road only once, and knew nothing about the stations on the road. When the conductor in the course of his duty reached the plaintiff on the train, she gave him her ticket and baggage check, telling him that she desired to get off at America Junction, and that she was not acquainted with the stations along the route. The train carried a car which was to be cut off at Jefferson, an intermediate station, and incorporated in another of defendant's trains which ran between Jefferson and Blossburg.

Plaintiff testified, substantially, that she was riding in the rear car, on the way from Birmingham, and never saw the conductor

after he took up her ticket; that the "porter," a white man, who was calling the stations on the train, before the train reached Jefferson, asked her where she was going, and that she told him three times she was going to America Junction; that "he explicitly directed me to go into the other car, and stated that the car I was in was going back to Birmingham. I obeyed him, and he helped me carry my bundles in there." When the train reached Jefferson the car in which plaintiff was then traveling was cut out, and the train proceeded on its journey. The car cut out was then coupled into and made a part of the train to Blossburg, which train departed on its journey to Blossburg. Plaintiff did not learn that she was on the Blossburg train until it had attained a distance of 300 or 400 yards from Jefferson, when the conductor called on her for fare. She then asked him to let her get off, whereupon the train was backed to within a short distance of the station, and she alighted and walked to the station. This was near sundown. There were no white people living at Jefferson, and accommodations could not be obtained for plaintiff and her children overnight; so she prevailed upon a boy to go with her to Nebo, another station on defendant's road, in the direction of America Junction and near a mile from Jefferson. She spent the night at Nebo, at the home of Dr. Hancock; and on the next afternoon there took a train and proceeded on her journey to America Junction, where she was met by her husband. There is no testimony, in respect to what occurred between the plaintiff and the conductor or between the plaintiff and the flagman, save that of plaintiff as recited above. But, even if there were, it would at most only show a conflict in evidence.

In the light of the foregoing tendencies of the evidence, the court entertains the opinion that it cannot be contended, with any show of reason, that defendant's agent or agents were not guilty of negligence in respect to plaintiff's stopping at Jefferson, instead of going on to her destination that afternoon. This being true, the next question to be considered is: Is the evidence of such a nature as to fairly afford an inference of wantonness on the part of defendant's flagman? "A purpose to injure is not an ingredient of wantonness." If the flagman knew that the car plaintiff occupied was the proper car to convey her to her destination that afternoon, and knew that the car into which he directed plaintiff to remove was to be cut out at Jefferson and would not proceed to America Junction, and saw and realized plaintiff's condition—if he was conscious of all this, and realized, from the attending circumstances, that the course of conduct he adopted would likely or probably result in inconvenience and injury to the plaintiff—then wantonness might be fairly inferred and attributed to him." Birmingham, etc., Co. v.

Bowers, 110 Ala. 328, 20 South. 345; Birmingham, etc., Co. v. Pinckard, 124 Ala. 372, 26 South. 880.

Upon the foregoing considerations it follows that the court properly refused the affirmative charges requested by the defendant, leaving to the determination of the jury the questions of negligence and wantonness. It also follows that charges 4 and 5, requested by the defendant, were well refused.

For the reasons given in Hale's Case, 122 Ala. 85, 26 South. 236, condemnatory of charge 1 requested by the defendant in that case, charge 9, here requested by the defendant, was properly refused.

Cairns, a witness for defendant, testified that plaintiff was riding in the same coach he was in (the second car from the rear); that he knew he was at Jefferson, because the flagman came through the front end of the car and "hollered, 'Jefferson! Change cars for Blossburg. The rear coach goes to Blossburg.'" He further testified that he traveled on that train about once a month, and had been doing so for more than a year. Thereupon defendant's counsel asked him this question: "State whether or not you had heard that announcement made ordinarily when you traveled there." Even if it were competent to prove custom, in respect to defendant's servant's calling the stations or making the announcement testified to, the proffered testimony does not rise to the dignity of custom. The evidence sought was immaterial.

The court committed no error in overruling defendant's motion for a new trial.

It results that the judgment of the city court must be affirmed.

Affirmed.

HARALSON, SIMPSON, and ANDERSON, JJ., concur.

(158 Ala. 296)

LEAHART et al. v. DEEDMEYER et al.

(Supreme Court of Alabama. Jan. 14, 1909.)

1. CONSTITUTIONAL LAW (§ 186*)—RETROACTIVE LAWS—CONSTITUTIONAL PROVISIONS.

Const. 1901, § 22, is the only limitation on the enactment of retroactive laws, and provides that no ex post facto laws shall be passed; and, since ex post facto laws are necessarily penal, other laws are not unconstitutional merely because they are retroactive.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 528; Dec. Dig. § 186.*]

2. STATUTES (§ 263*)—CONSTRUCTION—RETROACTIVE OPERATION.

A statute will not be construed as having a retroactive effect unless it is plain from its terms that the Legislature so intended.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 344; Dec. Dig. § 263.*]

3. ATTORNEY AND CLIENT (§ 172*)—LIEN FOR COMPENSATION—CONSTRUCTION OF STATUTE.

Code 1907, § 8011, giving an attorney at law a lien on his client's papers and money and upon the suit and judgment for his services, does

not apply to a suit in progress at the time the section became effective, not being retroactive.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 384; Dec. Dig. § 172.*]

4. EXECUTORS AND ADMINISTRATORS (§ 97*)—CONTRACTS FOR SERVICES—EFFECT OF INSOLVENCY OF ADMINISTRATOR—STATUTORY PROVISIONS.

Code 1907, § 6085, provides that an administrator may render the estate liable for payment of necessary services rendered him, if he be or become insolvent without making payment, and has not charged the estate with and obtained credit therefor. Section 6086 provides that the person rendering the services may recover therefor against the administrator or his successor. *Held*, that attorneys, having rendered necessary services under a contract with an administratrix, and the conditions specified by section 6085 existing, could recover therefor in proceedings against the administratrix's successor.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 411½; Dec. Dig. § 97.*]

5. EXECUTORS AND ADMINISTRATORS (§ 97*)—ACTIONS AGAINST ADMINISTRATORS—PLEADING.

The statute requiring only that the administrator who made the contract or incurred the liability shall be insolvent, it was not necessary, in an action against the successor of the administratrix contracting for the services, and others, to allege that the successor and the other defendants were insolvent.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 411½; Dec. Dig. § 97.*]

6. PLEADING (§ 204*)—DEMURRER—PLEADING GOOD IN PART.

Where a bill sought to hold an estate liable for fees due complainants for services and have their lien therefor declared and enforced, and there was equity as to one of the prayers, demurrers pointing out objections to the prayer as to which there was no equity, but directed against the entire bill, were properly overruled.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 486, 487; Dec. Dig. § 204.*]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Bill by Frank Deedmeyer and others against Susie E. Leahart, administratrix of Martha A. Worley, and others. Decree for complainants, and respondents appeal. Affirmed.

Jere C. King, for appellants. Frank Deedmeyer and J. A. Mitchell, for appellees.

SIMPSON, J. The bill in this case was filed by the appellees against the appellants, seeking to enforce a lien for attorney's fees. The facts, in substance, are that one of the defendants—Martha A. Worley, as administratrix of the estate of Benjamin L. Worley, in accordance with a verbal agreement previously made by said Martha A. and M. V. Worley, who were the only heirs of said Benjamin L. Worley—entered into a written agreement with the appellees on December 23, 1907, by which appellees were employed as attorneys to bring suit against the defendant the Southern Railway Company for damages resulting from the death of said decedent, alleged to have been caused by the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

negligence of said railway company, and in said agreement it was provided that said appellees should have, as compensation for their services, a sum equal to one-third of the sum which should be collected in settlement of said claim either by suit or compromise. In April, 1908, said M. A. Worley resigned as administratrix, and shortly thereafter the defendant Susie E. Leahart, a daughter of said Martha A. Worley, was appointed administratrix de bonis non of said estate, and refused to allow herself to be made a party to said suit, but proceeded to make a settlement with said Southern Railway Company without the knowledge of said attorneys, appellees, and made a settlement by written agreement for the sum of \$3,500, which has not been paid. Complainants claim a lien on said suit under section 3011 of the Code of 1907, which went into effect May 1, 1908; and they allege that the resignation by said M. A. Worley, and the appointment in her stead of her said daughter, Susie E. Leahart, was part of a fraudulent scheme entered into between them, said M. V. Worley, and other persons unknown, for the purpose of defrauding complainants of their just rights, by compromising said claim, and that the Southern Railway Company, through some agent, participated in said collusive scheme or arrangement to defeat or defraud complainants out of their fees. The prayers of the bill are that the estate of said Benjamin L. Worley, deceased, be decreed to be liable for the fees due complainants, that complainants be adjudged and decreed a lien on said suit and said claim for damages, "and incidentally that they be adjudged and decreed a lien on the said sum of \$3,500 due from the Southern Railway Company, and that said company be ordered and directed to pay over to the complainants the amount due them for said services, and that the court adjudge and decree that the complainants are entitled to the amount of \$1,166.66, with interest thereon."

The first question which presents itself is whether the lien provided for by section 3011 of the Code applies to causes of action which were in progress when said section became a law. It may be stated, as a general proposition, that there is no section in our Constitution which prohibits the enactment of a retroactive law. *Aldridge v. Tuscumbia*, etc., R. R., 2 Stew. & P. 199, 23 Am. Dec. 307; *Lindsay v. United States Savings*, etc., Ass'n, 120 Ala. 168, 24 South. 171, 42 L. R. A. 783. Section 22 of our Constitution of 1901 expresses the only limitation in that line, and our courts have held that "ex post facto" laws are necessarily penal laws; so that, unless a law impairs the obligation of a contract, or deprives the citizen of some vested right, or is obnoxious to some other provision of the Constitution, the mere fact that it is retroactive does not render it unconstitutional. The general rule is that a law will not be construed as having a retroactive ef-

fect unless it is plain from its terms that the Legislature so intended. *Smith v. Kolb et al.*, 58 Ala. 645. It was held in the case just cited that the act amending the statute in regard to mechanics' liens did not have any retroactive effect. The retroactive statutes which have been recognized as valid have been mainly acts affecting merely the remedy; but when an act fixes a lien upon a citizen's property, which did not exist before, as the result of a contract already made, while it does not impair the obligation of the contract, yet, on the contrary, it increases the burden of the contract, which would seem to be as great a wrong to one party as impairing the obligation would be to the other. In fact, to the extent that the lien attaches, it is taking the party's property without due process of law, inasmuch as it gives to the lienor the right to take the property of the other by mere legislative enactment.

In our own court, in a case wherein it declared unconstitutional a mechanic's lien law, which made the fact that the person performing labor was not notified in writing not to perform it prima facie evidence that it was by and with the owner's consent that such labor was performed, the court quotes with approval from the case of *Meyer v. Berlandi*, 39 Minn. 438, 40 N. W. 513, 1 L. R. A. 777, 12 Am. St. Rep. 663, these words: "As liens are an incumbrance upon the owner's property, it is fundamental that they can only be created by his consent or authority. No man can be deprived of his property without his consent, or by due process of law." *Randolph v. Builders' & Painters' Supply Co.*, 106 Ala. 501, 512, 17 South. 721. And in a later case, on the mechanic's lien law, the same question is made. *Selma Sash, etc., Factory v. Stoddard*, 116 Ala. 251, 253, 22 South. 555. This court also said, referring to the principle that a mechanic's lien could not have precedence of a prior mortgage on the land: "To hold that a subsequent contractor or materialman could acquire a lien which would take precedence over an intervening incumbrance * * * would shock the moral sense of the profession and fail to carry out the intention of the Legislature." *Wimberly v. Mayberry & Co.*, 94 Ala. 248, 10 South. 157, 14 L. R. A. 305; *Welch v. Porter*, 63 Ala. 232.

It would involve the same principle to hold that the Legislature could import into a contract already made a provision fixing a lien on the property of the contractor, not included in the original contract. An act similar to section 3011 of our Code was passed by the Legislature of Minnesota, and the Supreme Court of that state held that it did not apply to a suit which was in progress at the time the act became effective. *Northrup v. Hayward*, 102 Minn. 307, 113 N. W. 701.

It results that section 3011 of the Code of 1907 does not apply to the claim in this case, and that the appellees have no lien upon the

cause, or upon the proceeds thereof, under said section. However, section 4183 of the Code of 1896 (section 6065, Code 1907) provides that an administrator "may render the estate in his hands, to be administered, liable for the payment for necessary services rendered to him, * * * if he be or become insolvent, without making payment, and has not charged the estate with, and obtained credit for such services." And the succeeding section provides for the enforcing of said liability by proceedings in the chancery court against said administrator or his successor.

It is insisted by the appellants, as a reason for sustaining the demurrer, that, while the bill alleges that Martha A. Worley is insolvent, it does not allege that Susie E. Leahart, M. V. Worley, or the Southern Railway Company is insolvent. There is no merit in this contention. The statute requires only that the administrator who made the contract or incurred the liability shall be insolvent. The evident reason of this is that, if he is not insolvent, he is liable personally for the claim.

The bill seeks, first, that "the estate of Benjamin L. Worley, deceased, be decreed liable for the fees due them [complainants] for services," etc.; and, second that their lien be declared and enforced. The demurrers point out objections only to the liens, and yet are directed against the entire bill, and as to the second prayer of the bill there is equity. Consequently the demurrers were properly overruled. *Worthington et al. v. Miller*, 134 Ala. 421. 32 South. 748.

The question of the misjoinder of parties is not included in either cause of demurrer. The decree of the court is affirmed.

HARALSON, ANDERSON, and DENSON, JJ., concur.

(158 Ala. 5)

REAVES v. STATE.

(Supreme Court of Alabama. Jan. 21, 1909.)

1. CRIMINAL LAW (§ 419*) — STATEMENTS BY DECEDENT—HEARSAY—ADMISSIBILITY.

A statement by decedent, made the night after the shooting, in reference to the difficulty, is inadmissible as hearsay, unless offered as a dying declaration; sufficient predicate having been laid for that purpose.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 419.*]

2. CRIMINAL LAW (§ 1153*)—RULINGS ON OBJECTIONS TO LEADING QUESTIONS—REVIEW—DISCRETION OF COURT.

Objections to leading questions are addressed to the sound discretion of the trial court and its rulings thereon are, as a general rule, not revisable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3064; Dec. Dig. § 1153.*]

3. CRIMINAL LAW (§ 782*)—MISLEADING INSTRUCTIONS.

An instruction that the jury must consider the entire evidence in making up the verdict,

and that they should not single out any part of the testimony and base the verdict on it, and that unless the jury and each individual member are convinced beyond reasonable doubt of accused's guilt they cannot convict, is properly refused, because misleading; for, while the jury cannot captiously reject any evidence, but must consider all in arriving at a verdict, yet the existence or nonexistence of a single fact shown in evidence may furnish the basis of a just verdict.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 782.*]

4. CRIMINAL LAW (§ 798*)—INSTRUCTIONS—DOUBT OF INDIVIDUAL JUROR.

Instructions that if there is a reasonable probability in the mind of any single juror of the innocence of accused growing out of any portion of the evidence, the jury must give accused the benefit of it and not convict him, etc., are properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1940; Dec. Dig. § 798.*]

5. HOMICIDE (§ 300*) — SELF-DEFENSE — INSTRUCTIONS.

An instruction on self-defense, which ignores the element of imminent peril to life or limb, is properly refused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 627; Dec. Dig. § 300.*]

Appeal from City Court of Anniston; Thomas W. Coleman, Jr., Judge.

Collie Reaves was convicted of the murder of Joel Shivers, and he appeals. Affirmed.

The charges refused to the defendant are as follows: "(1) I charge you, gentlemen of the jury, that it is your duty to consider the entire evidence in making up your verdict, and that you should not single out any part of the testimony and base your verdict upon it, and unless the jury and each individual member of the jury are convinced beyond all reasonable doubt, and to the exclusion of every other reasonable hypothesis but that of the defendant's guilt, then the jury cannot convict the defendant. (2) If there is a reasonable probability in the mind of any single juror in the case of the innocence of the defendant, growing out of any portion of the evidence, then the jury must give the defendant the benefit of this, and not convict him. (3) If there is a probability of the innocence of the defendant growing out of any portion of the evidence, the jury should give the defendant the benefit of this, and acquit him. (4) If you have a reasonable doubt as to whether the defendant acted in defense of himself and brother, and as to whether they were free from fault in bringing on the difficulty, and whether there was no reasonable mode of escape open to them, you should give the benefit of this, and acquit him."

Tate & Walker, for appellant. Alexander M. Garber, Atty. Gen., for the State.

DOWDELL, J. The statement made by the deceased person the night after the shooting in reference to the difficulty, and which was sought to be proved by the defendant, was properly excluded on objection of the state. This evidence was not offered as a

dying declaration, since no predicate was laid for that purpose, and otherwise it was illegal as hearsay evidence.

There was no reversible error in sustaining the state's objection to the question by the defendant to his witness R. A. Reeves on direct examination: "Did Mary say, just before the shooting, 'He is talking to me, not to you, Collie; not to you?'" The ground of the objection was that the question was leading. The question was undoubtedly a leading one, and objections to leading questions are addressed to the sound discretion of the trial court, and as a general rule are not revisable. *Greenleaf on Evidence*, § 435.

Charge 1, refused to the defendant, was not free from a misleading tendency, and for this reason, if no other, was properly refused. While it is the duty of the jury not to captiously reject any evidence, but to consider it all in arriving at a verdict, yet it is not impossible that the existence or non-existence of a single fact shown in evidence might furnish the basis of a just verdict one way or the other.

Like charges to those numbered 2 and 3, which were refused to the defendant, were condemned in *Liner v. State*, 124 Ala. 7, 27 South. 438.

Charge 4, requested by the defendant, ignored imminent peril to life or limb, an element of self-defense, and for that reason was properly refused. *Storey v. State*, 71 Ala. 330.

We find no reversible error in the record, and the judgment appealed from will be affirmed.

Affirmed.

TYSON, C. J., and SIMPSON and DENSON, JJ., concur.

(153 Ala. 511)

SLOSS-SHEFFIELD STEEL & IRON CO. v. SALSER.

(Supreme Court of Alabama. Jan. 13, 1909.)

1. PLEADING (§ 20*)—SUFFICIENCY—CONSISTENCY OF AVERTMENTS.

Plaintiff alleges that he was employed in railroad work near defendant's quarry; that in blasting defendant used a powerful explosive; that the rock was liable to seriously injure persons struck thereby; that defendant knew, or by reasonable care could have known, that plaintiff, or men working with him, were near enough to be injured by blasted rock; that while engaged in his work plaintiff was struck on the head by a rock, which was thrown upon him by defendant's operations; that his injuries were proximately caused by defendant negligently using its explosives, or by negligently failing to give plaintiff and the men working under him notice that a blast was to be set off, so as to enable plaintiff to escape the dangers arising therefrom. *Held*, that the allegations were not demurrable, as being inconsistent and repugnant, nor as containing alternative averments.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 43; Dec. Dig. § 20.*]

2. EXPLOSIVES (§ 12*)—ACTION FOR INJURY—PLEADING—SUFFICIENCY.

A complaint for injury to a railroad employé, caused by blasting in defendant's near-by quarry, was not insufficient for failing to allege that defendant knew, or could by reasonable care have known, of plaintiff's presence, where it alleged that defendant negligently failed to give him and the men working under him notice that a blast was to be set off, so as to enable him to escape from the dangers arising therefrom.

[Ed. Note.—For other cases, see *Explosives*, Cent. Dig. §§ 9, 10; Dec. Dig. § 12.*]

3. EXPLOSIVES (§ 12*)—PERSONAL INJURY—LIABILITY.

That plaintiff was working near defendant's quarry, where blasting was being done, that defendant knew, or could by reasonable care have known, that plaintiff was near enough to be injured by falling rocks, and that plaintiff's injuries resulting from being struck by rocks thrown by a blast were caused by the negligent manner in which defendant conducted its blasting operations, shows violation of defendant's duty to plaintiff, and actionable negligence by defendant.

[Ed. Note.—For other cases, see *Explosives*, Cent. Dig. §§ 9, 10; Dec. Dig. § 12.*]

4. EXPLOSIVES (§ 12*)—ACTION FOR INJURIES—PLEADING—SUFFICIENCY—CONSISTENCY OF AVERTMENTS.

Plaintiff alleges that he was employed in railroad work near defendant's quarry; that in blasting defendant used a powerful explosive; that the rock was liable to seriously injure persons struck thereby; that defendant knew, or by reasonable care could have known, that plaintiff, or men working under him, were near enough to be injured by falling rock; that, while engaged in his work, plaintiff was struck by a rock, caused to fall upon him by defendant's operations, resulting in specified injuries; and that plaintiff's injuries were proximately caused by negligence of defendant's employes in charge of the blasting operations, in that they knew, or by reasonable care could have known, that plaintiff and the men working under him were liable to be injured by blasted rock, and that they negligently failed to give him warning, and that because thereof plaintiff did not protect himself, and because thereof was injured. *Held*, that the allegations were not demurrable, as failing to allege violation of any duty by defendant to plaintiff, or as failing to charge actionable negligence, or as being inconsistent and repugnant, or as failing to charge that defendant's employes were acting within the scope of their employment.

[Ed. Note.—For other cases, see *Explosives*, Cent. Dig. §§ 9, 10; Dec. Dig. § 12.*]

5. DAMAGES (§ 182*)—PERSONAL INJURY—EVIDENCE.

It was proper to refuse to allow a physician to state whether, judging from the wound as it appeared when plaintiff first came to see him, it could have been entirely cured if plaintiff had had it treated, where plaintiff went to defendant's regular physician, who dressed his wound, and did not consider it serious, and gave plaintiff no instructions about coming again, and who testified that it was his duty to look after such cases.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 500; Dec. Dig. § 182.*]

6. EXPLOSIVES (§ 12*)—BLASTING—INJURIES—LIABILITY.

One is liable for the throwing of rocks upon adjoining lands of another in blasting, regardless of negligence, as it is a trespass, and in

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

other cases liability attaches where the work has been done negligently.

[Ed. Note.—For other cases, see *Explosives*, Cent. Dig. §§ 9, 10; Dec. Dig. § 12.*]

7. *EXPLOSIVES* (§ 12*)—*BLASTING*—*DUTY*.

Persons blasting, who know, or by reasonable diligence could know, that injury will probably result from the blasting, should protect persons exposed to a danger by covering the blasts, or, if that cannot be done at reasonable expense, by warning such persons.

[Ed. Note.—For other cases, see *Explosives*, Cent. Dig. § 10; Dec. Dig. § 12.*]

8. *EXPLOSIVES* (§ 12*)—*BLASTING*—*INJURY*—*NEGLIGENCE*—*JURY QUESTION*.

Under the evidence, in an action for personal injury caused by blasting on adjoining land, held a jury question whether the blasting was done negligently.

[Ed. Note.—For other cases, see *Explosives*, Cent. Dig. § 9; Dec. Dig. § 12.*]

Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge.

Action by J. E. Salser against the Sloss-Sheffield Steel & Iron Company for personal injuries received from blasting operations. There was judgment for plaintiff, and defendant appeals. Affirmed.

The first, second, and third counts of the complaint were in the following language: (1) "Plaintiff claims of defendant, the Sloss-Sheffield Steel & Iron Company, a body corporate, \$10,000 damages, in this: That on or prior to the 7th day of November, 1906, plaintiff was in the employment of the St. Louis & San Francisco Railroad Company, and at work for said company at or near North Birmingham, Ala., as foreman of a gang of workmen in repairing a bridge on the Birmingham Belt Line, which was being kept in repair by the St. Louis & San Francisco Railroad Company, where he had a right to be. That plaintiff and said gang of men were working near defendant's lime rock or limestone quarry, where defendant was engaged in blasting rock for use in the furnace plant. That in its blasting operations defendant used a powerful explosive, and at times caused rock to be thrown great distances from its said quarry, with great force and violence, and was liable to seriously injure said persons who should be struck thereby. That defendant knew, or by the exercise of reasonable care on its part could have known, that plaintiff or men working with him in said gang were near enough to said rock or stone quarry, and to where said blasting was being done, to be injured by the throwing and falling of rock from its blasting operations as aforesaid; and while plaintiff was engaged in his work as aforesaid he was struck violently on the head by a rock or piece of stone, which was thrown or caused to fall upon him by defendant's blasting operations as aforesaid. That plaintiff was by said rock knocked down and rendered unconscious, his head was lacerated, bruised, and contused, and he was otherwise injured. That from his injuries aforesaid

he has suffered, and will in the future suffer, great physical pain and mental agony. That the said wound on his head did not effectually heal for a long time, and at intervals will become sore and suppurate, which said condition continued for about six months. That he has suffered from said injury constantly and almost continuously, the same causing his head to ache or to cause pain in his head. That he was by said injury caused to lose a great deal of time from his usual vocation and to expend large sums of money for medicine, medical attention, nursing, and proper diet. That he was caused to lose a great deal of sleep, and his rest at night was greatly disturbed. That his earning power was and has been greatly decreased, and will in the future be decreased, and that his physical stamina has been injured and impaired, and he has been made sick, sore, and lame, and that his said injuries are permanent. And plaintiff avers that his said injuries were proximately caused by the negligence of the defendant in the negligent manner in which its blasting operations were conducted as aforesaid."

(2) Same as 1, down to and including the words "and his injuries are permanent," and further stating: "And plaintiff avers that his said injuries were proximately caused by the negligence of the defendant in negligently using its explosives in such quantities as to cause rock or stone to be thrown from its quarry as aforesaid, and to fall on plaintiff as aforesaid, or by negligently failing to give plaintiff and the men working in the gang under him the notice of the fact that a blast was to be set off in said quarry, so as to enable plaintiff to escape from the dangers arising therefrom, and because thereof plaintiff was struck and injured as aforesaid."

(3) Same as 1, down to and including the words "and his injuries are permanent," and then alleging: "And plaintiff further avers that his injuries were proximately caused by the negligence of defendant's servants or agents in charge of its blasting operations, in this: That they knew, or by the exercise of reasonable care could have known, that plaintiff and the gang of men working under him were liable to be injured by stone or rock thrown by said blasting operations, and defendant's said servants or agents so in charge of its blasting operations negligently failed to give plaintiff warning that a blast was going to be made immediately before it was made, and because thereof plaintiff did not shelter or protect himself from the throwing or falling of said rock or stone, and because thereof he was struck and injured as aforesaid."

The following demurrers were filed to the first count: "It does not aver that defendant violated any duty it owed to plaintiff. (2) The facts set forth do not constitute neg-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ligence for which defendant is responsible. The facts showing any duty on the part of defendant to plaintiff, which defendant violated, are not set forth." To the second count, the same as to the first, with the following additional: "The averments of said count are inconsistent and repugnant." To the third, the same as to the first and second, with the additional ground that "it does not aver that defendant's servants or agents were acting within the line and scope of their employment as such."

The fourth assignment of error is as follows: "The court erred in sustaining objection to the question propounded by defendant to the witness Dr. Wilder: 'Do you believe, looking at the wound the way it is now, and what you knew of it the time when he first came to see you, do you believe that if he had had it treated, or had gone to see any one after he left you, that it could have been entirely cured?'"

There was judgment for plaintiff in the sum of \$750.

Tillman, Grubb, Bradley & Morrow, for appellant. Frank S. White & Sons, for appellee.

SIMPSON, J. This action, by the appellee against the appellant, is for damages from an injury received by being struck by a rock, which had been thrown out by blasting operations carried on by the defendant. The first assignment of error insisted upon is to the action of the court in overruling defendant's demurrer to the second count of the complaint as amended. The averments of said count are not "inconsistent and repugnant," and there is no cause of demurrer raising the ground of alternative averments in the count.

The other ground of demurrer insisted on was not well taken, to wit, that it is not alleged that defendant knew, or could by reasonable care have known, of the presence of the plaintiff. That is covered by the expression that he "negligently failed," etc. *Robinson Mining Co. v. Tolbert*, 132 Ala. 462, 466, 31 South. 519. There was no error in overruling the demurrer to said count.

The demurrer to the first count as amended was properly overruled. The count states that plaintiff was working near the quarry where the blasting was being done; that defendant knew, or by the exercise of reasonable care could have known, that plaintiff was near enough to be injured by the falling rocks; also that the injuries were caused "by the negligence of the defendant, in the negligent manner in which its blasting operations were conducted." *Armstrong v. Montgomery Street Railway*, 123 Ala. 233, 28 South. 349, and cases cited; *Robinson Min.*

Co. v. Tolbert, 132 Ala. 462, 31 South. 519.

There was no error in overruling the demurrer to the third count of the complaint. Authorities supra; *Lampkin v. L. & N. R. R.*, 106 Ala. 287, 17 South. 448; *Woodward Iron Co. v. Herndon*, Adm'r, 114 Ala. 191, 214, 21 South. 430.

Referring to the fourth assignment of error, we do not think that the cases holding that an entire failure to use any remedies have any application to this case, in which it is shown that the plaintiff went to the regular physician of the defendant, who dressed his wound, did not consider it serious, gave him no instructions about coming again, and who testified that it was his duty to look after such cases. Moreover, the plaintiff testified that he did go to see the physician three other times, and did not find him at his office.

The next assignment of error insisted on by the appellant is that the court erred in refusing to give the second charge, to wit: "If you believe the evidence, you cannot find for the plaintiff under the first count of the complaint." The argument in favor of this assignment is that, as the said count does not specially complain of the failure to give notice, and there is an entire absence of evidence to show that the manner of blasting was dangerous, the plaintiff could not recover on this count. The rule is laid down that if, in blasting, rocks or stones are thrown upon the adjoining lands of another, the party is liable, without regard to negligence, as it is a trespass upon the premises; also that it is necessarily dangerous in a thickly settled portion of a city, but that in other cases the liability attaches where the work has been done negligently. 1 *Thompson on Negligence*, § 764; *Bessemer C. & I. Co. v. Doak* (Ala.) 44 South. 627, 680, 12 L. R. A. (N. S.) 389.

It is also said that persons blasting, who know, or by reasonable diligence could know, that injury will probably result from the blasting, should protect the parties exposed to danger by covering the blasts, or, if this cannot be done at a reasonable cost, warning must be given so that the parties can seek a place of safety. *Blackwell, Ex'r, v. Moorman & Co.*, 111 N. C. 151, 16 S. E. 12, 17 L. R. A. 729, 32 Am. St. Rep. 786. We think there was sufficient testimony in this case, from the facts that the rocks were thrown and there was no evidence of any particular precautions, to leave it to the jury to determine whether the blasting was done in a proper or negligent manner.

The judgment of the court is affirmed.

ANDERSON, DENSON, and McCLELLAN, JJ., concur.

(158 Ala. 622)

MOBILE, J. & K. C. R. CO. v. BAY SHORE LUMBER CO.(Supreme Court of Alabama. Nov. 19, 1908.
Rehearing Denied Jan. 14, 1909.)**1. ESTOPPEL (§ 112*)—CARRIAGE OF FREIGHT—CONVERSION—PLEADING.**

A plea by a carrier, sued by a shipper for the conversion of a shipment of lumber wrongfully delivered, which seeks to invoke an estoppel by act or misrepresentation under a custom known to the shipper and prevailing between the parties in the delivery of lumber consigned to the shipper, which fails to identify the lumber mentioned in the pleas with that specified in the complaint, is demurrable on that ground.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 302; Dec. Dig. § 112.*]

2. ESTOPPEL (§ 112*)—CARRIAGE OF FREIGHT—CONVERSION—PLEADING.

A plea by a carrier, sued by a shipper for the conversion of a shipment of lumber wrongfully delivered, which alleges that the lumber had been shipped to a designated point for sale in the market there, that on the arrival of the lumber the shipper delivered to a third person engaged in the purchase and sale of lumber there an invoice, that on the demand of the third person and on the representation that he had purchased the lumber the same was delivered to him, that the carrier acted on the invoice indicating a sale of the lumber by the shipper to the third person, and that its action was in accordance with its custom of dealing with the shipper and the third person, which custom was known to the shipper, etc., is sufficiently definite in averment of the act alleged to have induced the delivery of the lumber to sustain the defense of estoppel.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 302; Dec. Dig. § 112.*]

3. TROVER AND CONVERSION (§ 34*)—ISSUES—PROOF.

One, to recover for a conversion, must prove the time alleged; the averment fixing the date being material, and calling on defendant to defend a wrong alleged to have been inflicted on that date only.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. § 208; Dec. Dig. § 34.*]

Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge.

Action by the Bay Shore Lumber Company against the Mobile, Jackson & Kansas City Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The complaint was for the conversion of a lot of lumber, the dimensions of which are set out in the complaint. Plea 2, as originally filed, is as follows:

"That plaintiff shipped over defendant's line of railroad, from some point in the state of Mississippi two cars of lumber to the city of Mobile, in the state of Alabama, said lumber being loaded on cars of the defendant, No. 3212 and No. 242, respectively, and consigned to plaintiff company in Mobile. That said cars of lumber were designated on one freight waybill. Defendant further says that said lumber had been shipped to Mobile for the purpose of selling and disposing of the same in market, and that upon the arrival of said cars in Mobile said plaintiff, by

its agents and servants, prepared and delivered to the Lewis Land & Lumber Company, an incorporation engaged in the purchase and sale of lumber in the city of Mobile, an invoice or statement in writing in words and figures as follows:

Mobile, Ala., Nov. 28th, 1906.

Lewis Land & Lbr. Co.

Mobile, Ala.

Our No. B. D.

To Bay Shore Lumber Co., Dr.

Manufacturers

Yellow Pine Lumber

Order No. 45-G.

Initial

Car Nos. 3212 & 242 K. C.

Shipped to

Lewis Land & Lbr. Co.

Mobile, Ala.

c/o Munson S. S. Line.

32 pcs 5 x 12 x 38.....6089

23 " 4½ x 5½ x 43.....2040

49 " 6 x 8 x 43.....8248 16548

16548 ft. @ \$35.00.....\$579.18

F. O. B. Mill.

"And that upon the demand of the said Lewis Land & Lumber Company, and upon the representation that it had purchased said lumber upon said cars, the same was delivered to the said Lewis Land & Lumber Company; and defendant says that it acted upon the said invoice or statement, in writing aforesaid, indicating a sale of said lumber by plaintiff to the said Lewis Land & Lumber Company, and that its said action was in accordance with its custom of dealing with said plaintiff and said Lewis Land & Lumber Company, which said custom is known to plaintiff; and defendant further says that defendant's negligent misdirection to it in delivering to said Lewis Land & Lumber Company said invoice or statement hereinabove set out caused defendant to surrender possession of said lumber as aforesaid."

The ninth ground of demurrer to this plea is as follows: "It does not appear, from the invoice or statement set out in the plea, that there was any lumber of the dimensions of that alleged in the complaint to have been converted."

The amended plea 2 is exactly similar to the original plea 2 down through and including the words, "F. O. B. Mill," and, while there is a more extended allegation of the custom, etc., there is no allegation that the lumber delivered to the Lewis Land & Lumber Company was the lumber sought to be recovered as described and set out in the complaint.

The fifteenth ground of demurrer raises the same question as that raised in the demurrer above set out.

McIntosh & Rich, for appellant. Inge & Armbrrecht, for appellee.

McCLELLAN, J. Plea 2, as originally filed, and as amended after demurrer sustained, sought to invoke, against a recovery by

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

plaintiff in its action for the conversion by defendant of the lumber described in the complaint, in that it was wrongfully delivered by defendant, a common carrier, to the custody of which for transportation to plaintiff it was committed, an estoppel by act or misrepresentation under a custom known to plaintiff and prevailing between these parties in the delivery of lumber consigned to plaintiff at Mobile. The principle indicated by our statement is, of course, familiar, and is a defense when the facts squaring to the principle—founded as it is in common sense and justice—are specially pleaded and sustained in the proof. *Jones v. Peebles*, 130 Ala. 269, 30 South. 564; *Goetter v. Norman*, 107 Ala. 586, 19 South. 56; *Turner v. Flinn*, 72 Ala. 532; 16 Cyc. p. 680, subhead 2; *Id.* p. 681, subheads 7 and 8, and notes. These pleas were respectively subject to the ninth and fifteenth grounds of demurrer, as directed against them, respectively. Both pleas are silent in identification of the material contained in the cars as being that described in the complaint; and this point the mentioned grounds of demurrer took. The demurrers were, of course, properly sustained.

Looking to another trial, to which we must remand, we have considered the other grounds of the demurrers to these pleas, and are of the opinion that none of them, save those mentioned before, are well taken. The pleas are sufficiently definite in averment of the action alleged to have induced the surrender of the cars, and, if the material alleged to have been converted was then contained in the cars so delivered, and the averments of fact made are sustained to the requisite degree, the plaintiff cannot recover. Authorities *supra*.

The complaint alleges the conversion to have been effected on December 6, 1906. The testimony of the witness Bates, tending to show that the cars were delivered on that day, was on objection excluded by the court, evidently upon the sound ground that the testimony was not only hearsay, but that the record, of the contents of which he proposed to speak, was the best evidence. The only other testimony touching at all the date of the alleged conversion was that of Shaver, who testified that the car (apparently car No. 242) was received by the Lewis Land & Lumber Company on December 13, 1906, a date different from that designated in the complaint. That such a variance, as indicated, was fatal to a recovery, is expressly decided in *Williams v. McKissack*, 125 Ala. 544, 27 South. 922. No good reason has been suggested or occurs to us why that ruling should be repudiated. It is in accord with the strictness with which this court has always enforced the principle of conformity of pleadings and proof. The averment fixing the date of the conversion on December 6, 1906, was, in our opinion, material, and, hav-

ing called the defendant to defend a wrong alleged to have been inflicted on that date only, the consequences of a failure of proof to sustain it, or of a variance in the premises, cannot be now obviated, as the complaint is at present written.

The judgment is reversed, and the cause is remanded.

TYSON, C. J., and DOWDELL and ANDERSON, JJ., concur.

(158 Ala. 438)

SELMA ST. & S. RY. CO. v. CAMPBELL.
(Supreme Court of Alabama. Nov. 19, 1908.
Rehearing Denied Jan. 14, 1909.)

1. CARRIERS (§ 314*)—INJURY TO PASSENGER IN ALIGHTING—COMPLAINT—WILLFUL MISCONDUCT.

The count, in an action against a carrier for injury to a passenger from the starting of the car while he was attempting to alight from it, averring that the motorman in charge willfully, wantonly, and negligently started the car back, and that the conductor and other employees of defendant knew it was necessary for plaintiff to get off at the corner of B. and S. streets, but not averring that they knew he had to get off at the particular point at said crossing, or that this was the place of making transfers, and that this was so known to the servant starting the car, and not averring consciousness by the motorman of plaintiff's peril, or that the car was started at a point where its starting was known to the motorman as being dangerous, or that the motorman knew plaintiff was preparing to alight or in the act of alighting when he started the car, or that people customarily transferred at that particular point, does not charge wanton or willful misconduct.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 314.*]

2. CARRIERS (§ 314*)—INJURY TO PASSENGERS—COMPLAINT—PLEADING—NEGLIGENCE.

A count for injury to a passenger while attempting to alight from a car, averring the surroundings and conditions, and that the motorman negligently started the car, thereby throwing the passenger, but not ascribing the negligence to the preceding detailed circumstances, does not predicate the negligence on those circumstances, and so is not insufficient because they do not show negligence.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 314.*]

3. APPEAL AND ERROR (§ 1040*)—REVIEW—HARMLESS ERROR—PLEADING.

Where a count of the complaint charged that plaintiff was thrown from the car, sustaining a demurrer to a plea that plaintiff stepped off backward was harmless; there having been a plea of the general issue.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1040.*]

4. EVIDENCE (§ 471*)—QUESTION TO WITNESS—CALLING FOR CONCLUSIONS.

The question, "Did you step off the car, or were you thrown off?" does not necessarily call for a conclusion; whether he did or did not step off being a fact to which witness could testify.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 471.*]

5. TRIAL (§ 83*)—RECEPTION OF EVIDENCE—OBJECTION TO QUESTION.

The objection to a question as calling for a conclusion should separate the good from the

bad, and be limited to so much of the question as asks for a conclusion.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 83.*]

6. TRIAL (§ 191*)—INSTRUCTIONS—INVADING PROVINCE OF JURY.

A charge assuming, and in effect telling the jury, that indications were given that a car was being slowed to permit passengers to alight, when there was a question of fact for the jury as to the nature and character of the indications, or if any there were, invaded the province of the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 429, 430; Dec. Dig. § 191.*]

7. TRIAL (§ 252*)—INSTRUCTIONS—CONFORMITY TO EVIDENCE.

A charge, bottomed on the jury believing a fact contrary to what the undisputed evidence showed, was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

Appeal from City Court of Selma; J. W. Mabry, Judge.

Action by J. G. Campbell against the Selma Street & Suburban Railway Company for damages for personal injury. From a judgment for plaintiff, defendant appeals. Reversed.

The complaint was in the following language:

Count 1: "Plaintiff claims of defendant the sum of \$1,500 as damages, to wit: That on the 5th day of April, 1907, defendant corporation was engaged in operating by electric force a street railway as a common carrier of passengers in and upon the streets of Selma, in the state of Alabama, and said defendant then and there so negligently conducted said business that by reason of such negligence plaintiff, who was a passenger on one of defendant's street cars, received personal injuries, to wit, a broken arm, which resulted in great pain and suffering to plaintiff, and rendered him incapable of performing his real duties, those of a clerk in the post office in Selma, Ala., and still render him unable to perform said duties, and necessitated his having a physician and medical attendant at a great expense to him, all of which is to his damage as aforesaid."

Count 2: Same as 1, with a different statement of damages.

Count 3: Same as 1.

Count 4 (omitting the formal part, which is the same as in count 1): "That while so a passenger plaintiff requested of the conductor on said car, and was furnished by him with, a transfer ticket or check, from the car upon which he was riding to another car operated by the defendant corporation. That it was necessary for plaintiff to get off the car upon which he was riding at the corner of Broad and Selma streets, in said city, in order to get on the car to which he was to be transferred, and for which purpose he held such transfer ticket, which had been given him by the said conductor, and that said conductor and other employes of defendant on said car

knew that it was necessary for him to do so. That when the car upon which plaintiff was riding reached the said corner of Broad and Selma streets the said car was stopped, and plaintiff prepared to alight therefrom in order to get on the car to which he was to be transferred, and which was then at said corner. That in order to alight from the car upon which he had been riding the defendant stood up and stepped upon the running board upon said car, which is used for that purpose. That at that time the said car was standing still, but before plaintiff alighted from said car, and while he was in the act of so doing, the motorman in charge of said car willfully, wantonly, and negligently, and with willful and wanton negligence, started the said car backwards suddenly and with a violent jerk, and without any warning whatever to plaintiff, thereby throwing plaintiff violently to the ground. [Here follows the allegation of damages and injuries as alleged in the first count.]"

Count 5: Same as 4, except that it does not allege wanton or willful misconduct.

Count 6: Similar to the fifth, except that it alleges that the conductor and motorman had knowledge of the fact that he was attempting to alight when the car was started violently backwards without notice to him.

Count 7: Similar to the sixth, except that it alleges wanton, willful, or intentional misconduct.

Plea No. 6 is as follows:

"Plaintiff was guilty of contributory negligence in this: That while said car was moving, as alleged in said count, plaintiff negligently and carelessly stepped off said car backwards, which act, at the time and place where plaintiff then was, was attended with danger obvious to a person of ordinary care and prudence, in the position in which plaintiff then was, and as a proximate consequence of said negligently and carelessly stepping from said car backwards plaintiff proximately contributed to his own injury as alleged in said count."

The following charge was given at the instance of the plaintiff:

"The court charges the jury that, though the car did not stop at the crossing, the jury might find it was so operated as to imply an invitation to passengers to alight by reason of indications given that it was being slowed up for that purpose. In such a situation the duty of the trainmen towards passengers departing is the same as to those taking passage. Employes must see that no person intending to act on the invitation is so situated as to be imperiled by starting."

The following charge was refused to defendant:

"The court charges the jury that if they believe from the evidence that the car stopped before it reached the corner of Broad and Selma streets, and plaintiff got up from his

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

seat and got on the running board of the car, and defendant, in switching its car, started the car backwards suddenly, and that caused plaintiff to fall, then plaintiff cannot recover under counts 4, 5, 6, and 7 of plaintiff's complaint."

A. D. Pitts and Daniel Partridge, Jr., for appellant. Craig & Craig, for appellee.

ANDERSON, J. While count 4 of the complaint charges that the motorman in charge of said car willfully, wantonly, and negligently started the car back, it does not aver a consciousness on the part of the motorman of the plaintiff's peril, or that it was so started at a point where the starting of which was known to the motorman as being dangerous. It does not aver that the motorman knew that the plaintiff was preparing to alight or in the act of alighting when he started the car, or that people customarily transferred at that particular point. It does aver that the conductor and other employees of the defendant knew that it was necessary for him to get off at the corner of Broad and Selma streets, but does not aver that they knew he had to get off at this particular point at said crossing, or that this was the place of making transfers, and that it was so known to the servant starting the car. It is a matter of common knowledge that there are four corners at the usual street crossing, and there is no averment that the servants knew that plaintiff had to transfer at the one where he made the attempt, or that it was the particular corner where passengers did transfer. The trial court did not err in overruling the demurrers proceeding upon the theory that this was a count for wanton or willful misconduct. Moreover, it was treated as a simple negligence count throughout the trial, by the allowance of pleas of contributory negligence thereto and in giving special charges that contributory negligence would defeat a recovery thereunder. *Montgomery St. R. R. v. Rice*, 142 Ala. 674, 38 South. 857; *L. & N. R. R. v. Orr*, 121 Ala. 489, 28 South. 35; *M. & C. R. R. v. Martin*, 117 Ala. 367, 23 South. 231.

Counts 4, 5, 6, and 7 aver that the car was negligently started backwards, and sufficiently charged simple negligence. *Armstrong v. Montgomery R. R.*, 123 Ala. 244, 26 South. 349; *L. & N. R. R. Co. v. Marbury*, 125 Ala. 237, 28 South. 438, 50 L. R. A. 620; *Russell v. Huntsville R. R.*, 137 Ala. 628, 34 South. 855. We do not understand the count to set out or attempt to set out the constituents of negligence. It does not ascribe the negligence to the preceding detailed circumstances above, or charge that it consisted in the acts or omissions as aforesaid. We are, of course, aware of the rule that, notwithstanding the quo modo need not be averred, yet when it is, and the pleader relies upon the facts so set out as charging negligence, that the count is bad if the facts so stated fail to show negligence. But we do not think the complaint in

the case at bar predicates the charge of negligence upon the facts detailed. It avers the surroundings and conditions, and that the motorman negligently started the car, etc., thereby throwing the plaintiff down. It does not aver that the conditions detailed constituted negligence, nor attempt to set out the quo modo by reference to the detailed facts or otherwise.

The trial court did not commit reversible error by sustaining the demurrer to plea 6. Whether good or bad, which we need not decide, it was cured by the general issue as to counts 4, 5, 6, and 7. Each of said counts charge that the plaintiff was thrown from the car, while the plea avers that he stepped off backwards. If he stepped off, whether forward or backwards, then he was not thrown off, as charged in said counts of the complaint. It is true counts 1, 2, and 3 merely charge a negligent failure to safely transport the plaintiff as a passenger; and conceding, without deciding, that said plea 6 was a good plea of contributory negligence to these counts, the defendant got the benefit of same under plea 7, to which no demurrer was sustained.

The question asked the plaintiff as a witness, "Did you step off the car, or were you thrown off?" did not necessarily call for a conclusion of the witness. The fact that he did or did not step off was a fact to which he could testify. Conceding, therefore, without deciding, that a part of the question called for a conclusion, in order to put the trial court in error, the objection should have separated the good from the bad, and applied to only so much of the interrogation as solicited a conclusion.

Charge 1, given at the request of the plaintiff, was an invasion of the province of the jury and should have been refused. It assumes and in effect tells the jury that indications were given that the car was being slowed for the purpose of permitting passengers to alight. It may be from the plaintiff's evidence that the jury might be authorized to infer an invitation to alight and that this inference could be drawn by reason of indications, if any there were; but the vice with the charge is that it assumes and instructs that indications were given from which an invitation to alight might be implied, when it was for the jury to determine the nature and character of the indications, or if any there were. A charge which assumes the existence of a fact, or which instructs that it does exist when it does not, or when there is a conflict in the evidence as to whether or not it does exist, is clearly an invasion of the province of the jury. 2 *Mayfield*, p. 571; *Thompson v. State*, 30 Ala. 28; *A. G. S. R. R. v. Roebuck*, 76 Ala. 277; *Hair v. Little*, 28 Ala. 236.

The trial court did not err in refusing the affirmative charges as to counts 4 and 7. We have already held that these counts did not charge wanton or willful misconduct, and

there was evidence from which the jury could infer simple negligence.

The trial court did not err in refusing charge A, requested by the defendant. The undisputed evidence shows that the car had reached the corner of Broad and Selma streets before it stopped, or before the plaintiff attempted to alight. It may not have passed even the first corner, but the front of it reached the corners nearest to it, and the complaint avers (counts 4, 5, 6, and 7) that when the car reached the corner of Broad and Selma streets it was stopped, etc. It does not designate any particular corner.

For the error above designated, the judgment of the city court is reversed, and the cause is remanded.

Reversed and remanded.

TYSON, C. J., and DOWDELL and McCLELLAN, JJ., concur.

(158 Ala. 583)

WESTERN UNION TELEGRAPH CO. v.
CROWLEY.

(Supreme Court of Alabama. Jan. 18, 1909.
Rehearing Denied Feb. 5, 1909.)

1. APPEAL AND ERROR (§ 1042*)—REVIEW—
ELEMENTS OF DAMAGES — STRIKING FROM
COMPLAINT.

Denial of a motion to strike certain parts of the complaint as improper elements of damage is not reviewable on appeal, as such elements, if not recoverable, may be eliminated by objection to the evidence or by special charges.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4113; Dec. Dig. § 1042.*]

2. TELEGRAPHS AND TELEPHONES (§ 66*)—
FAILURE TO TRANSMIT—BURDEN OF PROOF.

In an action for failure to transmit a telegram, the burden is on plaintiff to show that defendant could have delivered the message to the addressee if it had been transmitted.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 61; Dec. Dig. § 66.*]

3. TELEGRAPHS AND TELEPHONES (§ 66*) —
MESSAGES—DELIVERY TO ADDRESSEE.

Where the house of the addressee of a telegram was very near defendant's office, and she had received a message sent the night before, warning her to expect the one sent, but not transmitted, which related to the death of her grandchild, such facts were sufficient to warrant an inference that the message could have been delivered to her if transmitted.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 63; Dec. Dig. § 66.*]

4. TELEGRAPHS AND TELEPHONES (§ 69*) —
MESSAGES — FAILURE TO TRANSMIT—PUNI-
TIVE DAMAGES.

Where a telegram requesting the preparation of a grave for plaintiff's infant child, directed to its grandmother, especially in connection with a prior message, disclosed on its face the importance of immediate delivery, but it was not transmitted from the sending office until it was called for by the receiving office on the succeeding day, though the defendant's wires were open for transmission of the message for more than three hours after it was delivered to it, by reason whereof plaintiff, when he arrived with the body of his child, was not met by any

of his relatives, and found that no preparation had been made for the funeral, defendant was so grossly negligent as to warrant a recovery of punitive damages.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 71; Dec. Dig. § 69.*]

5. TELEGRAPHS AND TELEPHONES (§ 68*) —
MESSAGES—FAILURE TO SEND—MENTAL AN-
GUISH.

Where plaintiff, by reason of the failure of defendant telegraph company to transmit a message, on arrival at the place where he expected to bury the body of his dead child, was met by none of his relatives and friends, and found that no arrangements had been made for the funeral, he was entitled to recover for mental suffering and anguish in mind incident thereto.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 70; Dec. Dig. § 68.*]

6. APPEAL AND ERROR (§ 1033*)—PREJUDICE.

Where the jury found for plaintiff, the refusal of the general charge in plaintiff's favor and of other charges seeking to fasten a liability on defendant for a failure to transmit the message, regardless of the condition of its wires, was without prejudice to plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4056; Dec. Dig. § 1033.*]

7. COSTS (§ 233*) — APPEAL — CROSS-ASSIGN-
MENTS OF ERROR.

Where plaintiff filed only a consent assignment of errors on defendant's appeal, as authorized by Supreme Court rule 3, and did not take a separate appeal, plaintiff was entitled to costs on the affirmance of the judgment.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 233.*]

Appeal from City Court of Bessemer. William Jackson, Judge.

The telegram was in words and figures as follows: "Birmingham, Ala., June 2, 1906. To Mrs. W. A. Johnson, % Shepherd Bros., Berry, Ala. Coming to-day will bury Freeman cemetery in the morning, dig vault two feet wide, three feet long, select location. E. L. Crowley." It seems from the evidence that on the evening of June 1st a message was sent by the same party to Mrs. Johnson, stating that the baby was dead and that there would be a later wire, and that the second telegram was the later wire referred to, which it seems was not transmitted, and when Crowley arrived with his dead child no one was at the station to meet him and the funeral arrangements had not been made. The other facts sufficiently appear in the opinion of the court.

The following charges were refused to the defendant: "(5) I charge you that the alleged absence of funeral arrangements on plaintiff's arrival cannot be made the basis of any assessment of damages for mental pain and anguish alleged to be suffered by plaintiff." "(8) I charge you that plaintiff can recover no damages for the alleged fact that he was deprived, at the time of his arrival at Berry, with the remains of his child, of the comfort, consolation, and assistance of his near relatives and friends." "(12) I charge you that plaintiff is entitled to re-

cover nothing whatever for the mental pain and anguish that every person suffers at the death of his child, as such suffering is caused by the act of the Almighty, for which the defendant is in no wise responsible; and it would be highly improper for you to assess damages against this defendant for the suffering caused plaintiff by the death of his child. (13) I charge you that under the evidence in this case, if you believe the same, you cannot award any damages to plaintiff for mental pain, anguish, distress, or humiliation. (14) I charge you that there is no evidence here that plaintiff suffered mental pain and anguish by reason of the alleged negligence of the defendant. (15) I charge you that there is no evidence before you that any other or different reception would have been accorded the plaintiff if the telegram had been delivered before the arrival of the train, and you cannot, therefore, assess any damages for the alleged failure of plaintiff's near relatives and friends to meet him at the train. (16) I charge you that the only damages for mental suffering which were within the contemplation of the parties, and allowable in this case, are those arising out of the reference in the telegram to the digging of the grave and the interment of plaintiff's child; and if these preparations could have been reasonably carried out by those at Berry as well after the plaintiff's arrival as before, you cannot award any damages for mental suffering. (17) I charge you that you cannot assess any damages against defendant for mental pain and suffering on part of plaintiff. (18) I charge you that there is no evidence in this case on which you are authorized to base a recovery for mental pain and anguish. (19) I charge you that you can assess no damages whatever against defendant by way of punitive damages." "(23) I charge you that you can assess no damages on account of the fact that the grave for plaintiff's child was not dug when the train arrived."

There was a jury trial, and verdict for plaintiff in the sum of \$100.

Campbell & Johnson for appellant. Estes, Jones & Welch, for appellee.

ANDERSON, J. The motion of the defendant to strike certain parts of the complaint as elements of damage is not reversible upon appeal, since the same can be eliminated, if not recoverable, by objection to the evidence or special charges. *Woodstock Co. v. Stockdale*, 143 Ala. 550, 39 South. 335, and cases there cited.

It is true the plaintiff had to show that the defendant could have delivered the message to the sendee, and it is insisted by counsel that there was no proof that Mrs. Johnson was at her home between the delivery of the telegram to the defendant at Birmingham and the arrival of the plaintiff at Berry. But we think the jury could have

inferred from the evidence that the sendee would have been found, had there been a transmission and an attempt to deliver. Her house was very near the defendant's office, and she received the message sent the night before, wherein she was warned to expect the one in question. She was the grandmother of the dead child, and knew that it would be buried at Berry; and it would be rather a violent presumption to "presume" that she left her home town during this interval under the peculiar circumstances. These facts were not shown in the *McMorris Case*, 48 South. 349, and it is therefore distinguishable from the case at bar.

The trial court did not err in refusing the general charge requested by the defendant. The jury was authorized to infer, from the plaintiff's evidence, that the failure to transmit the message until it was called for by the operator at Berry the next day was so grossly negligent as to evince an utter disregard of the feelings and rights of the plaintiff. *Western Union Tel. Co. v. Cunningham*, 99 Ala. 314, 14 South. 579; *Western Union Tel. Co. v. Seed*, 115 Ala. 676, 22 South. 474. The message upon its face suggested the importance of a delivery before the plaintiff's arrival that afternoon, and especially was such the case when taken in connection with the one transmitted the night before. There was also evidence that the wires were in order, and yet no transmission of the message for over 24 hours after its delivery, and then only after it was called for by the operator at the other end of the line. The defendant attempted to excuse the failure by showing that its line was out of fix; but this was a question for the jury, as Collins testified that the wires were in order. Moreover, the defendant's evidence shows that its own local wire was open from 8 a. m. to 11:08 a. m., more than three hours from the delivery of the message at 8:06 a. m.

The case of *Western Union Tel. Co. v. Westmoreland*, 151 Ala. 319, 44 South. 382, dealt with a social message, and expressly states that it was not shown that the delay arose from any willful or malicious act, and in discussing the character of cases which would not support punitive damages expressly differentiated the *Seed Case* therefrom. The facts in the case at bar are perhaps stronger in support of punitive damages than those in the *Seed Case*, in so far as the misconduct of defendant's servants is concerned. There the defendant made a partial attempt, in that the message was transmitted to Mobile, and the misconduct consisted in a mere failure to deliver. Here there was evidence from which the jury could infer that the defendant's servants held the message in the sending office for more than 24 hours without the slightest effort to transmit same, notwithstanding the wires were open all the time according to plaintiff's theory, and for over three hours according to the defendant's evidence.

The trial court did not err in refusing charge 19, requested by the defendant. The telegram notified the sendee when to expect the plaintiff with the remains of his child, and imported upon its face that it was for the purpose of having the funeral arrangements made before his arrival, and it cannot be said that he did not suffer mental anguish when he reached Berry and learned that no arrangements had been made and that none of his friends or relatives met him at the depot. It is true there was no direct proof that the grave would have been dug, or his friends and relatives would have met him; but the jury could easily infer that such would have been the case, had the telegram been delivered. The sendee was the grandmother of the dead child, and it is not a violent presumption to infer that she and others in the village where the plaintiff and his wife's family resided would have made all arrangements for the burial and met them upon their arrival, and by their sympathy and assistance alleviated to some extent the anguish and pain incident to their sad journey. *Western Union Tel. Co. v. Long*, 148 Ala. 202, 41 South. 965.

The trial court did not err in refusing charges 5, 8, 12, 13, 14, 15, 16, 17, 18, and 19, requested by the defendant.

Affirmed.

The only errors assigned by the appellee on the cross-assignment, as provided by rule 3, relate to charges refused the plaintiff. They embrace the general charge, and all the others sought to fasten a liability on the defendant, regardless of the condition of its wires, and, as the jury found for the plaintiff, the refusal of these charges was of no detriment to him. The judgment of the city court is therefore affirmed in all respects, and the defendant in the court below is taxed with all the costs, as there was no separate appeal by the plaintiff, but a mere consent assignment of errors on the defendant's appeal under rule 3.

Affirmed.

DOWDELL, DENSON, and MCLELLAN, JJ., concur.

(158 Ala. 91)

DODGE v. IRVINGTON LAND CO.

(Supreme Court of Alabama. July 8, 1908.
Rehearing Denied Jan. 14, 1909.)

1. APPEAL AND ERROR (§ 1008*)—REVIEW—FINDINGS OF FACT.

The findings on the issues of fact in a case tried without a jury have the weight of a verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955-3969; Dec. Dig. § 1008.*]

2. EJECTMENT (§ 16*)—RECOVERY ON PROOF OF POSSESSION.

On proof of actual possession of the land by plaintiff under color of title when defend-

ant entered, and prior actual possession by plaintiff's grantor, plaintiff in statutory ejectment is entitled to judgment against one who shows no title in himself nor superior title in a third person, and this, though defendant has color of title, and though title to the land was originally in the United States; plaintiff's possession being prima facie evidence of title, and the presumption not being that title is in the United States or another.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 33; Dec. Dig. § 16.*]

Denson and McClellan, JJ., dissenting.

Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge.

Statutory ejectment by the Irvington Land Company against R. M. Dodge. Judgment for plaintiff. Defendant appeals. Affirmed.

Gunter & Gunter, for appellant. Erwin & McAleer, for appellee.

TYSON, C. J. This case was tried by the judge without the intervention of a jury. The determination of all issues of fact was therefore submitted to him, and his finding upon those issues is entitled to the same consideration as that of a verdict of a jury. Under the testimony it was open for the court to find that plaintiff was in the actual peaceable possession of the lands in controversy at the time the defendant entered thereon; no abandonment of the possession of them being shown. *Brand v. U. S. Car Co.*, 128 Ala. 579, 30 South. 60; *Goodson v. Brothers*, 111 Ala. 589, 20 South. 443. So, then, the single question presented by this record is whether the trial judge was authorized to render judgment for plaintiff, upon proof of prior actual possession under color of title and proof of prior actual possession by its grantor, against the defendant, who showed no title in himself, nor superior outstanding title in a third person, but whose entry and occupancy was under color of title.

We do not regard the question as an open one in this jurisdiction. The plaintiff's right to recover is founded upon the principle that "possession of lands is prima facie evidence of title, and is sufficient evidence against all who do not show a prior possession or a better title." *Mickle v. Montgomery*, 111 Ala. 421, 20 South. 441; *Adams v. Frampton*, 9 Ala. 124; *McCall v. Prior*, 17 Ala. 533; *Cox v. Davis*, Id. 714, 52 Am. Dec. 199; *Russell v. Irwin*, Adm'r, 38 Ala. 44; *Anderson v. Mclear*, 56 Ala. 623; *Mills v. Clayton*, 73 Ala. 359; *Strange v. King*, 84 Ala. 212, 4 South. 600; *Stephenson v. Reeves*, 92 Ala. 582, 8 South. 695; *Bradshaw v. Emory*, 65 Ala. 208; *Crosby v. Pridgen*, 76 Ala. 387; *Wilson v. Glenn*, 68 Ala. 383; *Steele v. Brown*, 70 Ala. 235, 237; *Reddick v. Long*, 124 Ala. 260, 27 South. 402; *Campbell v. Bates*, 143 Ala. 345, 39 South. 144. This principle in no wise contravenes the doctrine that the plaintiff in ejectment must recover, if at all, upon the strength of his own title, and not on the

mere weakness of that of his adversary. It simply accords to his possession, as evidence, a presumption of title, which must be rebutted or overcome by his adversary; and this his adversary may do, if not a bare trespasser and he has not the legal title, by showing his antecedent actual possession, or an outstanding title in a third party, or that plaintiff's title was subordinate or permissive, or that the action is barred by the statute of limitations.

If this were not the rule, the plaintiff in every case—except, perhaps, where the contesting parties derive their respective claims to title from a common source, or where no element of estoppel exists—in order to recover, would be forced to trace his title to the government, or to establish an adverse possession for a sufficient length of time to ripen into a title, as against an adversary who has no shadow of title, except the color of title under which he wrongfully entered and dispossessed the plaintiff. Such a rule would strike down the doctrine of presumptive title, generally indulged, founded upon proof of possession of the property in controversy, be it real or personal. And surely the fact that title to lands in this state was originally held by the United States government will not authorize the striking down of this principle, to the end of indulging the presumption, in favor of one having no title, that the outstanding title is still in the government. Why not presume, in support of plaintiff's *prima facie* rightful possession, that it acquired the government's title, rather than, in favor of a trespasser, that the government has never parted with it? Indeed, that such a presumption will be indulged in favor of the plaintiff, rather than the one, invoked by the defendant, that the title is still outstanding in the government, has been too long settled to be now debatable. *Smoot v. Lecatt*, 1 Stew. 590, 600. While this principle has not, perhaps, been announced in this language, the many decisions of this court, permitting a recovery by a plaintiff upon proof of prior actual possession, where no better title was shown in either party (conceding that in this action the question of legal title is always involved), cannot be sustained upon any other theory. This presumption is, of course, a rebuttable one, and may be overcome by proof of title in the government, or in some person other than the plaintiff. If this were not true, then there would be no room for the application of the principle of presumptive title predicated upon actual possession.

If the title is still outstanding in the government, as is insisted, proof of that fact is not difficult. But, however difficult of proof it may be, this would not afford a good reason for a departure from the principle so clearly and accurately stated by one of the ablest Chief Justices of this court in this language: "As to an *intruder or trespasser*, or as to one who does not show a better right, possession of lands, like the possession

of personal property, is *prima facie* evidence of title, and will support ejectment." (Italics supplied.) *Dothard v. Denson*, 72 Ala. 544. A trespasser under color of title is entitled to no more consideration than any other wrongdoer; and it cannot be regarded a hardship to require of him to acquit himself of the imputation of wrongful entry upon lands in the possession of another, when that occupancy is of such character as to carry with it the presumption of ownership. Indeed, the only distinction recognized by our decisions between the right of defense of a bare, naked trespasser, and that of a trespasser under color of title, is that the former is not permitted to show an outstanding title in a third person in order to defeat the plaintiff's recovery, while the latter is accorded that right of defense, without connecting himself with such outstanding title.

After a careful research we have been unable to find any case in this state which holds to the contrary of the views we have announced. It is true that in *Bernheim v. Horton*, 103 Ala. 384, 15 South. 823, this language is used: "The general rule is that in ejectment plaintiff must recover on the strength of his legal title, and not on the weakness of his adversary's title. To this general rule there is an exception, that prior possession is sufficient to sustain the action against a mere trespasser; but this exception does not extend as against a person in possession, claiming in his own right under color of title." In support of this proposition the cases of *Snedecor v. Freeman*, 71 Ala. 140, *Gulmartin v. Wood*, 76 Ala. 204, *Lucy v. Tennessee & Coosa R. R. Co.*, 92 Ala. 246, 8 South. 806, *Stephenson v. Reeves*, 92 Ala. 582, 8 South. 695, and *Jernigan v. Flowers*, 94 Ala. 508, 10 South. 437, are cited. An examination of these cases will show that they assert no more than the proposition laid down by us, and that they do not go to the extent of holding, or even of intimating, the existence of the limitation as asserted in the latter part of the quotation above. Indeed, this limitation upon what is denominated as an exception in the quotation was never before recognized by this court, nor has it ever been since recognized. Besides, if it is not wholly unsound upon principle, it is clearly misleading, and has never been applied by this court as determinative of any of the numerous cases reviewed by it. An entry and dispossession by one who has no more than color of title is just as much a trespass, unless he shows an outstanding title in another, as would be the entry of a bare, naked intruder or trespasser. Furthermore, the doctrine asserted was dictum, and did not control the decision of the case, as will be readily seen by a reading of the opinion.

It has always been our understanding of the law in this jurisdiction that a plaintiff in ejectment makes out a *prima facie* case, entitling him to recover, upon proof of his possession under a conveyance from a grantor

shown to be in possession when the conveyance was executed. When these facts are proven, the burden is then cast upon the defendant to show title in himself or in some third person. Indeed, this seems to be the doctrine very generally accepted by the courts of this country.

In this case the plaintiff was entitled to recover unless its presumptive title was overcome by proof of title in defendant or in some third party. No such proof was offered. Therefore the *prima facie* case made by plaintiff must prevail. 15 Cyc. pp. 30, 31, 32, and cases collected in note; note to *Plume v. Seward*, 60 Am. Dec. 601, and cases there cited.

Affirmed.

DOWDELL, SIMPSON, and ANDERSON, JJ., concur.

DENSON, J. (dissenting). I am unable to agree with the majority opinion, and the questions involved being of great importance, from their constant recurrence in litigation respecting land, I think it proper that I should express my dissenting views.

The action is statutory ejectment by the plaintiff (appellee) to recover of the defendant (appellant) two distinct subdivisions of land. The defendant conceded the plaintiff was entitled to recover as to one of the subdivisions, and contested its right of recovery to only one of the subdivisions. It is only to that subdivision, the title to which was contested, this opinion has application. The plaintiff showed no paper title derived from the government; nor, first showing that the title had passed out of the government, so that adverse possession could operate to create title, did it prove adverse holding for 10 years. It only showed a prior possession to that of defendant, who in turn proved that he entered under claim and color of title when the premises were vacant. Pointing out that it was government land, of which the court takes judicial notice, and that there was no proof that it had ever parted with its right, the appellant insisted in the court below, and here insists, that appellee must recover on the strength of its own title, and that none had been shown, but, on the contrary, that the proof showed a perfect outstanding title behind which he could take shelter, though not connecting himself with it; and, this upon the idea that, the title being once shown, the presumption is that it so remains, nothing appearing to the contrary. I think the position of the defendant (appellant) is unassailable, and that the ruling to the contrary is unsupported by principle or the authority of any well-considered case where the point was directly involved and discussed.

Discussing the point at issue first on principle, I have never heard that the maxim "*nullum tempus occurrit regi*" had been abro-

gated. The majority opinion, however, according to my view, treats it as no longer of force in our jurisprudence, since, if it existed, under the proof in this case, it was impossible for the appellee's mere prior possession even to assume an adverse character, or to become the basis for the recovery of the land except against a mere trespasser. It has always been accepted as a truism in the law of real property that when there is no *pedis possessio* the possession is referred to the title and the true owner is in possession. *L. & N. R. R. Co. v. Philyaw*, 88 Ala. 268, 6 South. 837. This rule, however, has no need to be invoked as to the government, because there can be no possession hostile to it, and therefore, whatever may be the ostensible character of an occupancy of its land, it is by the force of law merely permissive and in subordination to the true title. However, since the existence of society itself requires that all actual possessions, whether of real or personal property, shall not be wantonly or rudely interfered with—that is, without authority of law—it is held that one in the actual possession of property, which he has not abandoned, may recover against a bare trespasser. But the same necessity of preserving the status quo against bare trespassers involves and carries with it the rule that a possession gained without—that is, taken while vacant under claim and color of right—force cannot itself be displaced without title.

It is actual possession which is always presumed to be right, and, nothing appearing to the contrary, to evidence title against all force and bare trespassers. Therefore an occupier of government land or a tenant may recover on a prior possession alone, without proof of other right, against a bare trespasser. But, when one enters on vacant premises under color and claim of right, his possession, on the same general principle of public policy, is entitled to protection against intrusions not founded on title. How, and on what principle, can one so entering and holding be ousted except by title? And how can there be title against the government, or one holding possession of its land permissively, excepting by grant shown? The mere prior possession of such land discloses no title whatever, but only a permissive possession during its actual existence, and, it having terminated, the entry by the defendant on the vacant premises under claim and color of right gives him presumptively a permissive possession as to the true owner (the government), and therefore a clear right to hold against a mere trespasser, or a prior possessor whose right is not shown to have been more than a permissive occupancy, which has terminated.

The whole law in this view is based on public policy, founded on reasonable presumption. Wrong is not presumed without warrant; hence actual possession is held

to evidence ownership in fact, or a permissive holding under true title, and is, therefore, to be protected from bare trespassers without more. But presumption of title from possession can never be indulged until the title is shown to be such that it is reasonable to indulge the presumption, which can never be against government land until it has parted with its title. Hence it is that careful lawyers, when adverse or prior possession is relied on for a recovery, except as against bare trespassers, first show that the government has patented the land, so that presumption of title from possession may be indulged, as was done in the case of *Wilson v. Glenn*, 68 Ala. 383-385. On principle, then, I think it is clear that the mere permissive prior possession of the plaintiff below was no warrant for ousting the defendant from his permissive actual possession under claim and color of right at the bringing of the suit, and that the defendant's shelter behind the outstanding title of the government was a perfect defense. The plaintiff exhibited no strength of title of its own to recover on against him.

Now, turning to the authorities, the first of our cases that I refer to is *Hallett v. Eslava*, 2 Stew. 115, as clearly stating the law as above expressed. It is there said: "The presumption [of title] which it [possession] creates may be destroyed in various ways, by showing that the title was not with the possession, as that possession was permitted, or that it was held against the consent of the person in whom the title is." And under this ruling it was held that the defendant could defend "behind the title in the heirs of Farmer." In the instant case we take judicial notice that the title was in the United States. *Lewis v. Harris*, 31 Ala. 689; 1 *Elliott on Evidence*, § 48 et seq. And it not being shown that the government had parted with its title, the presumption is that the title remained with the government. It is said there is no exception to this presumption of continuance of title. 1 *Rice on Evidence*, 66; 1 *Elliott on Evidence*, § 109; 1 *Greenleaf on Evidence*, §§ 41, 42; 4 *Wigmore on Evidence*, § 2530. The appellant, then, under the doctrine that there can be no hostile possession against the government, which I insist is still the law, showed "that the title was not with the possession," and thus destroyed the presumption of title from prior possession, according to the very words of the case of *Hallett v. Eslava*, supra.

Coming to *Wilson v. Glenn*, 68 Ala. 383, it will be found, when that case is well understood, that, approving the case in 2 Stew. 115, it again expresses the law as I insist it is. It is there said the plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's; that prior possession creates a presumption of title, which can only be rebutted by showing title in the defendant, or that plaintiff's title was subordinate or permissive, or is barred

by limitations, or by showing an outstanding title in a third person; but that a bare trespasser cannot plead this last defense without showing possession under such title. It would seem that here is the law, and we have only to apply it here as applied there. In that case the defendant showed a patent of the land by the government to a third party, and he requested the court to instruct the jury that the patent was an outstanding title, and a good defense. The court refused the request, and this court justified the ruling only and exclusively on the ground that there was evidence that the defendant was a bare trespasser, and therefore could not put the plaintiff to proof of title beyond possession.

The only caution to be observed in applying the doctrine of the principles of law in that case, as in all others, is that the language must be restricted to the case before the court, and therefore it cannot be inferred that there was any intention to hold that possession raised a presumption of title against the sovereign. And surely, if the patent in that case shown to have been issued was an outstanding title, the title in the government in the case in judgment was an outstanding title, which, in the language in the case of *Hallett v. Eslava*, supra, "destroyed" the presumption of title from mere prior possession, and enabled defendant to "defend behind it." The principles of these two cases are confirmed and approved in a great number of cases in this jurisdiction, many of which are cited and quoted in the brief of counsel, and there is not, in my humble opinion, a case disputing their authority. I will indulge in quotations from a few of them.

In *Gullmartin v. Wood*, 76 Ala. 204, there is this headnote: "(6) When Defendant may Show Outstanding Title. In ejectment, or the statutory action in the nature of ejectment, if the defendant entered under the plaintiff, or if he is a mere trespasser on the plaintiff's prior possession, he cannot defeat a recovery by showing an outstanding title in a third person; but in all cases his possession will defeat a recovery by any other person than the true owner, and he may show the outstanding title of the true owner."

In *Gist v. Beaumont*, 104 Ala. 347-355, 16 South. 20, 21, we said: "Against the possession of a mere trespasser, plaintiff's prior actual possession, if he had such, will prevail. On the other hand, if the plaintiff was not in the actual possession at the time the defendant took possession under the quitclaim deed, * * * then he [defendant] was not a naked trespasser, so far as the plaintiff's rights are concerned, and under these circumstances the plaintiff could not recover on prior possession alone. * * * The plaintiff not having the legal title, it required actual possession of the lot by him to render the entry by the defendant a trespass."

Again, in *Bernheim v. Horton*, 103 Ala. 380, 15 South. 822, we said: "The general rule is that in ejectment the plaintiff must recover

on the strength of his legal title, and not on the weakness of his adversary's title. To this general rule there is an exception, that prior possession is sufficient to maintain the action against a mere trespasser; but this exception does not extend as against a person in possession, claiming in his own right under color of title. *Snedecor v. Freeman*, 71 Ala. 140; *Gullmartin v. Wood*, 76 Ala. 204; *Lucy v. Tenn. & Coosa R. R. Co.*, 92 Ala. 246, 8 South. 806; *Stephenson v. Reeves*, 92 Ala. 582, 8 South. 695; *Jernigan v. Flowers*, 94 Ala. 508, 10 South. 437. We are of the opinion that, if the evidence offered by *Bernheim & Co.* had been admitted, its tendency was to show that this possession was under color of title and claim, and that they were not mere trespassers. It was offered for this purpose, so that they might set up the outstanding legal title in *Witter*."

These quotations are supported by a number of decisions of this court: *Hallett v. Eslava*, 2 Stew. 115; *Smoot v. Lecatt*, 1 Stew. 590; *Eakin v. Brewer*, 60 Ala. 579; *Russell v. Irwin*, 38 Ala. 44; *Dothard v. Denson*, 72 Ala. 544; *Crosby v. Pridgen*, 76 Ala. 385; *Green v. Jordan*, 83 Ala. 220, 3 South. 513, 3 Am. St. Rep. 711; *Ware v. Dewberry*, 84 Ala. 568, 4 South. 404; *L. & N. R. R. v. Philyaw*, 88 Ala. 264, 267, 6 South. 837; *Stephenson v. Reeves*, 92 Ala. 582, 8 South. 695. According to my view, our cases, when properly understood, are uniform to the conclusion that bare prior possession is title against a mere trespasser, but not against one under claim and color of title. In *Bernheim v. Horton*, 103 Ala. 384, 15 South. 823, the express words of the court are: "Previous possession * * * does not authorize a recovery in ejectment, except as against a bare trespasser." The case of *Alexander v. Savage*, 90 Ala. 383, 8 South. 93, is also a case directly in point, for we there held that, the defendant not having been shown to be a bare trespasser, the question was purely one of title.

This rule of our court is fully supported by the decisions of the Supreme Court of the United States. In *Christy v. Scott*, 14 How. 292, 14 L. Ed. 422, it is said: "He shows no title whatever in himself. But a mere intruder cannot enter on a person actually seized, and eject him, and then question his title, or set up an outstanding title in another. The maxim that a plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's, is applicable to all actions for the recovery of property. But, if the plaintiff had actual prior possession of the land, this is strong enough to enable him to recover it from a mere trespasser, who entered without any title." In *Sabariego v. Marerick*, 124 U. S. 297, 8 Sup. Ct. 480, 31 L. Ed. 430, the court said: "This rule is founded upon the presumption that every possession peaceably acquired is lawful, and is sustained by the policy of protecting the public peace against violence and disorder. But, as it is intended to prevent and redress tres-

passes and wrongs, it is limited to cases where the defendants are trespassers and wrongdoers. It is, therefore, qualified in its application by the circumstances which constitute the origin of the adverse possession and the character of the claim on which it is dependent. It does not extend to cases where the defendant has acquired the possession peaceably and in good faith, under color of title. *Lessee of Fowler v. Whiteman*, 2 Ohio St. 270; *Drew v. Swift*, 46 N. Y. 204. * * * It therefore appears that prior possession is sufficient to entitle a party to recover in an action of ejectment only against a mere intruder or wrongdoer, or a person subsequently entering without right." And in *Haws v. Victoria*, 160 U. S. 316, 16 Sup. Ct. 287, 40 L. Ed. 436, it is said: "The elementary rule is that one must recover on the strength of his own and not on the weakness of the title of his adversary; but this principle is subject to the qualification that possession alone is adequate as against a mere intruder or trespasser, without even color of title, and especially so against one who has taken possession by force and violence. This exception is based upon the most obvious conception of justice and good conscience. It proceeds upon the theory that a mere intruder and trespasser cannot make his wrongdoing successful by asserting a flaw in the title of the one against whom the wrong has been by him committed." So, also, in *Burt v. Panjaud*, 99 U. S. 180, 182, 25 L. Ed. 451, it was said by Mr. Justice Miller, expressing the opinion of the court: "In ejectment, or trespass *quare clausum fregit*, actual possession of the land by the plaintiff, or his receipt of rent therefor prior to his eviction, is *prima facie* evidence of title, and which he can recover against a mere trespasser. The same principle was enforced in *Campbell v. Rankin*, 99 U. S. 261, 262, 25 L. Ed. 435, and application of it to various conditions of fact is shown in *Atherton v. Fowler*, 96 U. S. 513, 24 L. Ed. 732, *Belk v. Meagher*, 104 U. S. 279-287, 26 L. Ed. 735, and *Glacier Mining Co. v. Willis*, 127 U. S. 471, 481, 8 Sup. Ct. 1217, 32 L. Ed. 172."

The majority opinion, in antagonism to the many well-considered earlier and later decisions cited to support this dissent, relies in part on the opinion in *Anderson v. Melear*, 56 Ala. 621, in which, according to my view and understanding, no question here involved was discussed, or, as far as the record shows, involved. If the great judge delivering that opinion had considered any point now before us, and left his plainly expressed views, there would be reason to pause and consider well before adopting with confidence an argument opposed to them. But general expressions, having a wider sweep than necessary for the case under consideration, should not be accepted as the judgment of the court. That opinion, if its words are to be taken without limitation, would permit a bare trespasser to defend under a superior outstanding title,

which no one can doubt is wrong. It does not appear that any question about an outstanding title was raised in that case. It was not shown that the title did not rest with the prior possession, as here, or that Carleton's was under color of title. Judge Stone and this court then can no more be held, from the general expression in that case, to have decided that a defendant in under color and claim of title on a vacant possession could not put the plaintiff to proof of title, as was held by this court in *Alexander v. Savage*, 90 Ala. 383, 8 South. 93, and *L. & N. R. R. v. Philyaw*, 88 Ala. 264, 6 South. 837, and in many other cases, than it can be said he and this court held that a bare trespasser could put the plaintiff to proof of title more than a prior possession, as we have often held he could not do.

That there are also other cases in Alabama which, if general words are construed beyond the case before the court, to give color to the decision of the majority, may be admitted; but, when subjected to close examination, it will be found that not one disputes the authority or principles of any of the cases I have cited. What is said in each one is justified, as pointed out in the brief of appellant's counsel, by the circumstances of the particular case, without calling in question the rule, established by the authorities I have referred to, that "prior possession is sufficient to entitle a party to recover in an action of ejectment only against a mere intruder or wrongdoer." *Sabariego v. Maverick*, 124 U. S. 261, 8 Sup. Ct. 461, 31 L. Ed. 430; *Bernheim v. Horton*, 103 Ala. 384, 15 South. 822; *L. & N. R. R. v. Philyaw*, 88 Ala. 264, 6 South. 837; *Alexander v. Savage*, 90 Ala. 383, 8 South. 93.

In my opinion, the judgment of the trial court should be reversed.

MCCLELLAN, J. I concur in the views, in dissent, of DENSON, J.

(158 Ala. 1)

PATE v. STATE.

(Supreme Court of Alabama. Jan. 21, 1909.
Rehearing Denied Feb. 5, 1909.)

1. JURY (§ 56*)—QUALIFICATION OF JURORS—SHERIFFS AND DEPUTIES.

Code 1907, § 7245, exempting sheriffs and their deputies from jury duty, does not disqualify them, but confers a personal privilege, which they may waive.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. § 264; Dec. Dig. § 56.*]

2. CRIMINAL LAW (§ 543*)—EVIDENCE ON FORMER TRIAL.

Where a witness had been legally sworn and examined on a former trial of accused, and since the trial the witness had permanently or for an indefinite time removed to another state, where he resided at the date of the second trial, the witness' testimony taken at the first trial might be read in evidence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1233; Dec. Dig. § 543.*]

3. CRIMINAL LAW (§ 1114*)—APPEAL—OBJECTIONS—RECORD.

A contention that the court erred in the admission of evidence, not sustained by the record, is without merit.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2918; Dec. Dig. § 1114.*]

4. CRIMINAL LAW (§ 1170*)—APPEAL—HARMLESS ERROR.

Where a witness subsequently testified that defendant could not sign his name, the exclusion of a nonresponsive answer to a question whether defendant could read or write, in which the witness narrated a past occurrence involving defendant's declaration that he could not sign, his name some five years previous, was harmless.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3145, 3146; Dec. Dig. § 1170.*]

5. LARCENY (§ 70*)—CATTLE THEFT—INSTRUCTIONS.

Where, in a prosecution for theft of a cow, there was a conflict in the evidence as to the flesh marks of the cow alleged to have been stolen, and there were other marks of identification beside the color of her hair, an instruction that, unless the jury were satisfied beyond all reasonable doubt that the cow, which defendant was accused of stealing, was a black or a black-brown cow, with a white face, defendant should be acquitted, was properly refused.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 182; Dec. Dig. § 70.*]

Appeal from Law and Equity Court, Walker County; T. L. Sowell, Judge.

Seab Pate was convicted of larceny, and he appeals. Affirmed.

The evidence as to the swearing of the witness McLaughlin on the former trial was that all the witnesses were sworn together, and that he and Mrs. Upton were the main witnesses in the case, and was examined and testified on the trial, and that since said trial he had moved to Mississippi and was living there at the time of this trial. After this introductory testimony, a witness was permitted to testify as to what McLaughlin swore on a former trial.

The following charges were refused to the defendant: (1) General affirmative charge. (2) "I charge you, gentlemen of the jury, that unless you are satisfied from the evidence beyond all reasonable doubt that the cow the defendant is accused of stealing was a black or a black-brown cow, with a white face, you cannot convict the defendant."

Leith & Gunn, for appellant. Alexander M. Garber, Atty. Gen., and Thomas W. Martin, Asst. Atty. Gen., for the State.

TYSON, C. J. The first exception reserved relates to the overruling of defendant's challenge for cause to certain persons on the ground they were deputy sheriffs, and therefore incompetent to serve. The statute (section 7245, Code 1907) exempts sheriffs and their deputies from jury duty, but does not disqualify them. This exemption is a mere personal privilege, which they may waive.

Jackson v. State, 74 Ala. 26; Spigener v. State, 62 Ala. 383.

The testimony of the witness McLaughlin given on the former trial was properly admitted. It was open to the trial judge to find that this witness had been legally sworn and examined upon the former trial of the defendant for the offense, and that since that trial he had moved permanently or for an indefinite time to the state of Mississippi, where he still resided at the date of this trial. *Jacobi v. State*, 133 Ala. 1, 32 South. 158; *Lowe v. State*, 86 Ala. 47, 5 South. 435. It may be seriously doubted whether the objection interposed raised this question because of its generality. But, conceding that it did, upon the entire evidence pertinent to the inquiry we feel no hesitancy in holding that the ruling was correct.

We do not find in the record that the court allowed witness J. B. Ellis to testify as to what defendant's wife said on the night of his arrest. The contention of appellant's counsel that the court erred in this respect, being unsupported by the record, is, of course, without merit.

The prosecution offered testimony tending to show that at the time the defendant sold the cow to McLaughlin he wrote a name upon a piece of paper as the seller of the cow. To contradict this the defendant offered testimony tending to show that he could neither read nor write, which was undoubtedly competent, and which the court admitted. One Borden was examined as a witness for defendant. He testified that he had known him since he was a boy; that he worked for witness "about five years ago," which was more than two years before the alleged larceny of the cow. He was asked this question: "Well, can he read and write?" Instead of answering the question, "Yes" or "No," the witness narrated a past occurrence that took place between himself and defendant some five years previous, involving the declaration of defendant that he could not sign his name at that time, which was excluded, on motion, by the court. If this ruling was error, it was harmless, for the reason that this witness subsequently testified substantially that defendant could not sign his name.

The guilt of defendant upon the charge alleged in the indictment, was clearly, under the testimony, one for the jury. Therefore charge 1, requested by defendant, was properly refused.

Charge 2, refused to defendant, was also properly refused. Under the testimony there was a conflict as to the flesh marks of the cow alleged to have been stolen. This charge would have required an acquittal of defendant, although the jury may have believed beyond a reasonable doubt that he stole the cow, though they may not have believed beyond a reasonable doubt that her color was

"black or a black-brown," as asserted in the charge. There were other marks of her identification besides that of the color of her hair.

The overruling of defendant's motion for a new trial is, of course, not revisable.

Affirmed.

DOWDELL, ANDERSON, and McCLELLAN, JJ., concur.

(158 Ala. 527)

LOUISVILLE & N. R. CO. v. VANSANT.

(Supreme Court of Alabama. Jan. 14, 1909.)

1. RAILROADS (§ 344*)—CROSSING ACCIDENTS—ACTIONS FOR INJURIES—COMPLAINT—SUFFICIENCY OF ALLEGATIONS—FRIGHTENING ANIMALS.

A complaint alleged that it was necessary for plaintiff to drive past a railroad hand car negligently placed in a public road at a railroad crossing by the company through its servants, and that his horse became frightened at it, so that his buggy wheel struck the car which contained tools, dinner buckets, etc., thereby making an unusual noise, which frightened the horse and caused it to throw plaintiff from the buggy. *Held*, that the action was for injuries arising from frightening the horse, and the complaint was defective in not alleging that the hand car was an object calculated to frighten horses.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1107; Dec. Dig. § 344.*]

2. RAILROADS (§ 344*)—ACTIONS FOR INJURIES—COMPLAINT—SUFFICIENCY OF ALLEGATIONS—PROXIMATE CAUSE.

The complaint in an action against a railroad company for injuries caused by the frightening of plaintiff's horse by a hand car placed in the highway by defendant's servants *held* to sufficiently allege that the horse's fright and the resulting injuries were due to the acts of defendant's servants.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1107; Dec. Dig. § 344.*]

Appeal from Circuit Court, Calhoun County; A. H. Alston, Judge.

Action by John W. Vansant against the Louisville & Nashville Railroad Company. From a judgment overruling demurrers to the complaint, defendant appealed. Reversed and remanded.

The complaint was as follows: "Plaintiff claims of defendant the sum of \$10,000 as damages, for that, whereas, heretofore the defendant, on or about October 2, 1906, was operating a railroad for the transportation of freight and passengers for hire in Calhoun county, Alabama, and at a point where said railroad crosses the public road near Union Church, in Calhoun county, Alabama, leading from Jacksonville to Morrowville, there was a railroad embankment about five or six feet high and about eight feet wide. Plaintiff is and was a physician, and while proceeding about his business as a physician, and driving his horse and buggy, he came to the place where said public road (which is and has been a public road for many years) crosses said railroad, which is

at grade with said public road; and plaintiff avers that defendant, through its agents, employes, and servants, whose names are unknown to plaintiff, but known to defendant, had negligently put and set a hand car or lever car in said public road, not on the railroad track, but in said public road near said railroad track. Plaintiff avers that it became necessary to pass said hand car or lever car, and in attempting to pass said hand car or lever car in said public road, which was on said fill or embankment, his horse became frightened at it, and shied thereat, so that in passing it the rear wheel of his buggy struck the car, which contained some tools and dinner buckets, and thereby made a lot of unusual noise, which frightened said horse the more. The said horse then jumped, throwing plaintiff from the buggy, inflicting many painful wounds, in this: [Here follows the catalogue of his injuries.] Plaintiff further avers that by reason of said negligence of said railroad as aforesaid he was injured as aforesaid. [Here follows a lot of special damages.]

The following demurrers were filed to this complaint: "(1) It is not averred that said hand car or lever car was an object which is calculated to frighten horses. (2) It is not averred that plaintiff's injuries were the direct or proximate result of the negligence of defendant's employes in placing said car in said road. (3) For that it appears from said count that plaintiff's injury was the direct result of his horse becoming frightened. (4) For that it appears that the plaintiff's injuries were the direct and proximate result of his said horse jumping."

The second count was the same as the first, except that it charged gross, instead of simple, negligence. The same demurrers were assigned to it.

Knox, Acker & Blackmon, for appellant. Willett & Willett, for appellee.

DENSON, J. The plaintiff claims damages from the defendant for personal injuries suffered by plaintiff, consequent upon the alleged negligence of defendant's servants in placing a hand car in a public highway near defendant's railroad track thereby causing plaintiff's horse to become frightened and to jump, throwing plaintiff from his buggy and inflicting serious personal injuries upon him. The complaint is attacked by demurrer, upon the ground that it fails to aver that the car was an object calculated to frighten horses. Whether or not the complaint is subject to this demurrer depends upon what, according to its averments, constitutes the cause of action. The theory of construction out of which the demurrer grows is that the complaint alleged that plaintiff's injury arose from the fright of the horse as its proximate cause, whereas the construction contended for by the plaintiff is that the complaint shows that the placing of the car in the highway constituted

a public nuisance per se, that this was unlawful and wrongful, and the complaint counts for recovery on this wrongful act of the defendant as the proximate cause of the injury.

There can be no doubt that plaintiff's contention should be allowed to prevail, and the authorities relied on by him would be in point, if the cause of action had been that plaintiff's horse stumbled over the obstruction in the highway and thereby caused plaintiff's injuries, or that the buggy came in contact with the obstruction, causing plaintiff to be thrown from the buggy, and thereby to sustain the injuries complained of. But these are not the averments. They are: "Plaintiff avers that it became necessary to pass said hand car, and in attempting to pass said hand car in said public road, which was on said fill or embankment, his horse became frightened at it, and shied thereat, so that in passing it the rear wheel of his buggy struck the hand car, which contained some tools and dinner buckets, and thereby made a lot of unusual noise, which frightened the horse more. The said horse then jumped, throwing plaintiff from the buggy, inflicting very painful wounds," etc. So far as the complaint shows, there was ample space left for plaintiff's vehicle to pass safely while the car was in the road; and if we might look to the evidence in this respect we would see that the plaintiff had very recently, before the accident occurred, passed along while the car was in the road, and that it was on his return trip that the horse became frightened and caused his injury.

The case, in regard to the question under discussion, is in legal contemplation not distinguishable from that of Northern Alabama Railway v. Sides, 122 Ala. 594, 26 South. 116, and on the authority of that case, as well as upon the foregoing considerations, the court is of the opinion that the cause of action counted on in the complaint arose from the fright of the horse; and as we cannot judicially know that the hand car was an object calculated to frighten horses, it should have been averred in the complaint. For the lack of such averment the demurrer should have been sustained. Northern Alabama Railway Co. v. Sides, supra; Elliott on Roads & Streets, 448, 449; Cleveland, etc., Co. v. Wyant, 114 Ind. 525, 17 N. E. 118, 5 Am. St. Rep. 644, 649; Agnew v. City of Corruna, 55 Mich. 428, 21 N. W. 873, 54 Am. Rep. 383; Plollet v. Simmers, 106 Pa. 95, 51 Am. Rep. 496; Ayer v. City of Norwich, 39 Conn. 376, 12 Am. Rep. 396; Pittsburg, etc., Co. v. Taylor, 104 Pa. 306, 49 Am. Rep. 580; Cairncross v. Village, 78 Wis. 66, 47 N. W. 13, 10 L. R. A. 473; Card v. City of Ellsworth, 65 Me. 547, 20 Am. Rep. 722; Lynn v. Hooper, 93 Me. 46, 44 Atl. 127, 47 L. R. A. 752.

In view of the foregoing considerations, it is unnecessary to discuss the rulings of the court on the demurrers to the defendant's

pleas or its rulings on the admissibility of evidence.

The facts averred in the complaint show, with sufficient certainty to warrant the legal conclusion, that the fright of the horse and the consequent injuries were due to the acts of defendant's servants; hence the other grounds of demurrer to the complaint were properly overruled.

For the error pointed out, the judgment is reversed, and the cause remanded.

Reversed and remanded.

SIMPSON, ANDERSON, and McCLELLAN, JJ., concur.

(158 Ala. 208)

STATE ex rel. ATTORNEY GENERAL v. LOUISVILLE & N. R. CO. et al.

(Supreme Court of Alabama. June 18, 1908. On Rehearing, Jan. 14, 1909.)

1. MUNICIPAL CORPORATIONS (§ 682*)—VACATING STREETS—POWER OF CITY.

A city cannot, unless specially authorized by the Legislature, permit obstruction of a street by a depot extending across it.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1467; Dec. Dig. § 682.*]

2. MUNICIPAL CORPORATIONS (§ 657*)—VACATING STREETS—POWER OF LEGISLATURE.

The Legislature can vacate a street where it crosses a railroad and allow a depot to be erected there; and it can delegate to the city the power to do this.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 657.*]

3. MUNICIPAL CORPORATIONS (§ 657*)—VACATING STREETS—STATUTES.

Act Dec. 10, 1900 (Laws 1900-01, p. 239), providing that "all" grants, rights, privileges, and franchises, which the city council of M. has heretofore granted "or attempted to grant" to any railroad company, and which have been accepted and utilized for railroad purposes, be and the same are hereby legalized, ratified, and confirmed, covers the act of the city council in attempting to vacate a street where it crosses a railroad, and to give to the railroad company right to occupy it with a depot.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 657.*]

4. MUNICIPAL CORPORATIONS (§ 76*)—VACATING STREETS—VALIDATING ACTS.

The Legislature can legalize the void act of a city council in attempting without authority to grant a railroad power to occupy with a depot a street where it crosses the track.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 181; Dec. Dig. § 76.*]

5. STATUTES (§ 112*)—SINGLE SUBJECT.

Act Dec. 10, 1900 (Laws 1900-01, p. 239), providing that all grants, rights, privileges, and franchises which the city council of M. has heretofore granted or attempted to grant to any railroad company, and which have been accepted and utilized for railroad purposes, be and the same are hereby legalized, ratified, and confirmed, does not contain more than one subject, in violation of the Constitution.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 112.*]

Appeal from City Court of Montgomery; A. D. Sayre, Judge.

Suit by the State, on the relation of the Attorney General, against the Louisville & Nashville Railroad Company and others. Judgment for defendants, and relator appeals. Affirmed.

Alexander M. Garber, Atty. Gen., Marks & Sayre, Rushton & Coleman, H. F. Reese, and S. H. Dent, Jr., for appellant. George W. Jones and Knox, Acker & Blackmon, for appellees.

HARALSON, J. 1. The questions presented on this appeal are, first, whether the city council of Montgomery had the power, under its charter, to authorize the obstruction of Lee street in said city, by the erection thereon, at the foot of said street, of the freight depot of the Mobile & Montgomery Railway Company or of the Louisville & Nashville Railroad Company—the latter being the lessee of the first named railroad company—which depot extends entirely across said street at its foot; and, second, if it did not have such authority, whether the act of the Legislature of December 10, 1900 (Laws 1900-01, p. 239), "to ratify, legalize and confirm all grants, rights, privileges, and franchises, heretofore granted or attempted to be granted to railroads by the city council of Montgomery," was constitutionally enacted, and if so, if it cured and vitalized such lack of authority, and rendered the action of the city council in granting the right to obstruct said street valid, as though the city had such authority under its charter, in the beginning.

The court below held, that such authority in the city did not exist under its charter, and from such want of authority, the act of the city granting that right was void, but that the legislative enactment of December 10, 1900, was validly enacted, and cured that defect or want of authority and rendered the contract of the city with the railroad companies valid and binding.

2. As to the first of these propositions, it is scarcely necessary to enter upon its consideration, since the question is so well settled by the decisions of this court, and of other jurisdictions, and by the text writers.

The question received consideration at our hands in the case of *Douglass v. City Council of Montgomery*, 118 Ala. 599, 24 South. 745, 43 L. R. A. 376, where it was held, that municipal corporations hold title to streets, public squares, and parks, in trust for the public, and when lands have been dedicated for such purposes, the municipality has no power, unless specially authorized by the Legislature, to sell such lands for its own benefit, or to appropriate them for the use and benefit of private persons or corporations, or in any way divert them from the uses to which they were originally dedicated. *Webb v. Demopolis*, 95 Ala. 116, 13 South. 289, 21 L. R. A.

62; 2 Dillon on Munic. Corp. §§ 575, 650; 15 A. & E. Ency. Law (1st Ed.) 1064; 17 A. & E. Ency. Law (1st Ed.) 417.

It is not pretended that the city council had any authority in its charter to dispose of this street in the manner it did, or to abolish it, and under the authorities, its attempt to do so was unauthorized and void. This is practically admitted in the necessity which was supposed to exist, to have the Legislature, by the curative act of December 10, 1900, validate said unlawful procedure on the part of the city council. Without this enactment, the contract of the city with these corporations, of date June 20, 1896 (Exhibit A to the bill), would fall of its own weight, as being unauthorized and void; and the only question and the one more seriously argued by counsel on both sides, is, whether the said curative act of the Legislature is, for any reason, for the purposes intended, void.

3. The act of the Legislature of December 10, 1900, referred to herein as the curative act, the title to which we have hereinbefore set out, provides—following the caption—“that all grants, rights, privileges, and franchises, which the city council of Montgomery has heretofore granted, or attempted to grant (*italics ours*) to any railroad company, and which have been accepted and utilized for railroad purposes, be and the same are hereby legalized, ratified and confirmed.” If the contract between the city and these corporations, of date June 20, 1896, made any grants, rights, privileges, and franchises, or attempted to make such, it is difficult to see why it was not referred to, and covered by, this curative act. The contract itself, made an exhibit to the bill, provides, “that said buildings, underpass and enclosures may be constructed as herein provided for, and that Moulton street and Lee street shall terminate at the points where the same now intersect with the property of the Mobile & Montgomery Railway Company, and that the parts of said streets extending beyond where the same so intersect said property, shall be discontinued and abolished as streets, or any part thereof,” etc. This covered Lee street, in which the depot sought to be removed is located.

It will not, and cannot, be denied, that the Legislature had the power in the beginning, to allow the city council to do all that it attempted to do in its contract with these corporations.

In Mobile & Montgomery Railway Co. v. A. M. Railway Co., 116 Ala. 66, 23 South. 60, it is said: “It seems to be well settled, that the Legislature has the power, generally, to vacate a street in a city, and may delegate this power to the municipal authorities. Elliott on Roads & Streets, 661, 663, and authorities cited.”

Mr. Dillon, on the same subject, says: “The Legislature has power to determine when and where streets shall be construct-

ed, their width and mode of improvement, and its action thereon cannot be reviewed by the courts,” and further, “And it may be here observed, that whatever the Legislature may authorize to be done is of course lawful, and of such acts, done pursuant to the authority given, it cannot be predicated that they are nuisances; if they were such without, they cease to be nuisances when having the sanction of a valid statute. As respects the public or municipalities, there is no limit upon the power of the Legislature as to the uses to which streets may be devoted.” 2 Dillon on Munic. Corp. (3d Ed.) 656, 657.

What the Legislature may lawfully do in the first instance, it may ratify after the thing has been done, if no contract or property rights are involved. *Lovejoy v. Beeson*, 121 Ala. 605, 25 South. 599.

The act of 1900, as has been before stated, purported to validate, and did validate, “all grants, rights, privileges, and franchises, which the city council of Montgomery has heretofore granted (if valid) or attempted to grant (if invalid) to any railroad company, which have been accepted and utilized for railroad purposes.” Conceding that the contract ordinance was invalid, it was certainly an attempt to confer the rights and privileges referred to in it. As was well said by counsel for defendants in argument: “After every refinement of reason has been exhausted, it will be impossible, it seems to us, for any one to read the act approved December 10, 1900, in connection with the contract ordinance approved June 20, 1896, and fail to see that the Legislature intended to ratify, legalize and confirm the right of appellees to occupy and use a portion of Lee street, for depot purposes. The learned judge in the court below took this view, and we think this court can reach no other conclusion.

4. But it is said and urged, that the Legislature cannot legalize a void act, and that the contract ordinance being void for lack of power in the municipality to enter into it, the act of the Legislature of 1900 is without force.

In 8 Cyc. 1024, supported apparently by a great many adjudged cases, it is said: “A statute is valid which ratifies the action of a municipality or its officers (which action is void because informal or in excess of powers) in doing some act, making some contract, contracting some debt, or making some conveyance, provided the Legislature could originally have conferred such power, or have dispensed with such formality.” *Cooley on Taxation*, 229; *Grim v. School District*, 57 Pa. 433, 98 Am. Dec. 237.

In the case of *State of Pennsylvania v. Wheeling Bridge Co.*, 13 How. 518, 14 L. Ed. 249, a. c. 18 How. 421, 15 L. Ed. 435, the bridge constructed over the Ohio river, a public, navigable stream, was by the Supreme Court of the United States held to be both a public and private nuisance, and by

decree it was ordered to be abated and removed. Subsequently, an act of Congress was passed, to render lawful the maintenance of the bridge in its then condition. The Legislature of Virginia conferred full authority to erect and maintain the bridge, subject to the power of Congress to regulate the navigation of the river. The same case, after the passage of the act of Congress legalizing it, again went before the Supreme Court, and the court held, that whereas the construction and maintenance of the bridge, before the passage of the act of Congress, was unlawful and a public nuisance (and therefore void), it could not, after that, be abated, but might be maintained. *Allison v. Corker*, 67 N. J. Law, 600, 52 Atl. 362, 60 L. R. A. 564; *Perry v. N. O. & M. R. Co.*, 55 Ala. 418, 28 Am. Rep. 740; 1 Dillon on Mun. Corp. (3d Ed.) § 79, and notes.

Our own decisions are apparently to the same effect. *Lockhart v. Troy*, 48 Ala. 579; *Lovejoy v. Beeson*, supra; *Hewlett v. Camp*, 115 Ala. 499, 502, 22 South. 137.

5. But counsel for the state contend, that the curative act is unconstitutional, on the ground, that it contains more than one subject.

"The Constitution requires that only one subject should be embraced (in an act), and that it should be described in the title. 'Subject' is a very indefinite word. A phrase may state the subject in a very general or indefinite manner, or with minute particularity. The subject of laws with such titles as the following: 'To adopt a penal code,' 'To adopt the common law of England in part,' 'To adopt a code of laws,' 'To ratify the by-laws of a corporation'—would be expressed in a very general way, and very little knowledge of the specific provisions of the laws could be gleaned from the title; yet it would nevertheless be true that the subject was described in the title." *Ex parte Pollard*, 40 Ala. 98.

A special statute which prohibited the sale of spirituous liquors within a specified distance of two churches in different counties, is not violative of the provisions of the Constitution against each law containing but one subject. The subject of the act was declared to be single and related only to retailing spirituous, vinous or malt liquors, and that the clause of the Constitution is not violated by any legislative act having various details pertinent and germane to the general subject. *Block v. State*, 66 Ala. 495; *Tatum v. State*, 82 Ala. 5, 2 South. 531; *Hare v. Kennerly*, 83 Ala. 608, 3 South. 683.

The title of an act may be very general—as was said in *Ballentyne v. Wickersham*, 75 Ala. 536—and need not specify every clause in the statute. Sufficient if they are all referable and cognate to the subject expressed. When the subject is expressed in general terms, everything necessary to make a complete enactment in regard to it, or which results as a complement to the thought

contained in the general expression, is included in and authorized by it. *Bell v. State*, 115 Ala. 89, 22 South. 453; *Lockhart v. Troy*, 48 Ala. 584.

"The degree of particularity which must be used in the title rests in legislative discretion, and is not defined by the Constitution. There are many cases where the subject might with great propriety be more specifically stated, yet the generality of the title will not be fatal to the act, if by fair intendment it can be connected with it." *State v. Town of Union*, 33 N. J. Law, 350; *Sheppard v. Dowling*, 127 Ala. 1, 28 South. 791, 85 Am. St. Rep. 68; *State v. Street*, 117 Ala. 203, 23 South. 807.

Nothing more need be said to rebut the contention of appellant's counsel on this question. It cannot be sustained. Finding no error below, the judgment of the city court must be affirmed.

Affirmed.

SIMPSON, DENSON, ANDERSON, and McCLELLAN, JJ., concur. TYSON, C. J., and DOWDELL, J., not sitting.

On Rehearing.

DENSON and McCLELLAN, JJ., while concurring in the conclusion reached in the opinion of Justice HARALSON, do not commit themselves to the breadth of the statements made therein, since the bill—exhibited by the state, on relation of the Attorney General—is directed to the removal of an obstruction from an alleged public highway, and does not necessarily involve the determination of the constitutionality of the act of December 10, 1900, in respect of the taking, injury, or destruction of private property within the protection of section 7, art. 14, of the Constitution of 1875.

ANDERSON, J. While I concur in the conclusion reached in this case, I do not wish to indorse all that is said in the opinion. The Legislature had the right to authorize the city to vacate the street, but not to authorize it to convey or license the use thereof for the purposes indicated in the ordinance, unless the city owned the fee. If the city merely enjoyed the easement, and did not own the fee, it could only surrender its easement, by vacating said street, under the authority of the Legislature, and this would, of course, be subject to the rights of the abutting owners, under section 235 of the Constitution of 1901 (section 7 of Constitution of 1875). *Albes v. Southern Railway Co.*, 45 South. 234. Therefore, in the absence of ownership of the fee by the city, it could only be authorized to vacate the street, which was all that its said ordinance amounted to and all that the curative act could ratify. I think, however, that what the city did, notwithstanding more was attempted, amounted to a vacation, and that it was germane to the subject as expressed in the title of the

act and dealt with in the body, and that said act operated as a ratification of said vacation.

(158 Ala. 86)

STATE ex rel. MOORE v. WALDROP et al.
(Supreme Court of Alabama. Jan. 12, 1909.)

1. QUO WARRANTO (§ 55*)—RETURN—BURDEN OF PROOF.

Act Aug. 13, 1907 (Gen. Laws 1907, p. 892), known as the "Municipal Code Act," relating to the organization and government of cities, provides in section 199 that the then existing officers of the city shall continue to hold office until the time fixed therein for their term to expire, etc. *Held*, that where an application for quo warranto to determine the right to membership in the board of education showed that relators were lawfully entitled to hold the office when respondents were elected by the council of a city which had adopted such act, and averred that respondents had usurped such office, the burden was on respondents to show a clear title to the office, though the application did not aver the precise date when relators were elected, nor their terms of office and the date of expiration thereof.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 63; Dec. Dig. § 55.*]

2. QUO WARRANTO (§ 55*)—RETURN—PRESUMPTIONS.

Where an application for quo warranto to determine respondents' right to membership in a city board of education showed that relators were lawfully members of the board on March 3, 1908, when the city elected to reorganize under Act Aug. 13, 1907 (Gen. Laws 1907, p. 790), known as the "Municipal Code Act," and providing for the government of cities, and when respondents were elected by the city council, and the return did not show the terms and expiration of terms of office of relators, the court was authorized to assume that relators' term had not expired when respondents were elected.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 63; Dec. Dig. § 55.*]

3. MUNICIPAL CORPORATIONS (§ 211*)—OFFICES—BOARD OF EDUCATION—ELECTION—TIME.

Though Act Aug. 13, 1907 (Gen. Laws 1907, pp. 790, 875), known as the "Municipal Code Act," relating to the organization and government of cities, provides in section 169 that at the first regular meeting of the council in April, or as soon thereafter as may be practicable, the council shall elect the members of the board of education, this refers to April, 1909, since section 2 postpones the going into effect of the act generally until the officers elected at the general municipal election in September, 1908, enter on the discharge of their several official functions; and hence an election by the city council in April, 1908, of members of the board was unauthorized.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 568; Dec. Dig. § 211.*]

4. MUNICIPAL CORPORATIONS (§ 211*)—OFFICES—BOARD OF EDUCATION.

Since section 199 of Act Aug. 13, 1907 (Gen. Laws 1907, p. 892), known as the "Municipal Code Act," relating to the organization and government of cities, provides for the election, by a city coming in under the terms of the act, of only such officers as are required by the act and are not provided for by the charter of the city, where members of the board of education provided for by Act Feb. 11, 1891 (Laws

1890-91, p. 558), which operated as an amendment to the charter of the city, were in office, there was no authority for electing a new board until the incumbents' terms had expired.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 568; Dec. Dig. § 211.*]

Appeal from City Court of Bessemer; William Jackson, Judge.

Action in the nature of quo warranto by the State, on relation of T. A. Moore, against R. W. Waldrop and others. From a decree for respondents, relator appeals. Reversed and remanded.

Trotter & Odell, for appellant. Ben G. Perry, for appellees.

DENSON, J. This is a statutory action, in the nature of quo warranto, commenced for the purpose of ousting from membership in the board of education of the city of Bessemer certain individuals named in the application as respondents. An act of the General Assembly, approved February 11, 1891 (Laws 1890-91, p. 558), provided for a "board of education" for the city of Bessemer and prescribed the duties thereof. Under this act all the persons in whose interest the application is made in this cause, were duly elected; and they, together with the mayor, composed the board of education of the city of Bessemer, as constituted and existing on the dates of March 3, 1908, and April 21, 1908. The return or answer to the writ in this case shows that on the 3d day of March, 1908, the then city of Bessemer, by an ordinance passed in conformity to section 199 of the act known as the "Municipal Code Act," approved August 13, 1907 (Laws 1907, p. 892), organized its city government under the provisions of that act; and it is further averred in the return that on the 21st day of April, 1908, the city council, in accordance with section 169 of the act mentioned (section 1349 of the Code of 1907), proceeded to elect and did elect the respondents members of the board of education, and that they hold office under said election and by virtue of that section of the act of 1907.

Although, upon the passage of the ordinance as provided by section 199 of the act of 1907, the city government became organized under the provisions of the act, yet that section provides that "the then existing offices and officers of said city or town shall continue to exist and to hold such offices until the time fixed herein for their term to expire as provided in section two of this act." Section 1047, Code 1907. While the application for the writ does not aver the precise date when the members of the old board of education were elected, nor show the term of their office and the dates of expiration thereof, yet, as has already been pointed out, it shows they were lawfully entitled to hold the office of members of the board of education, and

were in office, with undisputed right, at the time of the passage of the ordinance and when the respondents were elected by the city council. These averments, together with the averment that the respondents have usurped and are now unlawfully holding office as members of the board of education, placed upon the respondents the burden of showing, by their return to the writ, a clear title to their office. This they have attempted to do only in the manner heretofore stated, and have not, in their return, undertaken to show the terms and expirations of terms of office of the persons who constituted the board of education on April 21, 1908, the date when respondents were elected.

Such being the condition of the record, and such the nature of this proceeding, we are authorized to assume that the terms of office of the members of the board of education had not expired when the ordinance of March 3, 1908, was passed, nor when the election was held on April 21, 1908, and, further, that they were holding office on January 1, 1908. Therefore under section 2 of the act in question, their terms of office were continued at least until the first Monday in October, 1908, and they were entitled to hold until that date. It may be that they are entitled to the office for even a longer period. It is true that section 169 of the act provides that "at the first regular meeting of the council in April, or as soon thereafter as may be practicable, at any regular meeting, the council shall elect the members of the board of education." Manifestly, this refers to April, 1909, because section 2 postpones the going into effect of the act, generally until the officers elected at the general municipal election on the third Monday in September, 1908, enter on the discharge of their several official functions. And section 199 of the act of 1907, under which the city of Bessemer became organized (which section, as we have held, should be regarded as a proviso to section 2 [Ward v. State (Ala.) 45 South. 655]), provides for the election, by a city coming in under its terms, of only such officers as are required by the act and are not provided for by the charter of such city or town, thus impliedly prohibiting the election of any officer provided for by the charter of the city.

The act of February 11, 1891, operated as an amendment to the charter of the city (Cobb v. Vary, 120 Ala. 263, 24 South. 442; City v. Birdsong, 126 Ala. 632, 28 South. 522); and, the board of education being already provided for, there was therefore in this instance no necessity or authority for electing the respondents members of the board. There were no vacancies. There can be no doubt that, when the act of 1907 becomes effective as to the city of Bessemer in respect to the subject of board of education, it will repeal the provisions of the act of 1891 on that subject. The two acts are

inconsistent in many respects, and it is evident the Legislature intended that the latter act should supersede the former. City, etc., v. National, etc., Co., 108 Ala. 336, 18 South. 816.

It must follow, from what has been said, that the return to the writ falls to show in respondents a legal right to membership on the board in question; and the court should have so held.

Reversed and remanded.

HARALSON, SIMPSON, and ANDERSON, JJ., concur.

(158 Ala. 179)

POLYTINSKY v. STEWART.

(Supreme Court of Alabama. June 18, 1908.
Rehearing Denied Feb. 5, 1909.)

1. ACCOUNT, ACTION ON (§ 11*)—EVIDENCE—ACCOUNT.

In a suit on an assigned verified account, the account was rendered admissible by testimony that the items were taken from a statement given witness by defendant's bookkeeper at defendant's request, regardless of whether it was so itemized or verified as to be self-proving, under Code 1896, § 1804.

[Ed. Note.—For other cases, see Account, Action on, Cent. Dig. § 32; Dec. Dig. § 11.*]

2. ACCOUNT, ACTION ON (§ 11*)—EVIDENCE—ADMISSIBILITY.

In a suit on an assigned verified account, rendered admissible in evidence by testimony that the items were taken from a statement given witness by defendant's bookkeeper at defendant's request, the fact that witness changed the account after it was first verified was a circumstance to be considered by the jury in weighing his testimony; but it did not affect the admissibility of the account.

[Ed. Note.—For other cases, see Account, Action on, Cent. Dig. § 32; Dec. Dig. § 11.*]

3. ACCOUNT, ACTION ON (§ 11*)—EVIDENCE.

That plaintiff could not swear to the credits in an account sued on did not render it inadmissible to show the debts, since the credits were favorable to defendant, who could not complain that plaintiff did not swear to credits voluntarily allowed him.

[Ed. Note.—For other cases, see Account, Action on, Cent. Dig. § 32; Dec. Dig. § 11.*]

4. ACCOUNT, ACTION ON (§ 12*)—VERIFIED ACCOUNTS—PROOF OF SIMPLE ACCOUNT.

Suit on a verified account does not preclude proof as in simple action on account.

[Ed. Note.—For other cases, see Account, Action on, Cent. Dig. § 37; Dec. Dig. § 12.*]

5. ACCOUNT, ACTION ON (§ 11*)—VERIFIED ACCOUNTS—EVIDENCE.

An account: "Nov. 21, 1906. To amount for ginning 25,116 lbs. lint cotton at .25 per hundred, \$62.49. To ginning 227,029 lbs. lint cotton at .30 per hund., \$671.08—\$733.67," followed by an affidavit by one who stated that he was a member of the creditor firm, and that the account was true and correct, and that a specified sum was due, was not so itemized and verified as to be self-proving, under Code 1896, § 1804, providing that in a suit on an account an itemized statement of the account, verified by the affidavit of a competent witness, is competent evidence of the correctness of the account.

[Ed. Note.—For other cases, see Account, Action on, Cent. Dig. § 32; Dec. Dig. § 11.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Circuit Court, Morgan County; D. W. Speake, Judge.

Suit on verified account by S. E. Stewart against Abraham Polytsky. For judgment for plaintiff, defendant appeals. Reversed and remanded.

This was an action for work and labor done by a partnership composed of Obar & Holmes, for ginning cotton, with an allegation that the account had been transferred and assigned to plaintiff. The fact of its verification was indorsed on the complaint. The facts are sufficiently stated in the opinion of the court. The account as itemized is as follows:

A. Polytsky, Hartselle, Alabama, in account of Obar & Holmes, a partnership, composed of William Obar and J. W. Holmes, Nov. 21, 1906.
To amount for ginning 25,116 lbs.
 lint cotton @ .25 per hundred... \$ 62 49
To ginning 227,029 lbs. lint cotton
 @ .30 per hund..... 671 08
\$733 67

Itemized credit, amounting to \$378.38.

State of Alabama, Morgan County.

Personally appeared before me, R. T. Pucket, a notary public in and for said county, in said state, William Obar, who, being duly sworn, deposes and says that he is a member of the firm of Obar & Holmes, a partnership composed of William Obar and J. W. Holmes, and that the above account is true and correct, and that \$355.19 is due therein after allowing all credits and offsets to which the same is entitled.
[Signed, sworn to, and subscribed.]

Then follows the transfer to Stewart.

Charge 3 is as follows: "The sworn and itemized account offered in evidence is competent evidence as to the correctness of the account sued upon in this case."

Callahan & Harris, for appellant. John R. Sample, for appellee.

ANDERSON, J. Conceding that the account offered was not so itemized or verified as to become self-proving, under section 1804 of the Code of 1896, there was proof sufficient to authorize its going to the jury. The witness Obar testified that the "items of indebtedness as appearing in the account were taken from a statement given to witness by the bookkeeper of the defendant, Polytsky, and that the account was furnished by the bookkeeper at defendant's request." This evidence was clearly sufficient, as an admission by the defendant, to render the account admissible. The fact that he changed the account after the first verification was a circumstance to be considered by the jury in weighing the witness' testimony, but did not render the account inadmissible, when taken in connection with the other testimony of the witness. Nor did the fact that the witness could not swear to the credits on the account prevent its being offered to show the debts, as the credits were favorable to the defendant, who could not com-

plain that the plaintiff did not swear to credits voluntarily allowed him. Suing on a verified account does not preclude proof as in simple action on account. Sullivan Timber Co. v. Brushagel, 111 Ala. 114, 20 South. 498.

While the account was competent, in connection with the other evidence, we do not think that it was so itemized and verified as to become self-proving, under the statute, and the trial court erred in giving charge 3 at the request of the plaintiff.

The evidence as to the nature and purposes for which the account was transferred is rather vague and uncertain, and, as this case must be reversed, we will not undertake to decide whether or not the suit was properly brought in the name of the present plaintiff, as the evidence as to the transfer and ownership of the account should be clearer on the next trial.

The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

TYSON, C. J., and DOWDELL and SIMPSON, JJ., concur.

(158 Ala. 147)

PABST BREWING CO. v. ERDREICH BROS. & MARX.

(Supreme Court of Alabama. Nov. 19, 1908.
Rehearing Denied Feb. 5, 1909.)

1. JUDGMENT (§ 525*) — RECITALS — CONCLUSIVENESS.

A recital in a judgment entry that the trial was had on issue joined on defendant's plea of tender is conclusive, and excludes all presumption of joinder in issue of any other plea.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 525.*]

2. APPEAL AND ERROR (§ 1040*) — HARMLESS ERROR—OVERRULING DEMURRERS.

An error in overruling demurrers to pleas afterwards abandoned is harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4104; Dec. Dig. § 1040.*]

3. APPEAL AND ERROR (§ 934*) — REVIEW — PRESUMPTIONS.

A recital in a judgment entry that the trial was had on issue joined on defendant's plea of tender being conclusive as to the issues upon which the case was tried, to uphold the judgment it will be presumed that all other pleas were withdrawn or abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777-3781; Dec. Dig. § 934.*]

Appeal from City Court of Birmingham; C. C. Nesmith, Judge.

Action by the Pabst Brewing Company against Erdreich Bros. & Marx for breach of contract and assumpsit. From a judgment for defendants, plaintiff appeals. Affirmed.

The complaint sets up a contract between the parties, and alleges a breach thereof and damages in the sum of \$2,000. There is also a count for an account due in the same

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

amount. The fourth plea is that before the bringing of the suit the defendants tendered to plaintiff the amount due, to wit, \$301.54, and now bring this amount into court. There were numerous other pleas, and demurrers thereto, on which error is assigned. What is said as to the joinder in issue sufficiently appears in the opinion. The court adjudged plaintiff entitled to receive the amount tendered, sustained defendants' plea of tender, and taxed the cost against plaintiff.

Brown & Murphy, for appellant. M. M. Ullman, for appellees.

DOWDELL, J. The case was tried by the court without the intervention of a jury. The judgment entry recites that the trial was had on "issue joined on the defendants' plea of tender." This recital in the judgment entry is conclusive, and excludes all presumption of joinder in issue of any other plea. *Dannelley v. State*, 130 Ala. 132, 30 South. 452; *Providence Life Ins. Co. v. Pruett* (decided at the present term) 47 South. 1019. The recital being conclusive as to the issues upon which the case was tried, in order to uphold the judgment of the court, it will be presumed on appeal that all other pleas were either withdrawn or abandoned. Any error, therefore, that the trial court might have committed in overruling demurrers to such pleas as were subsequently withdrawn or abandoned, would be error without injury. The recital in the judgment refers to a single plea, and plea No. 4, which is in the form prescribed in the Code for a plea of tender (Code 1907, p. 1202, form No. 36), is the only plea of tender, and consequently the only one to which the reference could be had.

There was evidence that Goldsmith was the "Southern representative" of the plaintiff and its general agent, and in making the agreement with the defendants modifying the original contract which he negotiated as to the empty bottles returned by the defendants to the plaintiff was acting within the scope of apparent authority. There was also evidence of ratification by the plaintiff in the credits given the defendants for the returned bottles for a long time thereafter, though the plaintiff claimed it had made a mistake in these credits to the defendants, but not until it was notified by the defendants that their business relations were to terminate. There was ample evidence to justify the trial court, that tried the case without a jury, to find that the plea of tender had been sustained, and in rendering judgment in favor of the defendants on said plea.

Affirmed.

TYSON, C. J., and ANDERSON and McCLELLAN, JJ., concur.

(157 Ala. 252)

WILLIS v. RICE et al.

(Supreme Court of Alabama. Nov. 26, 1908.
Rehearing Denied Jan. 14, 1909.)

1. LIMITATION OF ACTIONS (§ 84*)—PERIOD OF LIMITATION—STATUTORY EXCEPTIONS—ABSENCE FROM STATE—APPLICATION OF STATUTE.

Code 1896, c. 72, § 2805, excluding from the time necessary to constitute a bar under this chapter the period defendant is absent from the state, being expressly confined to limitations provided for in that chapter, will not apply to chapter 16, § 761, requiring applications to file bills of review to be made within three years from rendition of the decree, though section 674 extends the provisions of the Code prescribing limitations for civil suits to suits commenced by bill in chancery.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 84.*]

2. LIMITATION OF ACTIONS (§ 179*)—PLEADING FRAUD TO EXTEND LIMITATION—SUFFICIENCY OF ALLEGATIONS.

Allegations of a guardian's fraud in making final settlement and procuring an acknowledgment thereof by the ward, and that the latter did not know of the fraud until the guardian was discharged, and that the bill for relief was filed within a year after discovering the fraud, brought the case within Code 1896, § 2813, requiring actions for relief against fraud to be brought within a year after discovery of the fraud.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 668; Dec. Dig. § 179.*]

3. GUARDIAN AND WARD (§ 69*)—TRANSACTIONS BETWEEN GUARDIAN AND WARD—TRANSACTIONS AFTER MAJORITY.

Equity will not permit transactions between guardian and ward to stand, even when they occur after majority, if the intervening period is short, unless the fullest deliberation by the ward and the utmost good faith by the guardian is shown, as the latter's influence is still presumed to affect the transaction, especially if all of his duties have not ceased, so that the guardian cannot procure an acknowledgment of settlement from his ward shortly after her majority, and a written direction to the probate court to discharge the guardian, without a just and full account or disclosure of every fact necessary to inform the ward of the true condition of the accounts.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 305-307; Dec. Dig. § 69.*]

4. GUARDIAN AND WARD (§ 165*)—SETTLEMENT—ACTIONS TO OPEN SETTLEMENT—BURDEN OF PROOF.

In an action by a former ward to set aside a settlement made by the guardian shortly after the ward became of age, the burden was on the guardian to show that he dealt fairly with her and fully communicated every fact to her which might affect her assent to the settlement.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 536; Dec. Dig. § 165.*]

5. GUARDIAN AND WARD (§ 54*)—SETTLEMENT—CHARGES—INTEREST.

Where a guardian made no settlement after a partial settlement in 1891, and was discharged in 1898 upon acknowledgment of full settlement procured from the ward, simple interest was allowable on all funds held by the guardian after such partial settlement.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 242-253; Dec. Dig. § 54.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

6. PLEADING (§ 36*)—CONCLUSIVENESS OF ALLEGATIONS ON PLEADER.

Where the guardian, in the statement of his accounts attached to his answer in an action to compel a settlement, charged himself with interest on an item from the same period as claimed by the ward and allowed by the register, he cannot thereafter claim that interest should have been allowed for a less period.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 36.*]

Appeal from Chancery Court, Mobile County; Thomas H. Smith, Chancellor.

Action by Kate Rice and another against Byrd C. Willis. From a decree for complainants, defendant appeals. Affirmed.

See, also, 141 Ala. 168, 87 South. 507, 39 South. 991.

Inge & Armbrecht and Hamilton & Thornton, for appellant. Erwin & McAleer, for appellees.

DENSON, J. The purpose of this litigation is to compel Byrd C. Willis, guardian of complainants, Mrs. Kate Rice (née Brasfield) and Sallie Brasfield, to make settlement of his accounts as such guardian, Willis became guardian of complainants, by appointment of the probate court of Greene county, when they were infants of tender years. The guardianship was subsequently removed to Mobile county, where the guardian had taken up his residence. Said guardianship continued through the period of the wards' minority.

The bill shows that an annual or partial settlement was made of his accounts by the guardian on the 10th day of April, 1891, on which settlement a decree was rendered against him in favor of each of the wards. Kate attained her majority on August 6, 1898, and the bill avers that on December 17, 1898, the guardian had her to sign a written instrument acknowledging full settlement with her of his accounts as guardian, and asking that the probate court discharge him as her guardian. On January 1, 1900, Sallie came of age; and it is averred that on the 21st of May, 1900, Willis had her to sign an instrument similar to that signed by Kate. It is charged in the bill that the guardian had each of said instruments filed with the judge of probate in Mobile county, and induced the court to enter, on the 19th of December, 1898, without any notice to Kate, a decree discharging him as such guardian of her estate, and likewise induced the court to enter, on June 6, 1900, similarly, a decree discharging him as such guardian of Sallie's estate.

This is the third time the cause has appeared in this court on appeal. On the first appeal we held the bill sufficient in its averments in respect to fraud practiced upon or undue advantage taken of complainants by the guardian in procuring them to sign the written instruments referred to, and touch-

ing this phase of the case we used the following language: "There is no merit in the assignment that it is not shown how the respondent took advantage of the complainants in the matter of signing the paper acknowledging full settlement. His relation was one of the greatest confidence and trust, and called for the utmost of good faith. It was his duty to fully inform them of their rights in all respects. It charged that he took advantage of their youth and inexperience and of his influence over them in getting them to sign the paper, which, they further charge, was untrue in its statements. This was sufficient. They were his wards from tender years, and had lived with him and grown up under his care and control; and it requires no effort to understand how easily they might be influenced by him against their interests." *Willis v. Rice*, 141 Ala. 168, 37 South. 507, 109 Am. St. Rep. 26. But it was also held on that appeal that "a bill to impeach a decree for fraud, though not within the terms of the statute which bars a bill of review after a lapse of three years, must by analogy be governed by the same limitations"—citing *Gordon's Adm'r v. Ross*, 63 Ala. 363. The bill was filed June 25, 1902, and it was held that no sufficient reasons were then shown in the bill to relieve it from the bar of three years as to complainant Mrs. Rice; and, a demurrer presenting that point having been overruled by the chancellor, the decree was reversed, and a decree was here rendered sustaining the ground of the demurrer to the bill.

On the return of the cause to the chancery court the bill was amended to meet the ground of the demurrer just alluded to; and from a decree overruling the demurrer relied to the bill as amended the respondent again appealed, and assigned the decree as error. The amendments made to the bill proceeded upon two theories, viz., lack of knowledge on the part of Mrs. Rice of the alleged fraud, and absence from the state of the respondent. The cause, on the second appeal, was considered with respect to the latter of the above theories only, and we held that the amendment to the bill brought Mrs. Rice's cause of action within the saving clause of the statute (Code 1896, § 2805). *Willis v. Rice* (Ala.) 39 South. 991. That section is in this language: "When any person is absent from the state during a period within which a suit might have been brought against him, the time of such absence must not be computed as a portion of the time necessary to constitute a bar under this chapter."

While the construction we have placed upon the averments of the bill in respect to their sufficiency to bring the case within the saving influence of the section of the Code cited is sound, yet we are inclined to think, with appellants' counsel, that the statute can-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

not be applied to a case like the one in hand, and that we fell into error in so applying it on the former appeal. The reason for its nonapplication is, as suggested by appellants' counsel: The statute *ex vi termini* is confined in its application to limitations provided for in the chapter of the Code in which it is found (chapter 72). The statute of limitations which, on the first appeal, was held to apply by analogy to this cause, is section 761, c. 16, Code of 1896, and the exception provided for by section 2805, being confined to limitations enumerated in chapter 72, therefore, cannot be ingrafted upon section 761 in another chapter. This conclusion is not affected by section 674 of the Code of 1896, which is in this language: "The provisions of this Code, prescribing the time within which civil suits must be commenced after the cause of action has accrued, apply to suits commenced by bill in chancery."

While the effect of this section, of course, is to apply the statute of limitations, it also makes operative all exceptions, on such statutes ingrafted, which might properly be applied in a court of law. We have seen that the exception under consideration, being confined to limitations provided for in chapter 72, cannot be extended to limitations prescribed in another chapter; and this must be true, whether the action is pending in the chancery court or in a court of law. Moreover, section 761 is an express provision for limitations of actions in the chancery court, and operates independently of section 674. These considerations were not suggested by counsel on the former appeal, nor did they occur to the court.

However, the foregoing considerations and conclusions are not conclusive of Mrs. Rice's right to maintain the bill, if the first theory—lack of knowledge of the fraud practiced—is sufficiently pleaded and proved. The bill is amply sufficient in its allegations of fraud; and it was so held on the first appeal. The amendments made to the bill by the additions of sections 12, 13, and 14 clearly point out that Mrs. Rice was not aware of the facts constituting the fraud relied on until after the decree discharging the guardian had been entered. It is also shown that the bill was filed within a year after discovery of the alleged fraud. In this state of the case section 2813 of the Code of 1896, which extends the time within which actions seeking relief on the grounds of fraud must be brought for one year after the discovery of the fraud, saves the cause of action from the statute of limitations so far as the pleading is concerned.

In all the realm of administrative law, perhaps, no principle is more clearly stated or freer from diverse decisions than the one which controls in determining the validity of transactions between guardian and ward

before a final settlement; and, as approvingly said by one of our great Chief Justices (Brickell), "It is not, perhaps, capable of clearer or more accurate statement than is expressed by Judge Story: 'Courts of equity will not permit transactions between guardians and wards to stand, even when they have occurred after the minority has ceased, and the relation become thereby actually ended, if the intermediate period be short, unless the circumstances demonstrate, in the highest sense of the terms, the fullest deliberation on the part of the ward and the most abundant good faith (*uberrima fides*) on the part of the guardian. For in all such cases the relation is still considered as having an undue influence upon the mind of the ward, and as virtually subsisting, especially if all the duties attached to the situation have not ceased, as if the accounts between the parties have not been fully settled, or if the estate still remains in some sort under the control of the guardian.'" 1 Story's Eq. § 817; 2 Pomeroy's Eq. Juria. § 961; *Ferguson v. Lowery*, 54 Ala. 510, 25 Am. Rep. 718; *Jackson v. Harris*, 66 Ala. 565; *Volts v. Volts*, 75 Ala. 555.

Taking from the wards the receipts in full, and obtaining from them directions in writing to the judge of probate to discharge the guardian as on final settlement, were acts "into which it was the sacred duty of the guardian not to invite the ward, without a just accounting and full settlement; or the disclosure of every fact necessary to inform the ward of all with which she was parting, and then committing it to her uninfluenced will" whether she would give the receipt and direction or not. *Ferguson v. Lowery*, 54 Ala. 510, 514, 25 Am. Rep. 718. The guardian in this case carries the burden of proving that he dealt fairly, that he made full communication of every fact within his knowledge calculated to influence the conduct of his wards, and that he obtained nothing from them without their free consent, given after receiving information of all facts bearing on their rights and the extent of them. "This the law exacts, as a necessary protection of a class of persons liable to be made the victims of the artful." *Jackson v. Harris*, 66 Ala. 565, 567; *Harriaway v. Harriaway*, 136 Ala. 499, 506, 34 South. 836.

In the light of these principles it is impossible, we think, to read the evidence in this case and reach any reasonable conclusion other than that the circumstances disclosed as attending the procurement of the receipts from the wards, together with their written directions for the entry of the decrees discharging the guardian, stamp as voidable the transactions which culminated in the decrees in question, upon dissent seasonably expressed by the wards. We are also of the opinion that the evidence sup-

ports the allegations of the bill to the effect that Mrs. Rice did not discover the facts constituting the alleged fraud until within one year before the bill was filed. It was held on the first appeal that Sallie Brasfield is not barred. Consequently the chancellor correctly decreed that a reference should be had for a stating of the guardian's accounts.

On the reference held by the register, the statement of the account between the guardian and his wards showed a large amount as being due from the guardian to each of the wards. The chancellor overruled exceptions filed by the respondent to the report, and confirmed it. The only questions remaining for consideration relate to the exceptions overruled by the chancellor.

The account as stated by the register begins with the amounts ascertained to be due the wards on the partial settlement had on the 10th of April, 1891. No subsequent settlements were made by the guardian; and for this reason alone the register was warranted in charging him with simple interest on all funds held in his hands after that settlement. *Bryant v. Craig*, 12 Ala. 354; *Smith v. Kennard*, 38 Ala. 695, 702; *Calhoun v. Calhoun*, 41 Ala. 369; *Childress v. Childress*, 49 Ala. 237; *Thompson v. Thompson*, 92 Ala. 545, 9 South. 465.

The register reported that the respondent was not guilty of such misconduct as to warrant the charging of compound interest. Nevertheless the respondent insists that compound interest is included in the account as stated by the register. The report states that compound interest was not charged, and we find, upon a careful examination of the statement of the account, that interest has not been compounded—that the register simply followed the statute (section 2629, Code 1896) in computing interest.

In 1888 the respondent purchased a house and lot in the city of Mobile, on Dauphin Way, paid for it with money belonging to his wards, and took the title in his own name. The deed recited a consideration of \$3,250, and that is the sum which the respondent testifies he paid for the property. He testifies that he treated the property as his own up to the time he deeded it to the wards on the settlement made with them. He placed on record in Mobile county, on June 7, 1900, two deeds, one to each, conveying an undivided half-interest in said

house and lot; each of said deeds reciting a consideration of \$2,500. In stating the account, the register has given credit to the guardian for the money he paid for the property at the end thereof (or after it was deeded to the complainants), and charged him with interest on the same sum (\$3,250) from the date of the partial settlement in 1891. The respondent contends that this constitutes error; in other words, he holds that the credit should have been given at the date of the partial settlement, and that complainants should have been charged with the repairs, insurance, and taxes, paid on the property by the guardian while he held it in possession, and that the guardian should have been charged with the rents for the property.

One reason why this contention of the respondent should not be allowed to prevail is, that he, in his "general summary" (attached as Exhibit 1 to his answer to the bill, which summary is a statement of his accounts), charged himself with interest on the money for the same period, and he testified that the summary was true and correct. (See answer to question at bottom of page 92 of the record and continued at top of page 93.) This evidence was before the register, and it was within his province to act upon it in making up the account. In addition to what we have said, we think the maxim, "*Consensus tollit errorem*," may here be well applied in preclusion of the respondent's contention. His summary invited or induced the register to make the charge as he did. It is not necessary to give attention to the legal proposition which the respondent argues underlies his contention or insistence.

In respect to the failure of the register to credit respondent with charges for repairs, taxes, and insurance, claimed to have been paid on the wards' property, it is sufficient to say that we are not reasonably satisfied, from the evidence, that the register erred in not giving such credits, nor that the chancellor erred in overruling the exceptions which raised these questions.

No other question is presented by the exceptions to the register's report.

No error being found in the record, the decrees of the chancellor are affirmed.

Affirmed.

TYSON, C. J., and HARALSON and SIMPSON, JJ., concur.

(54 Miss. 209)

SWITZER v. BENNY. (No. 13,792.)

(Supreme Court of Mississippi. Feb. 22, 1909.)

1. APPEAL AND ERROR (§ 65*)—AMOUNT IN CONTROVERSY—AGREEMENT OF PARTIES.

Where the amount in controversy in replevin, originating in justice's court, did not exceed \$50, the parties could not, for the purpose of appeal to the Supreme Court, under Code 1906, § 86, authorizing an appeal when the amount in controversy exceeds \$50, agree that the affidavit in replevin should be so amended as to show that the property was worth \$51.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 65.*]

2. COURTS (§ 24*)—JURISDICTION—SUBJECT-MATTER—CONSENT OF PARTIES.

Jurisdiction of the subject-matter cannot be conferred on a court by consent of the parties.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 76-78; Dec. Dig. § 24.*]

Appeal from Circuit Court, Harrison County; W. H. Hardy, Judge.

Action between Fred Switzer and Edgar Benny. From a judgment for the latter, the former appeals. Dismissed.

J. H. Mize and Gex & Harrison, for appellant. W. R. Harper, for appellee.

FLETCHER, J. This cause originated in the court of a justice of the peace about a cow worth \$20, as shown by the affidavit in replevin and the officer's return on the writ. When the case got to the circuit court, it was decided on a certain issue, and the parties, manifestly desiring to appeal to the Supreme Court, agreed according to a recital in the record that the affidavit in replevin should be so amended as to show that the cow was worth \$51. It is clear, therefore, that the jurisdiction of this court is made to depend, not upon the real amount in controversy which is unquestionably only \$20, but upon an agreement as to what the affidavit shall recite; this agreement being, of course, entered into to escape the peremptory terms of section 86 of the Code of 1906. We cannot sanction such practice. It is obvious that the amount in controversy does not exceed \$50, and we are therefore without jurisdiction. Jurisdiction cannot be conferred on a court by consent of parties.

The appeal is therefore dismissed.

So ordered.

(55 Miss. 111)

LOUISVILLE & N. R. CO. v. DICK. (No. 13,789.)

(Supreme Court of Mississippi. Feb. 22, 1909.)

RAILROADS (§ 317*)—ACCIDENTS AT CROSSINGS—LIABILITY.

The liability of a railroad company under the statute (Code 1906, § 4043), making it liable for any injury sustained by any one from trains when running through towns at more than six miles an hour, depends on the lawfulness of the speed at the time the danger is discovered, or should have been discovered if the train had been running at the prescribed speed;

and a railroad company is liable for injuries to a traveler where at the time the danger was discovered the train was running at an unlawful speed, though at the time of the collision it was running at a lawful speed.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 317.*]

Appeal from Circuit Court, Jackson County; W. H. Hardy, Judge.

Action by F. M. Dick against the Louisville & Nashville Railroad Company for injuries received by plaintiff by being struck by a locomotive while driving across a public crossing within the corporate limits of the town of Ocean Springs. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Gregory L. Smith, for appellant. Denny & Denny and Witherspoon & Witherspoon, for appellee.

MAYES, J. The giving of the fifth instruction in this case was error, for which this case will have to be reversed. The instruction makes the railroad company liable for all injuries sustained by the running of a train through the corporate limits of any city if the locomotive shall have run at a greater rate of speed than six miles at any time whilst in the limits of the city. In other words, if a city be a mile long, and a train approaching the city come in at a rate of speed greater than six miles an hour for the first half mile, and for the second half mile slow down to a lawful rate of speed, and while so running at a less rate of speed than six miles an hour, a person is injured by the train, the railroad company is to be held liable for the injury, just as though they had run the entire mile at a greater rate of speed than six miles per hour. This is not the statute. The statute (Code 1906, § 4043) provides that the company shall be liable for any damage or injury which may be sustained by the locomotive or cars whilst running at a greater speed than six miles. The object of this statute is to have the speed of the train reduced so as to bring the train under perfect control. In the case of *Railroad Company v. Toulouse*, 59 Miss. 284, this court held that, even though the train be running at a less rate of speed than six miles per hour at the very time of the impact, still the company is liable if it appear that at the time the danger was discovered the train was going at an unlawful rate of speed. In the *Toulouse* Case, supra, it is plain to be seen that it was the unlawful rate of speed that caused the injury. In the case of *Mississippi Central Railroad Co. v. Butler*, 46 South. 558, this court held that where a train ran through a town at an unlawful rate of speed, and struck an animal just outside the corporate limits of the town, the statute did not apply because the injury must be occasioned whilst maintaining the unlawful rate of speed. The whole pur-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reports. Index—

pose of the instruction is to make the railroad company liable, whether the injury is inflicted whilst maintaining the unlawful speed or not, if the train has been run at a greater rate of speed than six miles per hour while passing through the corporate limits. If the statute can be so applied, it might just as well be applied to a case where it is shown that the train ran through any town along its route at an unlawful rate of speed. Under this construction of the statute, if at any time during its journey any train had been run at a greater rate of speed than six miles an hour in any municipality along its route, the company would be liable.

The question of liability by this statute is made to depend on the lawfulness of the speed at the time the danger is discovered, or should have been discovered if the train had been running at the prescribed speed.

Reversed and remanded.

(95 Miss. 410)

WHITTEN v. STATE.

(Supreme Court of Mississippi. Feb. 22, 1909.)

CRIMINAL LAW (§ 1168½*)—HOMICIDE—TRIAL—SELECTION OF JURY.

In a trial for homicide the case was very close on the facts; the evidence being delicately balanced. It appeared on motion for new trial that the sheriff who had spent a large sum of money from his private purse to secure defendant's capture sat by the district attorney, and aided him in selecting the jury; that the jury was formed in part from talesmen summoned by the sheriff through his deputies, after the regular panel and special venire had been exhausted; and that such talesmen were selected in large measure from certain towns where the sheriff was personally popular. *Held* to require a reversal.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1168½.*]

Appeal from Circuit Court, Quitman County; Sam. C. Cook, Judge.

Clint Whitten was convicted of murder, and appeals. Reversed and remanded.

Appellant and deceased visited a gambling den and low dive on the night of the homicide. The killing occurred upstairs, and there were no eyewitnesses except a woman, who escaped, and could not be found to be used as a witness. Persons below stairs heard a scuffling overhead followed by a pistol shot, and immediately following the shot appellant ran down the stairway, and, in response to an inquiry, stated that he had killed deceased. He immediately fled, but was afterwards captured and put on trial. The evidence shows the deceased was found dead with a bullet hole entirely through his head. His pockets had been rifled of everything of value, and he had no weapon. The defendant testified that the killing was in self-defense, and his testimony tends to make a case of justifiable homicide.

On appeal from a conviction, he assigns among other errors the action of the sheriff

in summoning special veniremen to serve on the jury from among his personal friends and in assisting the state in the selection of a jury.

Williams & Simpson, for appellant. Geo Butler, Asst. Atty. Gen., for the State.

FLETCHER, J. This case is exceedingly close, not to say unsatisfactory, on its facts. No eyewitnesses testified except the defendant, whose evidence makes out a clear case of self-defense. To offset this testimony, the state relied upon certain physical facts and circumstances, which were thought to suggest guilt. Certain witnesses testified that they believed that deceased was shot in the back of the head, since the bullet hole in the rear was smaller than in front, and because the hair seemed to be "tucked" into the wound in the back of the head. The observations of these witnesses, however, were all made before the blood was washed from deceased's face. After the blood had been washed off, several apparently reputable witnesses testified that there were unmistakable powder burns on the face, indicating that the shot had come from in front in harmony with defendant's theory. The pockets of the dead man had been rifled, but it is not unreasonable to suppose that this had been done by the abandoned woman, who was an habitu  of the loathsome dive in which this killing occurred. The defendant fled after the homicide, but this, though competent, of course, is not a very weighty circumstance in this case. The scuffling sound heard by the witness McArthur and the ready proclamation made by defendant immediately after the shooting are not easy to reconcile with the theory of assassination and robbery. We make these observations to show that the case was delicately balanced, and therefore one in which errors count for much.

It is shown on the motion for a new trial that the sheriff had spent a large sum of money from his private purse to secure the capture of defendant; that he was selected by certain indignant and interested citizens to aid the district attorney in the selection of the jury; that he sat by the prosecuting officer while the jury was being selected, and suggested what jurors to accept and what jurors to reject; that the jury was formed in part, at least, from talesmen summoned by the sheriff through his deputies, after the regular panel and the special venire had been exhausted; and that these talesmen were selected in large measure from the towns of Marks and Lambert, where the sheriff was shown to be personally popular. The sheriff, a gentleman of great candor and of unquestioned honesty of purpose, states that but for him the prosecution would have amounted to very little, or words to that effect.

In this close case we think the defendant carried too great a burden in having his case

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

submitted to a jury composed of the sheriff's friends, virtually chosen by him, and who had every opportunity to conclude that that officer was actively participating in the prosecution. We are not to be understood as holding that a district attorney may not confer with the sheriff, as he may with any other officer or citizen as to the personnel of a jury; but we do hold that where the scales are so delicately poised that the weight of a hair would turn the balance, it is burdening the defendant too grievously to try him with a jury so selected, with the sheriff's partisanship so glaringly apparent.

Reversed and remanded.

(36 Miss. 155)

YAZOO & M. V. R. CO. v. SHELBY.

(No. 13,471.)

(Supreme Court of Mississippi. Feb. 8, 1909.)

1. CARRIERS (§ 283*)—CARRIAGE OF PASSENGERS—PERSONAL INJURIES—ACTS OF EMPLOYEES.

A railroad conductor in charge of a train which has been made up to go to the aid of a wrecked passenger train, who uses insulting language and assaults plaintiff, who had come upon the train to ask permission to ride to the wrecked train in order to assist his mother, who was on that train, is engaged in the business of the railroad company, and the company will be responsible for his assault.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1121; Dec. Dig. § 283.*]

2. CARRIERS (§ 318*)—CARRIAGE OF PASSENGERS—PERSONAL INJURIES—ACTION—SUFFICIENCY OF EVIDENCE.

In an action for an assault committed on plaintiff by a conductor of a train made up to go to the relief of a wrecked passenger train, evidence held sufficient to sustain a judgment for plaintiff.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 318.*]

Appeal from Circuit Court, Bolivar County; Sydney Smith, Judge.

"To be officially reported."

Action by W. A. Shelby against the Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. A. Shelby received a message from his brother advising him that his mother would arrive on the appellant's train and requesting him to meet her at the depot at Rosedale. Mr. Shelby arrived at the depot in time to meet the train on which his mother was expected, and shortly after arriving at said depot saw the smoke of the approaching train some distance below the town. The train stopped before coming in sight of the depot and remained stationary for such a length of time that the appellee, knowing the bad condition of the railroad track and frequency of wrecks on that line, became uneasy and started to walk down the track towards the train. He met the fireman in the lower end of the yard, who told him that the train had been wrecked; but he did not know

whether any one was hurt or not. Appellee immediately returned to the depot, where he learned that the defendant was preparing to send an engine coupled to a coal car to the aid of the passenger train. He asked the fireman if he could go on the engine to the wrecked passenger train. The fireman refused to allow him to do so, explaining that he had no authority, but suggested that appellee ask the conductor, who was in the coal car attached in front of the engine. Appellee got off the engine, walked down to the coal car, and, not being able to see the conductor, climbed up on the iron ladder attached to the side of the car until he got in a position where he could see over in the car and see the conductor. He asked him if he could go down to the wreck with him, and, according to Mr. Shelby's testimony, the conductor replied: "No, get down off there." Appellee explained that he did not want to go through curiosity, but that his mother was on the train, and he wanted to go to her assistance. Appellee says the conductor replied: "I don't give a damn what you want to go for. Get off there!" That the conductor had crossed over to a place near where appellee was standing, and appellee then said, "You need not be so damn insulting," and the conductor immediately struck him in the face and on the ear and on top of the head until appellee jumped off of the car. The conductor denies the use of any profane or insulting words, and says that he struck appellee because he cursed him, and because he was coming on him, and he had to protect himself. Appellee testifies that he had decided to get off the car, and, as he was about to do so, made the reply above, and immediately the conductor struck him. A witness, Gibbons, testified that the conductor did use profane epithets toward appellee before appellee made any response. The conductor testified also that he was not operating the train for public use or for the handling of passengers, and that it was against the company's rules for him to allow persons to ride on it, as it was a work train and going to the assistance of a derailed train.

On the point raised by the defense as to whether the conductor was engaged in his master's business, the court instructed the jury as follows:

"No. 5. The court instructs the jury that they cannot find against the railroad company in this case unless they believe from the evidence that the conductor was engaged in and about the business of the railroad company and acting within the scope of his authority at the time he struck the plaintiff.

"No. 6. The court instructs the jury that if they believe from the evidence that the conductor struck the plaintiff because of insulting words used to the said conductor by the said plaintiff, or to protect himself from

an attack on him by the said plaintiff, then in that event the defendant is not liable to respond in damages, and they will find for the defendant."

"No. 8. The court instructs the jury that the railroad company in this case is not liable further and other than a private citizen would be in a like case of its agents and servants, and that the same rule would apply to a suit as between two individuals as applies in the present suit.

"No. 9. The court instructs the jury that, in determining whether the act in question in any case was done within the scope of employment, the question to be considered is whether the act was done as a means or for the purpose of performing the work of the master, and the court instructs the jury that in such case the inquiry is whether the act in question in any case was done, so far as time is concerned, while the servant is engaged in the master's business, nor as to the mode or manner of doing it, nor whether in doing the act he uses the appliances of the master, but whether from the nature of the act itself it is actually done, or was an act done in the master's business and wholly disconnected therefrom by the servant, not as a servant, but as an individual on his own account, and the court instructs the jury that, if they believe the said servant was acting as an individual and on his own account when he struck the plaintiff, then and in that event they will find for the defendant.

"No. 10. The court instructs the jury that if they believe from the evidence that the blow given the plaintiff in this case grew out of a private difficulty between the plaintiff and the conductor, and that at the time the said conductor struck the plaintiff he was acting as an individual in resenting an insulting remark made to him or in protecting himself from an attack of the said plaintiff, then and in that event they will find for the defendant."

"No. 13. The court instructs the jury that if they believe from the evidence that the conductor in this case was acting for his own personal purposes, independent and separate from the duty he owed to the defendant company, then and in that event the company is not liable, and they will find for the defendant.

"No. 14. The court instructs the jury that the railroad employes, as well as other men, whether engaged in their duties as employes of the company or otherwise, have the same right that other citizens of the community have to resent an unprovoked insult, and to exercise the right of self-defense."

The case was submitted to a jury, who returned a verdict for \$2,000.

Mayes & Longstreet, Chas. N. Burch, and C. L. Sivley, for appellant. Sillers & Owen, for appellee.

WHITFIELD, C. J. The learned counsel for the appellant have presented in their very able brief its cause as skillfully as it is possible for it to have been presented. They do not, however, give full force to the testimony of the plaintiff, and of the negro Tandy Gibbons. According to the testimony of the plaintiff, the conductor said to him: "I don't give a damn what you want to go for. Get off of there"—before the plaintiff concluded to get down, and made his counter observation, which he calls "a passing shot," at the conductor. The negro Tandy Gibbons testified that the conductor said to the plaintiff, in response to his request, "No, get down, God damn you," before Mr. Shelby made his response. It is perfectly obvious that the jury accepted the testimony of these two witnesses and repudiated the testimony for the defense. According to this testimony of the plaintiff and the witness Gibbons that the insulting conduct of the conductor occurred before the plaintiff had decided to get down off the side of the car, it is evident that this conduct took place plainly whilst the conductor was engaged in and about the "master's business." The whole controversy turns upon that point, whether or not the conductor's insulting language and conduct, as testified to by the plaintiff and the witness Gibbons, took place whilst the conductor was engaged in and about the "master's business," and on this point the learned counsel for the appellant drew and secured from the court a series of instructions presenting their contention in every possible view, in the aptest and strongest language. These instructions for the defendant are Nos. 5, 6, 8, 9, 10, 13, and 14. We cannot conceive how the law of the case for the defendant could have been any more learnedly or accurately presented. The trouble with the case is that the jury accepted the testimony for the plaintiff, and we cannot say that the verdict is manifestly wrong.

Therefore the judgment is affirmed.

(94 Miss. 874)

MILLS GUY CO. v. DICKERSON.

(No. 13,394.)

(Supreme Court of Mississippi. Feb. 8, 1909.)

CHattel Mortgages (§ 229*)—PROPERTY INCLUDED—QUESTION FOR JURY.

A trust deed, naming only L. B. as the grantor, recited that it was given to secure a pre-existing debt due by her and supplies to be advanced to her, and conveyed her entire interest in the crops to be grown on any land she might cultivate. B. B. signed the deed; but there was no reference to his crops, or any intimation that he meant to convey any crops to be grown by him, and there was nothing in the deed showing that he was L. B.'s husband, though it was admitted that certain of his individual property was also conveyed. Held, in an action by the trustee against a subsequent purchaser from the husband of cotton grown on land rented by him to recover the debt secured

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

by the trust deed, that a peremptory instruction for plaintiff was improper.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Dec. Dig. § 229.*]

Appeal from Circuit Court, Pike County; M. H. Wilkinson, Judge.

Action by W. H. Dickerson, trustee, against the Mills Guy Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

On February 19, 1906, Laura Booth and Barney Booth, her husband, executed their joint note to the Auburn Mercantile Company for \$72.34, and on the same day there was executed and delivered to W. H. Dickerson, trustee for the Auburn Mercantile Company, a deed of trust, which recited "that, whereas, Laura Booth, party of the first part, is indebted to the Auburn Mercantile Company," etc. This instrument further recited that said company expected to advance her supplies, merchandise, etc., not to exceed the amount of \$72.34, and conveyed "her entire interest in any and all crops of cotton and other agricultural products raised by her and any hand she may employ during the year 1906 on land belonging to Dr. W. L. Bowman, or any other land she may cultivate in said year," and also certain personal property, etc. This deed of trust was signed by Laura Booth and Barney Booth, and duly acknowledged and filed for record March 9, 1906. It seems that Barney Booth, being indebted to the appellant, Mills Guy Company, in a large amount, had, on January 13, 1906, executed a trust deed in their favor covering all crops, etc., that he might raise during the year 1906. This deed of trust was duly acknowledged and filed for record April 17, 1906. During the year 1906 Barney Booth raised a crop of cotton on lands rented by him from Dr. Bowman and other parties, and during the fall of that year he delivered two bales of cotton, of the value of about \$80, to the appellant, which was credited on his account. It is not shown that appellant had actual knowledge of any lien claimed by the Auburn Mercantile Company, other than such as might be imputed by the recorded deed of trust above mentioned. It is not shown that Laura Booth raised any cotton on any lands during that year, or that she rented any lands of Dr. Bowman, and it further appears that the two bales of cotton in question were raised by Barney Booth on lands rented by him. Thereafter suit was begun in the court of a justice of the peace by Dickerson, trustee, and judgment recovered against appellant for the amount of its debt and interest. On appeal to the circuit court a peremptory instruction was given to find for plaintiff, and the defendant appeals.

Geo. Butler and Milxon & Cassidy, for appellant. Clem V. Ratcliff, for appellee.

FLETCHER, J. The sole question presented for decision is whether the trust deed given on February 19, 1906, to the Auburn Mercantile Company, which purported to convey all crops raised by Laura Booth on a certain plantation, operated to convey the crops raised by her husband, Barney Booth, on the same plantation, or, if not, whether the fact that Barney Booth, as well as Laura Booth, signed and acknowledged the trust deed, was sufficient to put subsequent purchasers and incumbrancers upon inquiry. Appellant is such a subsequent incumbrancer and purchaser. The trust deed in question names only Laura Booth as the grantor, recites that it is to secure a pre-existing debt due by her and supplies to be advanced to her, and conveys her entire interest in the crops to be grown on the Dr. Bowman land. Nowhere in the body of the trust deed is there any reference to Barney Booth's crops, or any intimation that he meant to convey any crops to be grown by him. True, he signed the trust deed, but there is nothing in the instrument to show that he is the husband of the grantor; but, if there were, his signing of the deed is explained by the admitted fact that certain of his individual property is also conveyed. There is no dispute as to the fact that the cotton sold appellant was grown by Barney Booth on land which he had rented and that Laura Booth had no interest therein. We do not think that *Stone v. Montgomery*, 35 Miss. 83, and *Armstrong v. Stovall*, 26 Miss. 275, have the slightest application. These cases are discussed, and their true meaning settled, in *Marx & Sons v. Jordan*, 84 Miss. 334, 36 South. 386, 105 Am. St. Rep. 457. Besides, we are now dealing with the question as to whether Barney Booth actually executed the deed of trust, or whether he assented to his wife's execution. It is a question of what property was conveyed, and we feel sure that the trust deed upon which appellee relies cannot be held to convey property not mentioned therein. If the husband's crop was not in fact conveyed, it cannot be argued that his signature to the instrument can operate to put a purchaser upon inquiry as to a fact which in truth never existed. In no aspect of the cause was the peremptory instruction for the appellee proper.

Reversed and remanded.

(93 Miss. 234)

ALABAMA & M. R. CO. v. BEARD.
(No. 13,411½.)

(Supreme Court of Mississippi. Feb. 15, 1909.)

1. WATERS AND WATER COURSES (§ 179*)—EMBANKMENTS—OBSTRUCTING WATER—ACTIONS—INSTRUCTIONS.

Where, in an action against a railroad for constructing and maintaining an embankment obstructing water, the issue raised by the pleadings and evidence was whether the damages

resulted from the obstruction of a water course or from an interference with ordinary surface water, instructions authorizing a recovery unless the company showed that the construction of the embankment did not cause the injury and ignoring the point as to surface drainage were unauthorized.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 179.*]

2. WATERS AND WATER COURSES (§ 179*)—EMBANKMENTS—OBSTRUCTING WATER—PLEADING—VARIANCE.

Where, in an action against a railroad company for constructing an embankment obstructing water, the issue was whether the damages resulted from the obstruction of a water course or from an interference with surface water, and plaintiff's evidence went to show that a natural water course with fairly well-defined channels was obstructed, and defendant's evidence showed the contrary, plaintiff could not recover on the theory that the embankment obstructed surface water.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 179.*]

3. WATERS AND WATER COURSES (§ 171*)—OBSTRUCTION OF SURFACE WATER—LIABILITY.

A railroad company is not liable in every case where a necessary railroad embankment results in injury by interfering with natural drainage; but it is liable only where it can prevent the injury without substantial additional inconvenience, expense, and danger.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 216-222; Dec. Dig. § 171.*]

Appeal from Circuit Court, Greene County; W. H. Hardy, Judge.

Action by W. P. Beard against the Alabama & Mississippi Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Chas. L. Bomberg and McWillie & Thompson, for appellant. Harrison & Gex and H. P. Heidelberg, for appellee.

FLETCHER, J. Appellee is the owner of a certain tract of land situated a short distance south of the line of appellant's railroad in Greene county. He filed his declaration, alleging that the railroad was so constructed as that its embankment interfered with the natural course of a stream or streams known as "open bay branches," whereby the water was caused in times of freshets to back up and overflow plaintiff's land. The first count of the declaration sought recovery of actual damages, and the second count by proper averments made a case for punitive damages. The railroad company filed a special plea, averring that the embankment did not obstruct the course of any natural stream or water course, but served only to interfere with the drainage of rain water across plaintiff's land. Plaintiff did not demur to this plea, or in any way question its sufficiency in law, but filed a replication, denying the truth of the plea, and reasserting that the embankment did "stop up a natural stream of water." It will thus be seen that the issue before the jury, so far as the pleadings can determine the issue, was whether the damage

resulted from the obstruction of a water course or from an interference with ordinary surface drainage. Much testimony was heard; the plaintiff's evidence going to show that the "open bay branches" were natural water courses flowing in channels fairly well defined, and the evidence for the defendant tending in some degree to show the contrary. The instructions asked and given for the plaintiff, except perhaps the seventh, recognized that the plaintiff's recovery depended upon his showing that a natural water course had been obstructed, as these instructions clearly, and as we think correctly, predicated the right to recovery upon this theory. Upon defendant's theory of the case, in support of which there was some testimony, the defendant asked a number of instructions, all of which were refused, and the jury was in effect charged that the only escape for the railroad company was to show that the construction of the embankment did not cause the injury, entirely ignoring the point as to surface drainage. The twenty-seventh charge, to illustrate, was refused; that charge reading: "The court instructs the jury that if the roadbed of the defendant railroad company, upon which it constructed the fill which the plaintiff claims obstructed the water, was upon the lands of the defendant company, and the obstruction of water was merely the surface drainage of rain water, and not a regular stream or drain, then the jury must find a verdict for the defendant."

Upon the issue made by the pleadings, this error is apparent. It is said, however, that, independent of the pleadings, it is the law that, if a railroad company by the construction of an embankment collects surface water so as to cause overflow and damage, the liability is the same as if a natural stream is obstructed, and that a recovery was proper upon either theory; that if the declaration was for the obstruction of a water course, while the proof showed an interference with ordinary surface drainage, at the most there was but a variance, which was waived by the failure of the defendant to object to the testimony or to ask for a peremptory instruction on this ground. There might be some force in this argument if the testimony was in harmony as to the character of the water; but a variance could not have been suggested in the court below in the light of plaintiff's testimony that the "open bay branches" in fact constituted one or more water courses flowing in well-defined, or at least regular, channels. There was manifestly no variance if plaintiff's testimony was to be credited. There is no escape from the conclusion that the pleadings, the proof, and the charges for the plaintiff made one case, and the court, by refusing defendant's charges, made another. Nor is it true that the railroad company must respond in damages in every case

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

where a necessary railroad embankment results in injury to land by interfering with natural drainage. The true rule on the subject is stated with precise accuracy in *Sinai v. Louisville, New Orleans & Texas Ry. Co.*, 71 Miss. 547, 14 South. 87. That case modifies the doctrine of the common law as to surface water only to this extent: That if the railroad company can prevent the injury without substantial additional inconvenience, expense, and danger, then it should do so. If this plaintiff expects to concede that the embankment does not obstruct any natural water course, it must bear this principle in mind, and be prepared to meet the issue as to whether the road could have been constructed otherwise with equal economy and safety. On the trial of this case, it may be remarked, the testimony was all the other way.

It is insisted that this view as to surface water cannot be reconciled with the case of *Railroad Company v. Miller*, 68 Miss. 760, 10 South. 61. But that was a case in which the railroad company had constructed a ditch half a mile long, in which surface water was collected and afterwards discharged upon plaintiff's land, and is therefore akin to the case of *Railroad Co. v. Lackey*, 72 Miss. 881, 16 South. 909. Of course, the company cannot collect waters, and by an artificial channel pour them upon adjacent lands. This is altogether different from the incidental damage which will in many cases follow the construction of a railroad embankment over a swampy piece of land. The principles applicable in the case of obstructed surface drainage, and that alone, are set out in the *Sinai Case*, supra, and the cases of *Railroad Co. v. Davis*, 73 Miss. 678, 19 South. 487, and *Railroad Co. v. Wilbourn*, 74 Miss. 284, 21 South. 1. Of course, these authorities have no reference to interference with natural water courses, and, had the instructions been in accordance with the declaration and pleas, we would doubtless have reached a different conclusion.

Reversed and remanded.

(35 Miss. 121)

JONES v. STATE. (No. 13,641.)

(Supreme Court of Mississippi. Feb. 22, 1909.)

1. ROBBERY (§ 17*)—INDICTMENT.

An indictment for robbery, which alleges that accused voluntarily took the personal property of prosecutor from his person and against his will, by violence and by putting him in fear of immediate injury, but which fails to charge an intent to steal the property taken, is defective.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. § 18; Dec. Dig. § 17.*]

2. ROBBERY (§ 27*)—ELEMENTS OF OFFENSE—INSTRUCTIONS.

An instruction, on a trial for robbery, that if accused voluntarily took the personal property of prosecutor from his person and against his will, by violence or by putting him in fear of

immediate injury, he was guilty, was erroneous for failing to state that the intent to steal was a necessary element.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. § 38; Dec. Dig. § 27.*]

Appeal from Circuit Court, Hinds County; W. H. Potter, Judge.

"To be officially reported."

Albert Jones was convicted of robbery, and he appeals. Reversed and remanded.

Hallam & Cooper, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

WHITFIELD, O. J. The motion to arrest the judgment should have been sustained. The indictment is in the following words: "The State of Mississippi, County of Hinds, First District. Circuit Court, September Term, 1908, First Judicial District, Hinds County. The grand jurors for the state of Mississippi, taken from the body of the good and lawful men of said district, elected, impaneled, sworn, and charged to inquire in and for the county and district aforesaid, at the term aforesaid, in the name and by the authority of the state of Mississippi, upon their oaths present that Albert Jones, late of the county aforesaid, in said county and district, on the 12th day of July, A. D. 1908, did then and there willfully, unlawfully, and feloniously take a pistol, the personal property of E. S. Steen, from his person and against his will, by violence to his person and by putting said E. S. Steen in fear of some immediate injury to his person, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Mississippi. Wm. Hemingway, District Attorney pro tem." The indictment fails to charge an intent to steal.

This error was emphasized by the giving of the erroneous instruction No. 1 for the state, which is as follows: "If the jury believe from the evidence beyond a reasonable doubt that Albert Jones feloniously took the pistol of E. S. Steen in his presence or from his person and against his will, by violence to his person or by putting Steen in fear of immediate injury to his person, as charged in the indictment, then it is the duty of the jury to find the following verdict: 'We, the jury, find the defendant guilty as charged in the indictment.'" In the case of *Woods v. State*, decided by this court April 15, 1889, reported in 6 South. 207, the instruction was as follows: "(1) The court instructs the jury, if they believe from the evidence, beyond a reasonable doubt arising therefrom, that the defendant; either alone or in company with others, made an assault upon J. J. Gallaher, and by violence to his person and against his will took from him a pistol, of the value of \$10, and \$10 in money or United States currency, the jury should find the defendant guilty as charged; and it makes no difference whether the defendant himself took and car-

ried away the pistol and currency, if he was present, aiding and abetting." The court held that that instruction was erroneous, because it failed to state the intent necessary to constitute the crime charged. The doctrine is fully explained in Bishop's New Criminal Procedure, vol. 2 (6th Ed.) § 1002, and in 2 Bishop's New Criminal Law, § 1159. See, also, *Sledge v. State*, 99 Ga. 684, 26 S. E. 756, and *People v. Vice*, 21 Cal. 344.

Because of the refusal to arrest the judgment, and because of giving of charge No. 1 for the state, the judgment is reversed, and the cause remanded.

'94 Miss. 219)

ROBERTS v. THOMAS. (No. 13,815.)

(Supreme Court of Mississippi. Feb. 22, 1909.)

HOMESTEAD (§ 18*)—WHO MAY CLAIM.

A widower who moved into the state from a sister state, and who bought a house and lot on which he actually resided, and held as a homestead for himself and sons, who at his expense remained in the sister state boarding with a relative and attending school, but who would rejoin him as soon as they finished their school course, was the head of a family, and acquired a homestead in the premises.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 22-27; Dec. Dig. § 18.*]

Appeal from Chancery Court, Jackson County; T. A. Wood, Chancellor.

Suit by George Thomas against R. A. Roberts to cancel defendant's claim of title to property claimed by complainant as his homestead, and claimed by defendant under a sheriff's deed. From a decree for complainant, defendant appeals. Affirmed.

May & Sanders, for appellant. Denny & Denny, for appellee.

FLETCHER, J. George Thomas, the appellee, a widower, moved to Mississippi from Georgia some three years ago, and bought a house and lot upon which he actually resided. He had two boys who remained behind in Georgia, boarding with their grandfather and attending school; their board and tuition being paid by the father. The father testifies that he was holding the place where he lived as a home for himself and boys, who would rejoin him as soon as they finished their school course.

The sole question is whether Thomas had a right to hold this house and lot as a homestead against a purchaser at an execution sale. It will readily be conceded under all the authorities that appellee was the head of a family, and that he could send his children away from home to attend school without forfeiting his right to the homestead, provided he continued to reside in the home. It is difficult to see how the case can be different merely because the boys, who are temporarily absent at school, have never actually and physically resided in the home, provided

there is always present their intention to do so as soon as their school days are over. The authorities cited for appellant are not in point. Mere occupancy certainly is not sufficient; but, when that occupancy is coupled with residence, citizenship, and the status of being the head of a family, the right is perfect, and cannot be defeated because the children have chosen to remain at school when the father removed rather than go through the useless ceremony of coming to Mississippi for a while, and then returning to their school duties.

The learned chancellor held correctly, and the case is affirmed.

WESTERN UNION TELEGRAPH CO. v.

WEBB & SMITH. (No. 13,585.)

(Supreme Court of Mississippi. Feb. 8, 1909.)

TELEGRAPHS AND TELEPHONES (§ 67*)—REGULATION AND OPERATION—ERRORS.

A telegraph company is not liable for damages resulting from an error in a message from a prospective contractor to plaintiffs as to the time in which he could complete a building, which error caused plaintiffs to award the contract to another firm at a higher bid; there being no completed contract, and plaintiff losing only an opportunity to make an advantageous contract.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 67; Dec. Dig. § 67.*]

Appeal from Circuit Court, Marion County; W. H. Cook, Judge.

Action by Webb & Smith against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Webb & Smith contemplated the building of a storehouse, and had invited bids from various contractors. Among those who submitted bids was the firm of Oliver & Burks. Their bid was for \$3,354, which was the lowest bid received. Appellee thereupon wired Oliver & Burks as follows: "If awarded contract, how soon could you give us building." Oliver & Burks replied as follows: "Can give building in sixty days." In transmitting the message, the word "can" was changed to read "can't," so that the message read "Can't give the building in sixty days." Thereupon Webb & Smith awarded the contract to another firm at a higher bid, and thereafter brought suit for the difference in the two bids, and recovered judgment in the lower court. From this judgment, the telegraph company appeals.

Harris & Willing, for appellant. Weathersby & Rawls, for appellees.

FLETCHER, J. This case is completely controlled by the case of *Western Union Telegraph Co. v. Adams Machine Company*, 47 So. 412. Here, as there, there is no pretense that

there was a completed contract. Appellees have only lost an opportunity to make an advantageous contract. The case of *Alexander v. Telegraph Company*, 66 Miss. 161, 5 South. 397, 3 L. R. A. 71, 14 Am. St. Rep. 556, cited by appellee, is fully discussed and distinguished in the *Adams Machine Company Case*, supra.

Reversed and remanded.

(94 Miss. 458)

TURNER v. STATE (No. 13,614.)

(Supreme Court of Mississippi. Feb. 22, 1909.)

CRIMINAL LAW (§ 1171*)—APPEAL—MISCONDUCT OF PROSECUTOR—ARGUMENT.

Argument of a prosecuting attorney during the trial of a murder case exceedingly close on its facts, in which he stated that accused had said that she had witnesses to prove her good character, and asked why she did not present them, saying that the state could not introduce evidence of her bad character until she had given proof of her good character, which line of argument was excepted to, was reversible error.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 1171.*]

Appeal from Circuit Court, Harrison County; W. H. Hardy, Judge.

"To be officially reported."

Sarah Turner was convicted of manslaughter on a charge of murder, and she appeals. Reversed.

Evans & Hardy, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

WHITFIELD, C. J. During the progress of the trial of this case, which is an exceedingly close one on its facts, special counsel employed to assist the district attorney in the prosecution, in the course of his argument to the jury, used the following language: "She says that she has witnesses to prove her good character. Why didn't old Sarah Turner bring her witnesses here to testify to her good character, if she has witnesses to prove her good character? The state cannot introduce evidence of her bad character until the defendant has put in her good character." To this the defendant then and there excepted. The court does not seem to have sustained the exception or to have directed counsel to stop that line of argument; nor did the court give a single instruction directing the jury not to regard this statement.

In 12 Cyc. 578, it is said: "So it is prejudicial error entitling the defendant to be granted a new trial to allow counsel for the prosecution in his argument to the jury to comment upon the failure of the defendant to offer evidence of his previous character." In *McKnight v. United States*, 97 Fed. 208, 38 C. C. A. 115, it is said: "Such argument made over objection with the consent of the

court, in effect destroys the presumption in favor of the accused, and allows the jury to infer that his character is bad, because he has not produced proof to the contrary."

To the same effect are many other authorities. Indeed, the proposition is elementary. We would not in a case where the right result had manifestly been reached, where guilt was overwhelmingly shown, reverse for this sort of error alone; but in this case the guilt is not so shown, and it is not at all clear from the testimony that the defendant is guilty of the crime charged.

Reversed and remanded.

WILBURN v. STATE (No. 13,333.)

(Supreme Court of Mississippi. Feb. 22, 1909.)

Appeal from Circuit Court, Lafayette County; W. A. Roane, Judge.

George W. Wilburn was convicted of carrying a concealed weapon, and appeals. Affirmed.

Jas. G. McGowen, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

FERGUSON v. CITY OF PASCAGOULA.

(No. 13,747.)

(Supreme Court of Mississippi. Feb. 22, 1909.)

Appeal from Circuit Court, Jackson County; W. H. Hardy, Judge.

Action between J. D. Ferguson and the City of Pascagoula. From the judgment, Ferguson appeals. Affirmed.

Dodds, Leathers & Goldman, for appellant. H. B. Everitt, for appellee.

PER CURIAM. Affirmed.

LOUISVILLE & N. R. CO. v. McKAY et al.
(No. 13,788.)

(Supreme Court of Mississippi. Feb. 22, 1909.)

Appeal from Circuit Court, Jackson County; W. H. Hardy, Judge.

Action by Mrs. Maggie McKay and others against the Louisville & Nashville Railroad Company. From the judgment, the railroad company appeals. Affirmed.

Gregory L. Smith, for appellant. May & Sanders, for appellees.

PER CURIAM. Affirmed.

RUSSELL v. STATE (No. 13,639.)

(Supreme Court of Mississippi. Feb. 22, 1909.)

Appeal from Circuit Court, Holmes County; Sydney Smith, Judge.

Mose Russell was convicted of murder, and appeals. Affirmed.

Geo. Butler, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

WATKINS MACHINE & FOUNDRY CO. v. KEENE et al. (No. 13,810.)

(Supreme Court of Mississippi. Feb. 22, 1909.)

Appeal from Circuit Court, Jones County; R. L. Bullard, Judge.

Action between the Watkins Machine & Foundry Company and A. J. Keene and others. From the judgment, the company appeals. Dismissed.

G. W. Ellis, for appellant. Currie & Currie, for appellees.

PER CURIAM. Appeal dismissed.**BELL v. STATE** (No. 13,616.)

(Supreme Court of Mississippi. Feb. 22, 1909.)

Appeal from Circuit Court, Harrison County; W. H. Hardy, Judge.

Frank Bell was convicted of manslaughter, and appeals. Affirmed.

J. H. Mize, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.**WATSON v. RICHWOOD LUMBER CO.** (No. 13,821.)

(Supreme Court of Mississippi. Feb. 22, 1909.)

Appeal from Circuit Court, Hancock County; W. H. Hardy, Judge.

Action between D. A. Watson and the Richwood Lumber Company. From the judgment, Watson appeals. Dismissed.

PER CURIAM. Dismissed.**STEADMAN et al. v. BUTLER.** (No. 13,741.)

(Supreme Court of Mississippi. Feb. 22, 1909.)

Appeal from Circuit Court, Lawrence County; R. L. Bullard, Judge.

Action between R. N. Steadman and others and Ike Butler. From the judgment, Steadman and others appeal. Affirmed.

Currie & Currie, for appellants. S. B. Waddell and Touchstone & Salter, for appellee.

PER CURIAM. Affirmed.**SMITH v. PARKER.** (No. 13,794.)

(Supreme Court of Mississippi. Feb. 22, 1909.)

Appeal from Circuit Court, Harrison County; W. H. Hardy, Judge.

Action between W. M. Smith and O. H. Parker. From the judgment, Smith appeals. Affirmed.

J. I. Ballenger and Rucks Yerger, for appellant. M. D. Brown, for appellee.

PER CURIAM. Affirmed.**GALLOWAY v. STANLEY.** (No. 13,761.)

(Supreme Court of Mississippi. Feb. 22, 1909.)

Appeal from Circuit Court, Harrison County; W. H. Hardy, Judge.

Action between J. F. Galloway and Ben S.

Stanley. From the judgment, Galloway appeals. Affirmed.

Mayes & Longstreet, for appellant. Barrett & Taylor, for appellee.

PER CURIAM. Affirmed.**NOBLES v. KINSTRA.** (No. 13,811.)

(Supreme Court of Mississippi. Feb. 22, 1909.)

Appeal from Circuit Court, Jones County; R. L. Bullard, Judge.

Action between John F. Nobles and W. G. Kinstra. From the judgment, Nobles appeals. Dismissed.

PER CURIAM. Dismissed.

(56 Fla. 706)

VAUGHAN'S SEED STORE v. STRING-FELLOW.

(Supreme Court of Florida, Division A. Dec. 8, 1908. Headnotes Filed Feb. 11, 1909.)

1. EVIDENCE (§ 471*)—CONCLUSIONS—INCIDENTAL CONCLUSION.

While the opinion of a witness or a conclusion drawn by him from facts, is not admissible evidence, yet an incidental statement of a conclusion that is merely introductory of the facts and circumstances showing the means and sources of his knowledge will not be regarded as a violation of this rule.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2149; Dec. Dig. § 471.*]

2. EVIDENCE (§ 143*)—MATERIALITY.

Testimony tending to prove allegations of the declaration is not immaterial.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 424; Dec. Dig. § 143.*]

3. DAMAGES (§ 18*)—PROXIMATE OR REMOTE CONSEQUENCES.

A person is not liable in damages for the remote consequences of his act or for conjectural consequences. Damages, to be recoverable, must be both the natural and proximate consequence of the wrong complained of.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 87; Dec. Dig. § 18.*]

4. SALES (§ 442*)—BREACH OF WARRANTY OF SEED—MEASURE OF DAMAGES.

Where one sells seed under a warranty, and the seed produces a crop not harmful to the land, but of a poorer character, or of an inferior quality and less value than would have been produced had the warranty been fulfilled, the measure of damage is the value of the crop of the true product such as the seed was warranted to produce and such as would have ordinarily been produced that year, less the expense of raising it, and less also the value of the crop actually raised from the seed delivered.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1294; Dec. Dig. § 442.*]

5. SALES (§ 442*)—BREACH OF WARRANTY OF SEED—MEASURE OF DAMAGES.

Where one sells seed under a warranty, and the seed bought proves to be worthless—that is, where they wholly fail to germinate or grow after having been planted, and no crop results from planting the seed delivered—the only damages recoverable are the price paid for the seed, the expense in preparing the soil for the seed and for planting the same, together with the loss sustained from having the land lie idle for the year, or for such time as the use of it was lost.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1294; Dec. Dig. § 442.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

6. APPEAL AND ERROR (§ 1033*)—HARMLESS ERROR—ERRORS FAVORABLE TO PARTY.

In an action for damages, where the plaintiff sees fit to forego an element of his damages, and only asks for a part of what he may recover, the defendant cannot complain either of this omission on the part of the plaintiff or of the action by the court in permitting proof of a part only of what the plaintiff may recover.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4060; Dec. Dig. § 1033.*]

7. APPEAL AND ERROR (§ 1058*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Where an objection to a question which is afterwards answered by the witness is sustained, and the court does not strike the answer or withdraw same from the jury's consideration, and the defendant had the benefit of this testimony, he was not harmed by and cannot complain of the court's ruling.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4200; Dec. Dig. § 1058.*]

8. WITNESSES (§ 269*)—CROSS-EXAMINATION—SCOPE.

The court commits no error in sustaining objections to questions that were not in cross of the examination in chief.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 940; Dec. Dig. § 269.*]

9. TRIAL (§ 82*)—RECEPTION OF EVIDENCE—OBJECTIONS—SUFFICIENCY.

Objections that a question was irrelevant and immaterial and has nothing to do with the case are too general, and were properly overruled.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 195, 196; Dec. Dig. § 82.*]

10. APPEAL AND ERROR (§ 1056*)—EXCLUSION OF EVIDENCE—HARMLESS ERROR.

There was no error in the court's sustaining an objection to the question, "Isn't there a paper usually in the top of the bag like that?" where the witness testified that he opened the bag of seed and there was no such paper.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4188; Dec. Dig. § 1056.*]

11. EVIDENCE (§ 471*)—OPINION EVIDENCE.

Permitting a witness to state as his opinion that cucumber seed was cultivated in the usual and customary manner in his locality is not reversible error, where he has already stated with the greatest fullness all the methods and details of the planting and cultivation of these seed, and the witness had had nine years' experience in the planting and growing of cucumbers.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2160; Dec. Dig. § 471.*]

12. APPEAL AND ERROR (§ 738*)—ASSIGNMENT OF ERRORS—INCLUDING ERRORS IN ONE ASSIGNMENT.

Several rulings in regard to the admission or exclusion of evidence should not be joined in one assignment, for if any of the rulings complained of is correct the assignment must be overruled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3033; Dec. Dig. § 738.*]

13. EVIDENCE (§ 314*)—HEARSAY.

Hearsay evidence is properly excluded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1168; Dec. Dig. § 314.*]

14. EVIDENCE (§ 164*)—BEST AND SECONDARY.

Objection to the offer in evidence of "a drawn off statement from the stock book" was properly sustained, where the witness has the original stock book in his possession.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 546; Dec. Dig. § 164.*]

15. SALES (§ 440*)—BREACH OF WARRANTY—EVIDENCE—ADMISSIBILITY.

Where original orders for cucumber seed to be shipped to plaintiff are offered in evidence by the defendant to show that the plaintiff had knowledge of a disclaimer of warranty thereof, and said orders do not contain any such disclaimer, their exclusion is not reversible error.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1261; Dec. Dig. § 440.*]

16. TRIAL (§ 48*)—RECEPTION OF EVIDENCE—OFFER—NECESSITY.

Where the relevancy of a question propounded to a witness is not apparent, and there is no offer to make such relevancy to appear, the court may refuse to permit the witness to answer the question.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 116; Dec. Dig. § 48.*]

17. APPEAL AND ERROR (§ 738*)—ASSIGNMENT OF ERRORS—INCLUDING ERRORS IN ONE ASSIGNMENT.

Where one assignment of error groups the court's ruling upon objections to several questions and answers in the deposition of a witness, and the court properly sustained the objection to one of such questions, the appellate court will not consider the other objections.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3033; Dec. Dig. § 738.*]

18. CUSTOMS AND USAGES (§ 12*)—EVIDENCE—ADMISSIBILITY.

Under a plea which alleged that the seed was sold subject to the custom of seed merchants in the seed trade in the city and state of New York, the court properly sustained an objection to testimony going to prove the custom of seed merchants generally, and there was no tender of proof that the plaintiff had knowledge of any such custom.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 23; Dec. Dig. § 12.*]

19. EVIDENCE (§ 471*)—OPINION EVIDENCE—HEARSAY.

Where the expression of opinion upon an article written by another in relation to the mixing of cucumber and other vine seeds calls for the opinion of the witness upon what at best is but hearsay testimony, the court properly excluded the same.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2150; Dec. Dig. § 471.*]

20. APPEAL AND ERROR (§ 751*)—RECORD—MATTERS PRESENTED.

Where the transcript of the record does not sustain the assignment, no error is made to appear.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3040; Dec. Dig. § 751.*]

21. EVIDENCE (§ 471*)—CONCLUSIONS OF WITNESS.

The plaintiff may testify that a certain person was never employed by him as his agent to purchase seed for him.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2150; Dec. Dig. § 471.*]

(Syllabus by the Court.)

Error to Circuit Court, Alachua County; James T. Wills, Judge.

Assumpsit by J. D. Stringfellow against Vaughan's Seed Store. Judgment for plaintiff, and defendant brings error. Affirmed.

The defendant in error, who will be known elsewhere in this opinion as the "plaintiff," sued the plaintiff in error in an action of assumpsit. The declaration contained the

common counts and a special count, which is, in part, as follows:

"For that whereas, on the 1st day of January, A. D. 1905, the plaintiff being a truck farmer, operating at and in Alachua county, Fla., and the defendant corporation being a dealer in seeds, and offering and guaranteeing to furnish seeds for the growth of a certain quality of cucumbers, to wit, the Arlington White Spine cucumber, the plaintiff then and there purchased from the defendant, and the defendant sold and delivered to the plaintiff, 50 pounds of said Arlington White Spine cucumber seed at \$.80 per pound, aggregating \$40, and the plaintiff paid the defendant for said seeds; the same to be used by the plaintiff in the planting of his crop of cucumbers at and in Alachua county, Fla.

"And the plaintiff further says that believing the same to be good cucumber seeds, and that would yield and produce as represented and guaranteed by the defendant, received the said seeds and planted the same, but the said seeds did not yield and produce the kind and quality of cucumbers as represented and guaranteed by the defendant, but, on the contrary, yielded and produced a quality and kind of cucumbers that would not sell in the market, and that were rejected and refused by dealers, and declared by all dealers who handled them to be absolutely worthless. And the plaintiff, before and since that time, incurred large expense and damage in the purchase of said seed, in the clearing of the land, breaking the subsoil and harrowing the same, planting and replanting the seed, fertilizing the same, working the crop, piping and preparing for irrigation, irrigating the crop, and other necessary expenses incident to the preparation and cultivation of the said crop, all of which was a total loss to the plaintiff, and thereby the plaintiff was injured by reason of the said defective seeds, and by reason of the fact that the cucumbers produced and yielded from the said seed were absolutely worthless and unfit for sale and for shipment, in the sum of \$1,950, and therefore he brings this suit, and claims damages against the defendant in the said sum of \$1,950."

The bill of particulars, filed with the declaration, is as follows:

Vaughan's Seed Store,		
In account with J. D. Stringfellow, for		
Clearing up 22½ acres of land ready for plow, \$3 per A.....	\$	67 50
Breaking, subsoiling, harrowing same, \$5 per A.....	112	50
Seed	40	00
Planting and replanting.....	40	00
Fertilizer, hauling and distributing same, \$40 per acre.....	900	00
Working crop, \$5 per acre.....	112	50
Piping and preparing for irrigating, \$10 per acre.....	225	00
Irrigating the crop, \$5 per A.....	112	50
Putting up and tearing down frames on 4 acres and wear of cloth....	190	00
Salary of superintendent.....	150	00
	\$1,950	00

The defendant filed six pleas: The first was a plea of not guilty. The second plea was to the effect that the seeds sold were not guaranteed in any way, but were sold by the defendant to the plaintiff subject to a written condition known to the plaintiff, which was printed in and upon the bills, orders, and addresses of the parties, and placed also upon a slip put in each parcel or bag of seeds sold by the defendant, and of all of which the plaintiff had full notice, the language of which was as follows: "We give no warranty, express or implied, as to description, quality, productiveness or any other matter of any seeds, bulbs or plants we send out and we will not be in any way responsible for the crop. If the purchaser does not accept the goods on these terms, they are at once to be returned. Vaughan's Seed Store."

The plea further alleged that the said plaintiff, knowing that the sale of Vaughan's Improved Arlington White Spine cucumber seed was made to him subject to the condition aforesaid, received the seed so sold in the declaration set forth, and accepted same subject to the aforesaid condition, and did not return or offer to return the said seeds.

The third plea alleged that the seed was sold subject to the custom of seed merchants in the seed trade in the city and state of New York, which custom is that the sales of seeds are made subject to the disclaimer, as set forth in the second plea.

In the fourth plea defendant alleges that the plaintiff neglected to properly plant and cultivate the seed in the ordinary and usual manner of planting such seed in Alachua county, and that the fault of the failure of the crop was due to the cultivation of the said seed and its product, and defendant is not obligated to the plaintiff by reason of the contract, and became in no wise liable for any damages.

In the fifth plea defendant alleges: That the sale of seed in the declaration mentioned was made through one W. S. McDowell, an agent of the plaintiff, who sent to defendant an order on behalf of plaintiff to ship to plaintiff the said 50 pounds of cucumber seed of the variety known as "Vaughan's Improved Arlington White Spine." That said order bore upon its face a N. B. notice as follows, "This order is taken subject to approval by Vaughan's Seed Store, which approval will be acknowledged by mail," and upon its back a notice that Vaughan's Seed Store did not accept any responsibility in reference to same. That an acceptance of said order was duly mailed in a stamped envelope addressed to plaintiff at Gainesville, Fla., containing the following statement: "We Do Not Warrant. While we always aim to have the best seeds and bulbs, roots and like stock from the most reliable growers, we give no warranty, expressed or implied, nor do we guarantee the seeds, bulbs or plants supplied by us, nor will we be in any way responsible for the crop either as to

varieties or product, nor do we guarantee the successful flowering of any bulbs, or that plants which grow from same will be free from disease. If not accepted on these terms these goods must be returned at once and any money paid for the same will be refunded. We assume no responsibility for deliveries delayed or prevented by reason of war. Vaughan's Seed Store." That on the 31st day of December, 1904, the defendant shipped to the plaintiff the said seed of the variety aforesaid in a seamless bag. That within the bag and on top of said seed was a written notice of no warranty, express or implied, as to description, quality, productiveness, or any other matter of seed sent out, and that defendant will not be responsible for the crop. That a bill for said seed was duly mailed on the 8d day of January, 1905, to plaintiff, containing notice of no warranty of said seeds, and that no complaint would be entertained unless made within five days after receipt of goods. That said plaintiff received said bill and paid same, and had notice of contents thereof. That said bag of seed with the said notice was duly delivered to plaintiff, and defendant avers that, if the said seed so sold and delivered subject to the said "disclaimer" failed to produce Vaughan's Improved Arlington White Spine cucumbers, such failure was due to the improper care or want of care in the plaintiff's own negligence, and not to defects in the seed furnished.

There was a sixth plea similar to the fifth plea.

The parties went to trial, and the jury found for the plaintiff \$950. Final judgment was entered for the plaintiff, and the defendant sued out a writ of error.

Carter & Layton and Baker, Matheson & Baxter, for plaintiff in error. W. S. Broome and W. W. Hampton, for defendant in error.

PARKHILL, J. (after stating the facts as above). The plaintiff, J. D. Stringfellow, testified as a witness in his own behalf. His counsel asked him this question: "Mr. Stringfellow, did you make any purchase about the 1st of January, 1905, from the defendant corporation?" The witness answered: "I gave an order—I met Mr. McDowell, of the Vaughan Seed Store—" To this answer the defendant objected and moved to strike the same, because the answer assumed that W. S. McDowell was the agent of the Vaughan Seed Store, while the fact of such agency was put in issue by the pleadings. The objection was overruled and the motion denied. This ruling is made the basis of the first assignment of error.

The court committed no error in this ruling. The answer of the witness did not assume or disclose the agency of McDowell. As we read this answer, it was merely introductory to the subsequent statement, by the witness, of the facts and circumstances of the agency of McDowell and the means

and source of knowledge of the witness. *Hoadley v. Hammond*, 63 Iowa, 599, 19 N. W. 794; *Talladega Ins. Co. v. Peacock*, Adm'r, 67 Ala. 253. Any possible error was rendered harmless by the subsequent testimony of L. W. Wheeler, manager of the New York office of the Vaughan Seed Store, who testified in behalf of the defendant that: "During the year 1904, we made arrangements with Mr. McDowell to sell seed for us on commissions. * * * Mr. McDowell took an order from J. D. Stringfellow, the plaintiff in this suit, upon the Vaughan Seed Store." *McCallum v. Driggs*, 35 Fla. 277, 17 South. 407.

The witness Stringfellow testified that he gave McDowell "an order for these seed on the 26th day of September, 1904, to be shipped on January 1, 1905. I purchased 50 pounds of seed." The witness was asked: "What kind of seed?" He answered: "I purchased Arlington White Spine cucumber seed." The question and answer were objected to, and the defendant moved to strike the answer, because it was "immaterial and irrelevant and not in proof of any of the allegations of the declaration." This is the basis of the second assignment.

The declaration alleged that the plaintiff purchased from the defendant, and the defendant sold and delivered to the plaintiff, Arlington White Spine cucumber seed; but counsel argue "that the kind of seed he got was admitted, and that it was immaterial and should not have been testified to." Testimony tending to prove allegations of the declaration is not immaterial. Even though the declaration admits the contention of the defendant that the plaintiff bought and the defendant delivered Arlington White Spine cucumber seed, we fail to see how the defendant was harmed by proof of allegations of the declaration in harmony with the contention made by defendant. This assignment is without merit.

Counsel for plaintiff asked the witness Stringfellow the following question: "Did these cucumber vines resulting from the planting of these particular seed produce the Arlington White Spine cucumbers?" The witness answered: "They did not produce any Arlington White Spine cucumbers at all." The defendant objected to the question and moved to strike the answer thereto, on the ground that the plaintiff admits in his declaration that he purchased Arlington White Spine cucumber seed and received the same, and as being irrelevant and immaterial. The court overruled the objection and denied the motion to strike, and this is made the basis of the third assignment of error.

This assignment is without merit. The testimony was proper. It tended to prove the plaintiff's case. The declaration alleged that, the defendant "offering and guaranteeing to furnish seeds for the growth of a certain quality of cucumbers, to wit, the Ar-

lington White Spine cucumber, the plaintiff then and there purchased from the defendant, and the defendant sold and delivered to the plaintiff, 50 pounds of said Arlington White Spine cucumber seed at \$.80 per pound, aggregating \$40, and the plaintiff paid the defendant for said seeds; the same to be used by the plaintiff in the planting of his crop of cucumbers at and in Alachua county, Fla. And the plaintiff further says that believing the same to be good cucumber seeds, and that would yield and produce as represented and guaranteed by the defendant, received the said seeds and planted the same, but the said seeds did not yield and produce the kind and quality of cucumbers as represented and guaranteed by the defendant, but, on the contrary, yielded and produced a quality and kind of cucumbers that would not sell in the market, and that were rejected and refused by dealers, and declared by all dealers who handled them to be absolutely worthless." No attack was made on the declaration by demurrer or otherwise. From the allegations in the declaration we understand that the plaintiff bought and received from the defendant Arlington White Spine cucumber seeds, and that the defendant guaranteed said seeds would grow or produce Arlington White Spine cucumbers, but said seeds did not produce the kind and quality of cucumbers as represented and guaranteed by the defendant, which, of course, was the Arlington White Spine cucumber.

In support of his case it was proper for the plaintiff to prove, if he could do so, that the Arlington White Spine cucumber seeds bought by him did not produce the Arlington White Spine cucumber. The other objection that testimony was irrelevant and immaterial is too general to be considered. Neither can this court consider the argument of counsel based upon the conditions printed upon the order for the seed, which order was not before the court when the question now being considered was propounded and ruled upon. What we have said here disposes of the fourth assignment of error also.

The fifth, sixth, seventh, eighth, fifty-second, fifty-third, fifty-fourth, and that part of the fifty-sixth assignment based upon the refusal of the court to give the twenty-fifth instruction requested by the defendant may be considered together. They all relate to the measure of damage. The plaintiff, Stringfellow, and his witnesses Beville and Tenley were permitted to state the cost of the seed, the expense incurred by the plaintiff in planting, cultivating, and irrigating the crop. The defendant objected to this proof, contending that the measure of damage should have been the difference between the value of the crop that would have been raised had the seed been as represented, and the value of the crop which was actually raised. The theory of the plaintiff is that the measure of his damage is the purchase

money of the seed with interest and the expense incurred in preparing the land, in planting the seed, and compensation for any other expenditures for labor necessary in irrigating and making the crop of cucumbers.

As will be seen by looking at the declaration, the plaintiff complained because the seed purchased by him did not yield and produce the kind of cucumbers as represented and guaranteed by the defendant; but, on the contrary, it is alleged the seed produced a kind and quality of cucumber that was absolutely worthless and would not sell in the market. "And the plaintiff, before and since that time, incurred large expense and damage in the purchase of said seed, in the clearing of the land, breaking the subsoil and harrowing the same, planting and replanting the seed, fertilizing the same, working the crop, piping and preparing for irrigation, irrigating the crop, and other necessary expenses incident to the preparation and cultivation of the said crop, all of which was a total loss to the plaintiff."

It may be stated as a general rule that the party is entitled to compensation for an injury to his person, in his property, or in his reputation. There is another general rule that a person is not liable in damages for the remote consequences of his act or conjectural consequences. Damages, to be recovered, must be both the natural and proximate consequence of the wrong complained of. The wrongdoer must answer in damages for those results injurious to other parties which are presumed to have been within his contemplation when the wrong was done.

The defendant's engagement was that the seed sold was the Arlington White Spine cucumber seed and would produce Arlington White Spine cucumbers. The natural consequence of a breach of such a warranty would be a crop of cucumbers different in kind and quality from that guaranteed by the defendant. Where, then, the seed produces a crop not harmful to the land, but of a poorer character, or of an inferior quality, and less value than would have been produced had the warranty been fulfilled, the measure of damage is the value of the crop of the true product, such as the seed was warranted to produce, and such as would ordinarily have been produced that year, less the expense of raising it, and less also the value of the crop actually raised from the seed sold; or, in other words, the measure of damage would be the difference between the market value of the crop raised and the crop from the seed ordered. 30 Am. & Eng. Ency. Law (2d Ed.) 219; Wolcott v. Mount, 36 N. J. Law, 262, 13 Am. Rep. 438; White v. Miller, 71 N. Y. 118, 27 Am. Rep. 13; Passinger v. Thorburn, 34 N. Y. 634, 90 Am. Dec. 753; Depew v. Peck Hardware Co., 121 App. Div. 28, 105 N. Y. Supp. 390.

Where a crop, though of inferior quality,

is raised from the seed, the means would be furnished to enable the jury to make a proper estimate of the injury resulting from the loss of profits of this character, and prospective profits are allowed.

Where the seed bought proves to be worthless, however—that is, where they wholly fail to germinate or grow after having been planted, and no crop results from the wrong seeds—the evidence of the probable produce of the right seeds in the land and the year in question would be lacking; and the rule that the plaintiff must establish the quantum of his loss, by evidence from which the jury will be able to estimate the extent of his injury, will exclude all such elements of injury as are incapable of being ascertained by the usual rules of evidence to a reasonable degree of certainty. In such a case therefore the only damages recoverable are the price paid for the seed, the expenses in preparing the soil for the seed and for planting the same, together with the loss sustained from having his land lie idle for the year, or for such time as the use of it was lost. 30 Am. & Eng. Ency. Law (2d Ed.) 219; Shaw v. Smith, 45 Kan. 334, 25 Pac. 886, 11 L. R. A. 681; Butler v. Moore, 68 Ga. 780, 45 Am. Rep. 508; Reiger v. Worth, 127 N. C. 230, 37 S. E. 217, 52 L. R. A. 362, 80 Am. St. Rep. 798.

The instant case, as made by the pleadings and the proof, falls within the first class of cases, where the seed received from the defendant produced a crop of cucumbers, but a crop of an inferior quality and of less value than would have been produced had the warranty been complied with. Indeed, the crop was not marketable. The measure of recovery in this case then would be the difference between the market value of the crop raised and the same crop from the seed ordered. The plaintiff, however, in his declaration, does not claim prospective profits, and the proof made and objected to only goes to the cost of the seed and the expenses of planting and the rental value of the land. The plaintiff therefore claimed and tried to prove less than he would be entitled to recover. In either case, whether the seed failed entirely to sprout and make a crop, or grew and made a crop of cucumbers of an inferior quality, the plaintiff would be entitled to recover at least the actual expenses of planting the seed and the rental value of the land, for these expenses would be considered in a recovery of prospective profits. Therefore, if the plaintiff sees fit to forego an element of his damages, and only asks for a part of what he may recover, it is only his loss, and the defendant cannot complain either of this omission on the part of the plaintiff or of the action by the court in permitting proof of a part only of what the plaintiff may recover.

The ninth assignment predicates error upon the court's sustaining plaintiff's objection to the following question propounded by de-

fendant to the witness Stringfellow: "Who is the man who opens your seed for you?" The objection was "because the question should be confined to who opened this particular sack of seed?" The witness answered: "Different ones." Plaintiff objected to the answer, and the court sustained the objection; but the court did not strike the answer or withdraw the same from the jury's consideration. On the contrary, the witness continued to testify: "I don't know who opened this particular sack, except from information." The defendant had the benefit of this testimony, and the last statement of the witness met the very objection made to the first question. The defendant was not harmed by the court's ruling, and so this assignment is without merit.

The tenth and eleventh assignments predicate error upon the court's sustaining plaintiff's objection to the following questions propounded by defendant to the witness Stringfellow: "Did you ever see one of Peter Henderson's catalogues? When you went in Peter Henderson's store, did you see that big sign about nonwarranty?"

The court ruled correctly in sustaining objections to these questions. They were not in cross of the examination in chief. The witness was the plaintiff in the case. On his direct examination he had not been asked anything about Henderson's catalogue or about his store or the question of warranty. The defendant did not make the witness his own witness.

It is contended that these questions were asked to prove the plea that the seed in question was sold subject to the custom of seed merchants in New York. There was no preliminary proof that Henderson was a seed merchant in New York, though it seems to have been assumed.

The twelfth assignment of error is based on the refusal of the court to sustain defendant's objection to the following question propounded to the witness Stringfellow: "You stated in your cross-examination that you replanted other cucumber seed in the rows between these Vaughan seed. Now state to the court and jury whether or not those other seed produced cucumbers of a marketable character." The defendant objected to the question "because it was irrelevant and immaterial and has nothing to do with this case." These objections are too general, and they were properly overruled. Besides this, the testimony was material, because it tended to prove the issue that the failure of the Vaughan seed to produce the character of cucumber desired was due to the quality of the seed, and was not caused by the character of the soil or the cultivation thereof.

The thirteenth, fourteenth, and fifteenth assignments may be considered together. At the conclusion of a part of the testimony given on the redirect examination set forth in narrative form, the transcript shows:

"Defendant objected to testimony, and defendant's counsel moved to strike out the testimony preceding, because it is irrelevant and immaterial and has nothing to do with the case. The objection was overruled. Motion denied. Defendant excepted." These objections were too general and were properly overruled. Besides, the "preceding testimony" was but a repetition of testimony that had been brought out by the defendant on the recross-examination of the witness. In this testimony the plaintiff, who was testifying, explained that he planted $25\frac{1}{2}$ acres in cucumber seed bought from the defendant, Vaughan's Seed Store. Some of the seed did not come up, and plaintiff had to replant. The plaintiff did not have enough of the seed he got from Vaughan to finish replanting the whole field. There were about six acres where he had about half of a stand. So the plaintiff bought out seed from Thomas to finish the replanting. About three acres were replanted with the Thomas seed. The Thomas seed produced good marketable cucumbers, so the plaintiff made out his bill or claim for damages against the defendant for planting, cultivation, fertilizing, and irrigating $22\frac{1}{2}$ acres. This testimony was in explanation and proof of the items in plaintiff's bill of particulars.

The defendant asked the plaintiff: "How much did you get from the replants which were on the $22\frac{1}{2}$ acres, for which you sued, and how much did you realize out of the crop?" The witness testified that his "claim is made for $22\frac{1}{2}$ acres from which I did not get a cent." He explained that he replanted about half of the crop of $25\frac{1}{2}$ acres with other seed which he purchased from said Thomas, "but in all of the crop, except in about 6 acres, there were so few replants that we never bothered with them, we threw them out, and 6 acres were planted in Thomas and Vaughan seed—half of the Vaughan seed and half of the Thomas seed," so the defendant could not be allowed to show how much the plaintiff realized on the whole crop on $25\frac{1}{2}$ acres. Three acres were replanted in the Thomas seed, and the plaintiff did not sue for damages in cultivating the three acres planted in the Thomas seed.

The sixteenth assignment of error is based upon the court's overruling defendant's objection to the following question propounded to the witness W. A. Strickland: "They were not marketable, salable cucumbers?" The question was objected to as being immaterial and irrelevant to the issues in the case. The only argument made by plaintiff in error in support of this assignment is the statement: "We will endeavor to show in subsequent assignments that whether or not these were marketable, salable cucumbers was not in issue, and that this evidence simply tended to confuse the jury and prejudice the defendant." We accept the invitation to consider the question sought to be raised here when we come to consider other assignments,

pointing out, as we go, that this question was a leading question.

The seventeenth assignment of error is dismissed by counsel for plaintiff in error with the statement that "the argument of the preceding assignment applies to this." We will remark further that the very question presented here has been considered and disposed of by our discussion of the third assignment.

The eighteenth assignment is based upon the court's sustaining an objection by plaintiff to the following question propounded by defendant to the witness W. S. McDowell: "Did you know at the time you got those seed the usual conditions under which seed are sold?" The objection was properly sustained because it was not in cross of the direct examination. The witness was not examined in chief on his knowledge of the conditions under which the seed were sold. The defendant could have made Mr. McDowell his witness for the purpose desired, but he did not do so.

The nineteenth assignment is based upon the court's sustaining plaintiff's objection to the following question propounded to the witness E. M. Beville: "Isn't there a paper usually in the top of the bag like that?" There was no error in this ruling. The witness stated that he opened the bag of seed and there was no such paper as a disclaimer.

The twentieth assignment of error predicates error upon the court's sustaining plaintiff's objection to the following question propounded to the witness E. M. Beville: "What is the effect of such?" This question had reference to the preceding statement of the witness that he knew the effect of excessive use of water on a crop. The witness had testified that he "was foreman out there (for Stringfellow, the plaintiff), and had complete control of the management of the farm and attended to the irrigation of the farm." There was no error here. The question was not in cross-examination of anything said by the witness in chief.

The twenty-first assignment of error is predicated upon the court's overruling defendant's objection to the following question propounded to the witness Beville on his redirect examination: "State whether or not in the planting and cultivation of these seed—the Vaughan seed—were they cultivated in the usual and customary manner as adopted by all planters in the culture of cucumbers, or cucumber seed, in this climate?" The defendant objected "because it is seeking the opinion of the witness, is irrelevant and immaterial, and is not the proper way to determine whether or not the cucumbers were properly planted, cared for, and cultivated; the method used and the means employed being the best evidence." There was no error in this ruling for the reason that on his cross-examination the witness had stated with the greatest fulness all the methods and details of the planting and cultivation of these particular seed. The witness

had had nine years' experience in the planting and growing of cucumbers. After stating these facts fully, it was not reversible error to permit the witness to state as his opinion that the seed were cultivated in the usual and customary manner in that locality. 5 Ency. of Ev. 714, and cases cited.

The twenty-second assignment is based upon the court's sustaining plaintiff's objections to the seventh, eighth, twelfth, fourteenth, twenty-first, twenty-third, and twenty-eighth questions and answers in the deposition of John Charles Vaughan, a witness for the defendant.

Different errors in regard to the admission or exclusion of evidence should not be joined in one assignment, for if any of the rulings complained of are correct the assignment must be overruled. 2 Cyc. 986, 991; Daniel & Finley v. Siegel-Cooper Co., 54 Fla. 205, 44 South. 949. The twenty-first question to Vaughan is the same as the sixth question propounded to the witness Robinson, and was properly excluded for the reason pointed out in our discussion of the thirty-fifth assignment. So this assignment falls.

The twenty-third assignment is based upon the court's exclusion of the twenty-fourth and twenty-sixth interrogatories to the defendant's witness Edward Hallberg upon objection by the plaintiff. There was no error. The court properly excluded the questions and answers of the witness Hallberg because they brought out hearsay evidence in the form of letters from two parties that certain orders filled by the defendant produced satisfactory results.

The twenty-fourth assignment of error: L. W. Wheeler, a witness for the defendant, testified that he was the manager of the New York office of Vaughan's Seed Store, and had been such manager for seven years; his business is a seedsman. "At the time that the order from Mr. Stringfellow was filed, we didn't have 50 pounds of any other kind of seed in the house. I know that we did not have 50 pounds of any other kind of cucumber seed in the house from our stock book, the original of which I have in my possession. The copy I have here is a copy of the original book made by myself." Thereupon, defendant offered in evidence a "drawn off statement from the stock book," to which plaintiff objected, "because it is wholly irrelevant and immaterial; the original is the best evidence." The objection was sustained, and this ruling is made the basis of the twenty-fourth assignment of error. There was no error here, because the statement made from the stock book by the witness and offered in evidence was not the best evidence, the witness having the original stock book in his possession, and because every fact which he wished to prove by said statement had been already testified to by the witness and without objection. 17

Cyc. 368-9; 2 Ency. of Ev. 313-315; Huffman v. Knight, 38 Or. 581, 60 Pac. 207.

The twenty-fifth assignment of error is: "The court erred in refusing to allow the defendant to file in evidence two original orders of W. S. McDowell for cucumber seed to be shipped to J. D. Stringfellow and a part of the C. O. D. envelope accompanying said shipments."

The contention of the plaintiff in error is that these orders should have been allowed as tending to show that the plaintiff had knowledge of the existence of the disclaimer of warranty. The papers offered do not show any such disclaimer. Consequently there was no error here. What is said here disposes of the twenty-sixth assignment also.

The twenty-seventh assignment is: "The court erred in sustaining plaintiff's objection to the introduction in evidence of the duplicate letter dated July 25, 1904, to W. S. McDowell, which letter was signed by McDowell for the purpose of showing the scope of his employment and the extent of his authority as the agent of the defendant in refusing to allow the same to be filed and read in evidence." No prejudicial error has been made to appear in excluding this letter defining the authority of Mr. McDowell, because there is nothing in this letter which bears upon any issue in this case, even if Mr. Stringfellow had seen it and knew all about it. There is no question in this case about the pro rata or full delivery of seed which were ordered in this case by McDowell, and the letter deals only with the question of Mr. McDowell's power to promise full or pro rata delivery of seed ordered by him for his customers.

The twenty-eighth assignment of error is based upon the court's refusal to permit the witness Hill to answer the following question: "What effect has blight had on the total average crop in Florida?" What effect blight had on the total average crop of cucumbers in Florida has no bearing upon the issues in this case so far as we can see. There was no error.

The twenty-ninth assignment is based upon the refusal of the court to permit Mr. Jarvis to answer the following question: "On what class of land is blight more liable to come than on other kinds?" The relevancy of this question was not apparent, and there was no offer made by the defendant to make such relevancy appear or to connect anything the witness might say with the lands of Mr. Stringfellow.

The thirtieth assignment is based upon the refusal of the court to allow the witness McDowell to answer the following question: "During the spring of 1905, can you name some parties who had satisfactory results from cucumber seed which were purchased from Vaughan of the variety known as Arlington White Spine which you saw yourself?" Though the court did not permit

this question, it was subsequently fully answered by the witness; he giving the names of several parties to whom he had sold said seed where the results were satisfactory and the fruit produced was good, but he gave two instances in which the results were not good.

The thirty-first assignment has been disposed of by what we have said about the twenty-eighth assignment of error.

The thirty-second assignment predicates error upon the court's sustaining objections to the tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, and sixteenth questions and answers in the deposition of one Carl Crop. These objections are all grouped in one assignment, and the tenth question propounded to Carl Crop is: "State whether Vaughan's Seed Store made trials of certain cucumber seed at their trial grounds in Western Springs, Ill." We think the court did not err in excluding this question. It does not identify the seed as being of the same lot as that sold to Stringfellow, and does not identify the time of the trial, nor tend to elicit testimony that the conditions were similar to those under which Stringfellow planted the seed he bought from the defendant. As there was no error in the ruling of the court on this question we will not consider the other objections.

The thirty-third assignment is based upon the court's sustaining plaintiff's objection to the seventeenth interrogatory and answer contained in the deposition of Carl Crop. The question propounded to the witness is as follows: "If you have stated in your answers to the foregoing questions that you are a seedsman and have been in the business for some time and acquainted with the said business and the conditions under which it is operated, state, if you know, what the custom of seed merchants in reference to the sale of seed under a warranty or disclaimer is, and give the source of your knowledge, and state whether any seed merchants to your knowledge sell seed other than on the usual conditions. Also, state what are the usual conditions." This question and the answer thereto was not limited to the proof of the custom of seed merchants in the city and state of New York, as alleged in the plea, but undertook to prove the custom of seed merchants generally, and of such a custom there had been no proof, and there was no tender of proof that the plaintiff had knowledge of any such custom.

The thirty-fourth assignment has been disposed of by what has been said in the thirty-second assignment.

The thirty-fifth assignment is based upon the court's sustaining plaintiff's objection to the sixth, ninth, tenth, and eleventh questions and answers contained in the deposition of J. C. Robinson. The sixth question called for an expression of the witness' opinion as an expert upon an article written by

Philip De Vilmorin read before the World's Fair Horticultural Congress in 1893 in relation to the mixing of cucumber and other vine seeds. We think this question was objectionable as calling for the opinion of the witness upon what at best was but hearsay testimony. 5 Ency. of Ev. 634; 16 Cyc 1213, 1214; 17 Cyc. 270; Root v. Boston Elevated R. Co., 183 Mass. 418, 67 N. E. 365. The ruling of the court upon the sixth interrogatory being proper, this assignment, grouping four different objections, must fail.

The thirty-sixth assignment charges that the court erred in sustaining plaintiff's objection to the defendant placing in evidence that part of the catalogue gotten out by Vaughan's Seed Store for 1905, containing the nonwarranty or disclaimer. The transcript of the record before us does not sustain this assignment. The catalogue offered in evidence was for the year 1906, and there was no proof or offer to prove that the catalogue for 1906 contained the nonwarranty or disclaimer similar to that contained in previous catalogues.

The thirty-seventh assignment raises a question similar to the one presented by the thirty-sixth assignment, and what we have said disposes of it.

The thirty-eighth assignment is predicated upon the court's overruling defendant's objection to the following question propounded to the plaintiff, Stringfellow, when testifying in rebuttal: "Was Mr. Dowell ever employed by you as your agent to purchase seed for you?" The ruling of the court was correct. The question called for testimony as to a fact, and not the conclusion of the witness. See *Edwards v. Law*, 46 Fla. 203, 38 South. 569; 3 Wigmore on Ev. § 1960; *Sax v. Davis*, 81 Iowa, 692, 47 N. W. 990; 5 Ency. Ev. 553; *Parker v. Bond*, 121 Ala. 529, 25 South. 898; *Spor v. Grau*, 89 App. Div. 365, 85 N. Y. Supp. 876. What we have said disposes of the thirty-ninth assignment.

The fortieth assignment of error is based upon the court's overruling defendant's objection to the following question propounded to the plaintiff: "State whether or not you properly planted, in the ordinary and usual manner of planting seed in Alachua county, the seed purchased from this defendant company in 1905, and about which this controversy has arisen." This assignment is wholly without merit and illustrates the character of so many of the objections made during the trial of this case. The defendant objected to this question on the ground that this witness was not competent to answer this question "because in his direct testimony he stated he didn't know whether they were planted or not." On page 43 of the transcript, we find this witness testified, on his direct examination, as follows: "I probably used more care and caution in the planting of these cucumbers than I did any others, because I made a specialty of cucumbers that

year. I planted and replanted, irrigated and fertilized them, and did everything that a reasonable man could do to make a first-class crop."

The further objection was made to this question because it called for the opinion of the witness and the facts should be given. In answering this question the witness stated in great detail the facts showing how the land was prepared, fertilized, and the seed planted, and concluded by saying this was the usual and customary manner of planting such seed. There was no error in this ruling. 5 Ency. of Ev. 553.

The forty-first assignment is based upon the court's overruling the defendant's objection to testimony as follows: "Because it is irrelevant and immaterial and impertinent." We have said so many times that this objection is so general that it will not be considered.

There is as little merit in the forty-second assignment, as in the preceding ones; but, if we merely copy each assignment, this opinion will run to great length. We could write at great length in an effort to show what little merit there is in many of the objections made by the defendant. Many of these assignments present questions that have been ruled on time and again by this court. It will be of no benefit to the members of the bar to burden the pages of our reports with a discussion of many of the questions found in this case. We will content ourselves with discussing the most important questions to be decided. We have given most patient examination to each and every assignment and find no reversible error herein.

The forty-third assignment is covered by what we have said about the fortieth assignment.

The forty-fourth, forty-fifth, forty-sixth, forty-seventh, forty-eighth, forty-ninth, fiftieth, and forty-first assignments are without merit. They relate to objections made by defendant to the admissibility of testimony, and much we have already said will apply here also.

The fifty-fifth assignment of error is based on the giving of the first and second instructions requested by the plaintiff. We find no error in the first instruction, and therefore this assignment fails.

The fifty-sixth assignment of error embraces the refusal of the court to give 14 instructions requested by the defendant. The court properly refused to give the first of these, which is the fifth, because it was inapplicable to the evidence in the case. So this assignment fails.

The fifty-seventh and fifty-eighth assignments of error are based upon the overruling of the motion for new trial and that the verdict is not supported by the evidence. We have carefully read and considered the evi-

dence and think the same is sufficient to support the verdict.

The judgment is affirmed.

TAYLOR and HOCKER, JJ., concur.

SHACKLEFORD, C. J., and COCKRELL and WHITFIELD, JJ., concur in the opinion.

(56 Fla. 369)

HAMMOND v. A. VETSBURG CO.

(Supreme Court of Florida, Division B. Dec. 19, 1908. Headnotes Filed Feb. 11, 1909.)

1. CORPORATIONS (§ 172*)—ACTION AGAINST STOCKHOLDER—RIGHT TO SET OFF STOCK.

Since, ordinarily, the holder of shares in a corporation cannot, at pleasure, withdraw his contribution to the capital of the corporation, he cannot set off stock which he may hold against a debt which he owes the corporation.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 172.*]

2. PLEADING (§ 352*)—MOTION TO STRIKE—DEMURRER.

There is clearly a difference between the remedies afforded by a motion to strike out a pleading and a demurrer thereto, and they should not be indiscriminately employed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1078; Dec. Dig. § 352.*]

3. PLEADING (§ 352*)—MOTION TO STRIKE—GROUNDS.

When a plea is not authorized by the rules of pleading, or is plainly frivolous and trifling, or when the subject-matter of the plea, although accurately and technically set out according to the soundest rules of pleading, is entirely destitute of merit and fails to answer the declaration, it may be stricken out on motion.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 352.*]

4. PLEADING (§ 355*)—MOTION TO STRIKE.

A merely defective plea, one that is only wanting in fullness or explicitness or otherwise subject to attack by demurrer, cannot be tested by a motion to strike from the files. The court will not decide the legal sufficiency of a plea on such a motion when a good defense is defectively stated.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1102; Dec. Dig. § 355.*]

5. DEPOSITIONS (§ 110*)—OBJECTIONS—SUFFICIENCY.

Where interrogatories were offered in evidence, an objection to each question of each witness and the answer thereto is nothing more than a general objection to each deposition, and, where each deposition contains some legal evidence, the objection is properly overruled.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. § 324; Dec. Dig. § 110.*]

6. APPEAL AND ERROR (§ 738*)—ASSIGNMENTS OF ERROR—RULINGS ON EVIDENCE.

Where several rulings on the admission of testimony are made the subject of one assignment, and one of the rulings is correct, the assignment will be overruled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3033; Dec. Dig. § 738.*]

7. REFERENCE (§ 98*)—NOTICE OF JUDGMENT—SUFFICIENCY.

Objections to the rulings of a referee found to be without merit.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 129; Dec. Dig. § 98.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

8. REFERENCE (§ 98*)—RULINGS OF REFEREE—NEW TRIAL—FILING OF JUDGMENT.

Procedure before a referee examined and commended.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 129; Dec. Dig. § 98.*]

(Syllabus by the Court.)

Error to Circuit Court, Alachua County; T. W. Fielding, Referee.

Action by the A. Vetsburg Company against F. J. Hammond. Judgment for plaintiff, and defendant brings error. Affirmed.

Evans Haile, for plaintiff in error. Carter & Layton, for defendant in error.

PARKHILL, J. The defendant in error sued the plaintiff in error in assumpsit for goods, wares, and merchandise sold and delivered. The cause was by agreement tried by Hon. Thos. W. Fielding, a practicing attorney, as referee, who found for the plaintiff, and the defendant sued out writ of error.

The defendant filed the following plea: "For a third and further plea, defendant says that the plaintiff at the commencement of this suit was, and still is, indebted to the defendant herein in an amount equal to the plaintiff's claim for 10 shares of capital stock in the A. Vetsburg Company, of the value of \$1,000, which amount defendant paid to the plaintiff for said stock, together with the sum of \$200 and \$26.40 interest on same due and payable to the defendant by the plaintiff, which plaintiff withholds from the defendant, and which is due and owing the defendant by the plaintiff, which the plaintiff refuses to pay, though often requested so to do, which amount the defendant is willing to set off against the plaintiff's claim, and for this he puts himself upon the country."

Upon motion, the court struck out the third plea, and this ruling is assigned as error.

Since, ordinarily, the holder of shares in a corporation cannot, at pleasure, withdraw his contribution to the capital of the corporation, he cannot set off stock which he may hold against a debt which he owes the corporation. 25 Am. & Eng. Enc. Law (2d Ed.) 513; Harper v. Calhoun, 7 How. (Miss.) 203; Whittington v. Farmers' Bank, 5 Har & J. (Md.) 489; Lewiston Co-operative Soc. No. 1 v. Tharpe, 91 Me. 64, 39 Atl. 283.

There is clearly a difference between the remedies afforded by a motion to strike out a pleading and a demurrer thereto, and they should not be indiscriminately employed. The summary disposition of pleas by motion is a delicate matter. A merely defective plea, one that is only wanting in fullness or explicitness or otherwise subject to attack by demurrer, cannot be tested by a motion to strike from the files. The court will not decide the legal sufficiency of a plea on such a motion when a good defense is defectively stated. 16 Enc. Pl. & Pr. 582; Craft v.

Smith, 45 Fla. 222, 33 South. 996; Hooker v. Forrester, 53 Fla. 392, 43 South. 241.

If a party files a plea not authorized by the rules of pleading, or one which is wholly unauthorized in the particular form of action, a motion to strike out is proper; and when the plea is plainly frivolous and trifling, or when the subject-matter of the plea, although accurately and technically set out according to the soundest rules of pleading, is entirely destitute of merit and fails to answer the declaration, it may be stricken out on motion. 16 Enc. Pl. & Pr. 583; Bacon v. Green, 36 Fla. 325, text 337, 18 South. 870; Solary v. Stultz, 22 Fla. 263; Spratt v. Price, 18 Fla. 289; Johnston v. Allen, 22 Fla. 224, 1 Am. St. Rep. 180; Strobhar v. State, 55 Fla. 167, 47 South. 4; Horne v. Carter, 20 Fla. 45; Boil v. Simms, 60 Ind. 162; Howlett v. Dilts, 4 Ind. App. 23, 30 N. E. 313; Jenkins v. Barrows, 73 Iowa, 438, 35 N. W. 510.

The third plea, as we have seen, attempts to set up an unauthorized defense. The plea, if true, is entirely destitute of merit, and is not responsive to the declaration, and will be treated as a nullity and stricken out on motion.

The same may be said of the equitable plea, the filing of which the court denied. And this disposes of the second assignment of error.

The third and fourth assignments may be considered together. Under these assignments it is contended the finding of the referee is not sustained by the evidence. We have carefully read the testimony of the witnesses for the plaintiff. The defendant offered no testimony. The evidence is sufficient to sustain and support the finding of the referee in favor of the plaintiff.

The fifth assignment of error is as follows: "The referee erred in overruling the objections of defendant to the depositions, questions, and answers of L. C. Coleman, J. M. Rich, and I. L. Michels."

When the interrogatories and answers of these witnesses were offered in evidence, the defendant objected to them as a whole upon the following grounds: "Defendant's counsel objects to each question to each witness, and the answer thereto, because the same are irrelevant, immaterial, inadmissible, and are not the best evidence, and no proper foundation is laid for the same, and they are not taken in accordance with the requirements of the laws of Florida."

The objection to each question of each witness and the answer thereto is nothing more than a general objection to each deposition, and where each deposition contains some legal evidence, as appears to be the case here, the objection is properly overruled. 6 Enc. Pl. & Pr. 588; Taylor v. Strickland, 37 Ala. 642; Milton v. Rowland, 11 Ala. 732; Melton v. Troutman, 15 Ala. 535. The objection that the interrogatories and the answers

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

thereto were not taken in accordance with the law goes to the admissibility of the whole deposition because of defects in taking it, and this objection should be made by a motion to suppress. 6 Ency. Pl. & Pr. 587; Davis v. Hare, 32 Ark. 386.

As one of the rulings complained of is correct, the assignment, joining different errors in regard to the admission or exclusion of evidence, must be overruled. Vaughan's Seed Store v. Stringfellow (decided here at this term) 48 South. 410.

The sixth and seventh assignments may be considered together.

By the sixth assignment complaint is made that the referee did not give defendant or his counsel notice of the hearing, or an opportunity to argue the case on the hearing.

By the seventh assignment exception is taken to the entry of final judgment against the defendant within and before the expiration of 10 days after the referee arrived at his decision and before the defendant had an opportunity to file his motion for a new trial.

The bill of exceptions shows the finding and judgment of the referee in words and figures as follows:

"This cause by order of the judge of the circuit court dated February 6, 1908, having been referred to me to hear, try, and determine in accordance with the laws in such cases made and provided, I have therefore, in pursuance of the said order, set the times for taking the testimony and of hearing all the matters and things in connection with said cause and gave notice thereof to the respective counsel for both plaintiff and defendant.

"The referee finds with the papers in the said cause a written agreement of counsel, limiting the time for taking and submitting the testimony therein, and the plaintiff submitted its testimony and the defendant offered no testimony; and being fully advised of all the matters and things submitted in the said cause, and after a careful consideration of the testimony submitted, the referee finds for the plaintiff in the sum of twelve hundred and four dollars and fifty-nine cents.

"It is therefore considered by the referee that the plaintiff, A. Vetsburg Company, a corporation, do have and recover of and from the defendant, F. J. Hammond, the sum of twelve hundred and four dollars and fifty-nine cents as its damages, as well as all the costs of this suit; said costs to be taxed by the clerk of the circuit court for Alachua county, Florida.

"Done this 25th day of June, A. D. 1908.

"T. W. Fielding, Referee.

"Received a copy of the above findings and judgment on this suit the 25th day of June, A. D. 1908.

"Carter & Layton,

"Attorneys for Plaintiff.

"Evans Haile,

"Attorney for Defendant.

"Indorsed in circuit court of Alachua county, Florida A. Vetsburg Co. v. F. J. Ham-

mond. Findings and Judgment of Referee. Filed in the office of the clerk of the circuit court of the county of Alachua, state of Florida on the 17th day of July, A. D. 1908, and recorded in Book of Judgments No. 12, on page 384, on the 17th day of July, A. D. 1908.

"S. H. Wienges, Clerk, By M. S. Cheves, D. C."

On the 3d day of July, A. D. 1908, the defendant made a motion for a new trial; the fourth and fifth grounds thereof making the same objections that are presented by the sixth and seventh assignments of error.

On the 13th day of July, 1908, the defendant moved the court to extend the time for hearing the motion for a new trial. This motion was granted, and time for the submission of the motion fixed for July 17, 1908. On the last-mentioned day the motion for new trial was denied.

The referee in this case seems to have followed the law with an intelligent appreciation of its directions. Upon arriving at a judgment, the referee is required to give notice in writing of the same to both parties. Section 1660, Gen. St. 1906. This requirement of the statute was complied with, because the bill of exceptions exhibits the receipt by counsel for both plaintiff and defendant of a copy of the judgment arrived at by the referee on the 25th of June, 1908. Notice of the judgment in writing was given to both parties promptly on the very day judgment was arrived at.

Section 1661 of the General Statutes of 1906 requires motions for new trial to be made within 10 days after receipt of notice of the judgment arrived at by the referee. The notice of judgment was given on 25th day of June, and a motion for new trial was made on the 3d day of July, 1908, eight days after the giving of the notice aforesaid.

Section 1661 of the General Statutes of 1906 permits the enlargement of the time for the hearing of the motion, as was done in this instance.

Section 1662 of the General Statutes of 1906 provides that if motion for a new trial, etc., shall have been made and denied, or whenever the judgment of the referee shall have been finally arrived at by him, he shall file in the court by which the reference was made his decision and judgment; and so we find that the judgment of the referee was not filed in the office of the clerk of the circuit court until the 17th day of July, 1908, after the motion for a new trial had been made and the day said motion was denied. See Reynolds v. Smith, 49 Fla. 217, 38 South. 903.

Now the sixth assignment is not sustained by the record. The bill of exceptions recites: "The said cause having been submitted to the referee, and the referee rendered a verdict and judgment for the plaintiff against the defendant, as follows." Then follows the judgment already copied, wherein the referee declares: "I have therefore, in pursuance

of the said order, set the times for taking the testimony and of hearing all the matters and things in connection with said cause and gave notice thereof to the respective counsel for both plaintiff and defendant." If this statement is not true, counsel who complain here should have presented evidence in support of their contention that they were not given notice of the hearing before the referee.

The seventh assignment likewise is without merit. The record before us shows that the referee filed or entered his final judgment in the office of the clerk of the circuit court for Alachua county on the 17th day of July, A. D. 1908, or 22 days after the referee had notified counsel for the defendant in writing of the judgment arrived at, and not before the defendant filed his motion for a new trial, but 14 days after the filing of the motion for new trial.

The judgment is affirmed.

TAYLOR and HOCKER, JJ., concur.

SHACKLEFORD, C. J., and COCKRELL and WHITFIELD, JJ., concur in the opinion.

(122 La. 986)

No. 16,981.

GILLY v. HIRSH.

(Supreme Court of Louisiana. Jan. 18, 1909.
Rehearing Denied Feb. 15, 1909.)

1. NUISANCE (§ 5*)—TORTS (§ 10*)—WHAT CONSTITUTE—INTERFERENCE WITH BUSINESS—DAMNUM ABSQUE INJURIA.

The auction business is not a nuisance per se, but it may be so conducted as to become a nuisance; and, where an auctioneer, engaged in selling goods similar to those dealt in by a merchant next door, keeps a number of employes standing about, who molest and interfere with customers, whether actual or prospective, who are looking into his neighbor's show window, and otherwise interferes with his neighbor's business, an injunction will issue to restrain him. If, however, the neighbor be damaged because the auctioneer undersells or oversells him, or sells inferior goods, it is damnum absque injuria. And when the complaint is that the auctioneer deals unfairly with his own customers, it is a matter between him and them, or between him and the state.

[Ed. Note.—For other cases, see Nuisance, Dec. Dig. § 5;* Torts, Dec. Dig. § 10.*]

2. AUCTIONS AND AUCTIONEERS (§ 4*)—INJUNCTION (§ 99*)—FORFEITURE OF LICENSE—GROUNDS—PROTECTION OF BUSINESS.

The license of an auctioneer may be forfeited, in a criminal prosecution, for certain unfair dealings in the conduct of his business, but no such penalty can be imposed in a civil suit, brought by a neighboring merchant, nor can the latter be permitted to put the auctioneer out of business by signs or publications reflecting upon the character of his business.

[Ed. Note.—For other cases, see Auctions and Auctioneers, Dec. Dig. § 4;* Injunction, Dec. Dig. § 99.*]

3. COSTS (§ 62*)—PERSONS LIABLE.

When plaintiff obtains judgment on his demand, and defendant obtains judgment on his demand in reconvention, each of the parties should pay the costs incurred in obtaining the judgment against him.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 273, 274; Dec. Dig. § 62.*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Fred. Durlevé King, Judge.

Action by Sidney J. Gilly against Abraham I. Hirsh. Judgment for plaintiff, and defendant appeals. Reversed in part, and affirmed in part.

Foster, Milling & Godchaux and Alexis Brian, for appellant. Henry L. Garland, Jr. (Paul Louis Fourchy, of counsel), for appellee.

Statement of the Case.

MONROE, J. Plaintiff represents that he is engaged in business at 507 Canal street, New Orleans, as an auctioneer, selling jewelry and other personal property. That defendant has the adjoining store, in which he also sells jewelry and other wares. That for the malicious purpose of injuring him defendant has hung in his show window, adjoining the entrance to plaintiff's store, a sign, in large letters, reading:

"Don't be Misled.

"This store and window display has no connection with the would-be auction, next door. Our entrance is at the corner."

That the sole object and effect of the sign is to excite the distrust of plaintiff's customers as to the honesty of his business, to his great prejudice, and that he has been damaged to the extent of \$1,500. That defendant has repeatedly reported him to the mayor and police as—

"a criminal, carrying on an unlawful business, and has maliciously sought to injure his character and his business, and by his said acts and slanderous charges and accusations has damaged petitioner in his character and reputation, in the sum of \$1,000. That unless * * * enjoined from the further display of said sign, and from harassing petitioner, boycotting and picketing petitioner's place of business, and from button-holing and soliciting the customers entering and leaving, * * * the said Hirsh will inflict upon petitioner, and upon his business, repeated and irreparable damages and injury, for which no adequate redress could be obtained."

Wherefore he prays for an injunction and for judgment, condemning defendant in damages in the sum of \$2,500.

In answer to a rule nisi, ordering him to show cause why a preliminary injunction should not issue, and by way of answer to the merits and of reconventional demand, defendant admits that he is exhibiting the sign, as alleged, but denies that he is doing so from any malicious motive. And he further denies that he has in any manner harassed plaintiff, or boycotted or picketed

his store, or buttonholed or solicited his customers. And he alleges that the sign is necessary for his own protection, for the reason that plaintiff sells at auction, next door to defendant's jewelry store, articles of jewelry and notions upon flagrant misrepresentations as to their origin and worth and at exorbitant prices, being assisted therein by half a dozen or more cappers, or dummy bidders, who are employed to inveigle passers-by into entering said auction shop and bidding on said articles; that defendant recently caused the arrest of one of said cappers as a dangerous and suspicious character, and he was convicted and fined; that said cappers, under the direction of said Gilly, resort to all manner of artifices, both by words and acts, to induce persons who stop at respondent's show window, and who, if unmolested, would become customers of respondent, to enter said auction shop; that the said cappers, among other artifices, represent to said passers-by that said show window of respondent and said auction shop of plaintiff are one and the same place, and that the same grade and character of articles are being sold at public auction, in plaintiff's said shop, as are being displayed in respondent's show window; that the said cappers often—

"* * * gather around a prospective customer of respondent and rush and crowd him into said auction shop, thus preventing said prospective customer from entering respondent's store, and consequently resulting in damage and injury to respondent, in actual loss of business and in damage to his personal and business reputation, for which respondent reserves the right to sue in a proper proceeding; * * * that the reputation of said auction shop is bad; that it was, and is, necessary for the protection of the reputation of respondent's establishment that he give, by means of some sign, due notice to the public that his store is in no manner connected with said auction shop."

He further, and for the purposes of his demand in reconvention, alleges:

"That he is engaged in the business of retailing jewelry, notions, etc.; * * * that by fair dealing * * * he had built up a remunerative trade, and was continually increasing his business, * * * until about 18 months ago * * * plaintiff established, * * * immediately adjoining respondent's show window, a small shop, * * * where said Gilly and his employes sell jewelry, notions, etc., at auction; * * * that the auctioneer * * * is continually crying out in a loud voice, clapping his hands and making other noisy demonstrations, in his endeavors to attract people from the street, to sell his wares, and to harass respondent, his employes, and customers; that said auction shop is the rendezvous of cappers, loafers, and other dangerous and suspicious characters, who often insult, abuse, and revile respondent and his employes; that the said noise, boisterous conduct, and vile language of said plaintiff, his employes and associates * * * are distinctly audible in respondent's store, and have caused respondent damage, to his health, feelings, and peace of mind, in the sum of \$300; * * * that the said Gilly sells in said auction shop, at public auction, articles * * * of a worthless character; * * * that said Gilly and his said employes take advantage of the proximity of respondent's store, * * * and of the attractive display of first-

class goods made by respondent in his show window, to create the impression, by representations to that effect, and otherwise, among respondent's customers, actual and prospective, and the public at large, that said auction shop is part and portion of respondent's store; * * * and that respondent has been damaged, in his personal and business reputation, by being classed and associated with said shop as aforesaid, in the sum of \$1,500; * * * that, by reason of the aforesaid noise, vile language, and disreputable dealings carried on, and of the dangerous and suspicious characters congregated in said auction shop, the same constitutes a public and private nuisance, which should be abated by injunction * * * restraining said Gilly, his agents, and employes from further operating said auction shop."

And he prays that plaintiff's demand be rejected, and that he and his agents and employes be enjoined from further operating said auction shop, from inducing, crowding, or rushing persons from in front of respondent's show window into said auction shop; from representing to persons who stop at respondent's show window, or to any persons, that respondent's store is a part and portion of said auction shop; and from in any manner interfering with the orderly conduct of respondent's business. He further prays for damages, and costs.

After a full hearing in the district court there was judgment as follows:

"Enjoining the said defendant from placing in his show window a sign or card reflecting on plaintiff or his business, and especially the card, 'Don't be Misled. This store and window has no connection with the would-be auction next door'—and enjoining the said defendant from obstructing, interfering with, accosting, and buttonholing plaintiff's customers at or near the door of plaintiff's place of business, for the purpose of preventing their entrance therein and there transacting business with plaintiff. It is further decreed that there be judgment in favor of plaintiff in reconvention, and against the said Sidney J. Gilly, enjoining and restraining the said Gilly, his agents, and employes * * * from inducing, rushing, or crowding persons from in front of the show window of the said * * * Hirsh into the auction store of the said Gilly, from representing to persons who stop at the show window of the said Hirsh, or to any other persons, that the store of said Hirsh is a part and portion of said Gilly's shop, and enjoining the said Gilly from in any manner interfering with the employes and customers of the said Hirsh, * * * dismissing the said Gilly's demand for a moneyed judgment, and also dismissing the said Hirsh's reconventional demand for a moneyed judgment; plaintiff to pay all costs incurred by him, and defendant, in a like manner, all the costs incurred by him, including the testimony of witnesses called in his behalf."

From the judgment so rendered, defendant has appealed, but plaintiff has not appealed, nor has he answered the appeal of defendant, or prayed for any amendment of the judgment.

Opinion.

Defendant's counsel insist:

(1) That plaintiff is entitled to no injunction.

(2) That he is not entitled to an injunction restraining defendant from interfering with his customers, picketing his place, etc.

(3) That defendant is entitled to an injunction as prayed for by him.

(4) That defendant is entitled to damages.

(5) That there is error in the judgment appealed from in the matter of the costs.

The evidence shows that plaintiff has a license as an auctioneer, and is engaged in that business next door to the premises occupied by defendant; that he and defendant both sell notions and jewelry; that the jewelry sold by plaintiff is generally inferior in quality and value to that sold by defendant; that plaintiff employs men, who stand about his place, outside and inside, some of whom have interfered with persons who were looking into defendant's show window, and have represented to them that it was part of plaintiff's auction establishment; that defendant himself has, on one occasion, or perhaps oftener, been rudely treated by them, or by plaintiff; and that, on several occasions plaintiff, or those acting for him, have grossly misrepresented to purchasers the quality and value of the goods in his store.

The evidence does not show that plaintiff makes more noise than is usual in that kind of business, or that the noise made by him is such as to constitute his place a nuisance, public or private; nor, on the other hand, does it show that defendant has been interfering with plaintiff's customers in the manner alleged in the petition.

There can be no doubt that plaintiff has the right to conduct an auction business, free from interference on the part of the defendant, so long as he does not conduct it in such a manner as unlawfully to interfere with the business conducted by defendant.

"The law will only permit the abatement of so much of a nuisance as is necessary to prevent the injury." Wood's Law of Nuisances, § 33. A lawful business, located in a proper place, and conducted in a proper manner, cannot be treated as a nuisance *per se*, although it may be so conducted, or the surrounding circumstances may be such, as to make it a nuisance. Law of Nuisance (Joyce) § 99.

So far as we can see, the point at which plaintiff's business, by reason of the manner in which it has been conducted, has amounted to an unlawful interference with that of defendant was when plaintiff or his employees molested defendant's customers, actual or prospective, whilst enjoying the privilege of looking into his show window, and undertook to "hustle" or coax them into plaintiff's place, representing that it, and the show window, were parts of the same establishment, and such interference has been enjoined. Whether plaintiff sells goods that are inferior or superior to those of defendant, or whether he deals fairly or unfairly with his own customers, are matters with which defendant has no such concern as would entitle him to shut up plaintiff's place by the writ of injunction.

"The carrying on of banking operations contrary to the statute has been held not to be such a mischief or public nuisance that a court of equity would grant an injunction to restrain the same, even though it had jurisdiction over public nuisances." Law of Nuisances (Joyce) § 85, citing *Atty. Genl. v. Utica Ins. Co.*, 2 Johns. Ch. (N. Y.) 371; *Atty. Genl. v. Bank of Niagara*, 1 Hopk. Ch. (N. Y.) 354.

Where a merchant undersells or oversells his neighbor, though the latter may suffer damages thereby, it is *damnum absque injuria*. And if he deals unfairly with his own customers, it is a matter between him and them, or between him and the state.

If an auctioneer should be convicted, in a criminal prosecution, of having sold jewelry not of the quality represented by him, and of having refused to return the price, on demand made within 20 hours, or of having offered an article for sale, setting forth its value, and through the aid of mock bidders induced its purchase by a real bidder, and of then having substituted another article in lieu of that offered and sold, his license would be forfeited, and he would be liable to a fine of \$500. Rev. St. §§ 155, 156. But we know of no authority for imposing any such penalty in a civil suit, and what defendant cannot do legally through the courts he cannot do illegally by means of publications or signs, such as that exhibited by him, though he, no doubt, has the right to maintain a sign in his window notifying the public that the window is his, and has no connection with the business carried on next door.

2. We find no evidence going to show that defendant has been obstructing, interfering with, accosting, and buttonholing plaintiff's customers.

3. For the reasons which have been stated, we are of opinion that the injunction, issued in favor of defendant, goes as far as it should.

4. The proof is insufficient to warrant a judgment for damages claimed by defendant.

5. The party cast should bear the costs, and the judgment appealed from must be amended in that respect.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended, by annulling and avoiding so much thereof as enjoins the defendant "from obstructing, interfering with, accosting, and buttonholing plaintiff's customers, at or near the door of plaintiff's place of business, for the purpose of preventing their entrance therein, and there transacting business with plaintiff," and by annulling and avoiding that portion of it which condemns each of the litigants to pay his own costs; and, it is further adjudged and decreed that said judgment be, in other respects, affirmed, the defendant to pay the costs incurred in the lower court upon the main demand, and the plaintiff to pay the costs so incurred upon the

demand in reconvention. It is further decreed that plaintiff pay the costs of the appeal.

(122 La. 974)

No. 17,328.

STATE ex rel. DREW v. MYATT, Clerk and Ex-Officio Recorder, et al.

(Supreme Court of Louisiana. Feb. 1, 1909.)

1. MANDAMUS (§ 4*)—REMEDY BY APPEAL.

Mandamus is not the remedy, as the complaining defendant (relator here) has a right of appeal.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 9-34; Dec. Dig. § 4.*]

2. MANDAMUS (§ 4*)—OTHER ADEQUATE REMEDY.

The judgment and the judicial mortgage collaterally attacked were not absolutely null and void; therefore could not be affected in proceedings by mandamus. Appeal or action of nullity are the remedies.

The asserted illegality preceded the signing of the judgment.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 9-34; Dec. Dig. § 4.*]

(Syllabus by the Court.)

Appeal from Sixth Judicial District Court, Parish of Ouachita; James Pemberton Madison, Judge.

Mandamus by the State, on relation of Emanuel C. Drew, against W. A. Myatt, Clerk and Ex Officio Recorder, and others. Judgment for defendants, and relator appeals. Affirmed.

Allan Sholars, for appellant. Stubbs, Russell & Theus, for appellees.

BREAUX, C. J. Relator and appellant complains of the judgment rendered against him. His application for a writ of mandamus was not granted.

His purpose was to compel the clerk of court and ex-officio recorder to cancel an asserted illegal and void judicial mortgage from the mortgage records of the recorder's office of the parish of Ouachita. And relator also asks that the judgment under which the judicial mortgage exists, rendered against him and in favor of the bank, be decreed null and void as against him.

The partnership of which R. B. Blanks, J. P. Parker, J. E. Reynolds, and E. C. Drew were the members was indebted in a large amount to the Bank of Monroe.

The bank held the indebtedness without expressed acknowledgment; to quote the words used in the agreement: It was an "overdraft indebtedness."

In May, 1907, Blanks, of the firm in question and president of the bank, made a note in the name of the partnership (dissolved partnership is relator's contention), and signed as treasurer the name of the partnership, although, as averred, he was not the treasurer.

At the maturity of the note the bank sued

the four partners in solido on the note, which represented the sum of \$28,941.44, plus interest and fee of attorney, and alleged that they were commercial partners, as the firm had been organized for the purpose of buying and selling timber.

The case was closely litigated. It resulted in a judgment for plaintiff.

Defaults were entered against all the defendants.

All exceptions having been overruled, answers were filed.

The minutes of the court before us show that the judgment was rendered in favor of plaintiff on June 20, 1908, and on June 22, 1908, on motion of plaintiff's counsel, a nonsuit was entered as to R. B. Blanks and J. P. Parker, and the entry following is:

"Judgment against defendant E. C. Drew and J. E. Reynolds read and signed."

Counsel for defendant Reynolds obtained, immediately after, an order of appeal returnable to this court on the 3d of August last.

This fact is not pertinent. Drew, the relator, did not appeal.

The judgment reserved to the plaintiff bank the right to sue the defendants Blanks and Parker, and as to them the case was dismissed as in case of nonsuit.

It is this judgment and the judicial mortgage which follows it that relator, Drew, is seeking to have canceled and erased.

The proceedings on the face of the papers are sufficiently regular to render it impossible for the relator to obtain a writ of mandamus for the purpose before stated. A judgment was pronounced which can only be annulled by action of nullity or by appeal.

The relator has adequate remedy by appeal, and is still in time to take a devolutive appeal.

The suit was dismissed as to Blanks and Parker contradictorily with all persons concerned.

The judgment, though rendered, had not been signed when plaintiff moved to dismiss as against two of the parties. The change complained of preceded the signing of the judgment.

In this one act of dismissal of the suit (before the judgment had been signed) and reservation of a right, as stated in the judgment, we have not found the fatal effect for which relator contends. It is utterly impossible and out of all question in mandamus proceedings to hold that the judgment is a nullity, and that its registry in the mortgage office must be canceled because of the alleged illegality.

A judgment is the highest evidence of a debt, and it cannot in this manner be treated as void and all of its effects destroyed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It is well settled that mandamus will not lie if there be remedy by appeal. Garland's Code of Practice, art. 830.

We will go a step further, and state that even if the time for an appeal had passed the relator would not have any right to a writ of mandamus. It would be interfering with proceedings to which legal effect must be given at least until set aside.

We readily concede that a mortgage may be canceled when asked for by mandamus proceedings and the debt since the rendition of the judgment has been paid, or when asked for on other sufficient ground of a date subsequent to the judgment. But mandamus will not be issued to pronounce a judgment null rendered by a court of competent jurisdiction among parties, all of whom have been cited, and particularly when on the face of the papers all has the appearance of being in due form.

It has been held that mandamus is not the remedy to cancel the title to property. *Willis v. Waspy*, 41 La. Ann. 694, 6 South. 730; *Raymond v. Villere*, 42 La. Ann. 488, 7 South. 900.

It follows as a legal sequitur if it be not the remedy in such a case it cannot be adequate remedy to set aside a judgment or cancel a mortgage thereunder to which force and effect is to be given under the terms of the judgment and to the extent provided by law.

We refer to title to real property only because whenever an attempt has been made to affect the title to property by mandamus, and the question of nullity came up, the court has held that it was an attempt to go beyond the functions of the writ.

For the same reason, whenever a question of nullity arises in a case as in the present mandamus is not the remedy.

In other words, in a trial of title the action is petitory; in a trial to annul a judgment or set aside a judicial mortgage on grounds anterior to the judgment the remedy is by appeal or by action of nullity.

Let it be borne in mind that this judgment is not null and void on its face.

We have found no error in the judgment refusing the mandamus.

For reasons assigned, the judgment is affirmed, with costs.

(122 La. 978)

No. 17,264.

KEY v. McCALL et al.

(Supreme Court of Louisiana. Feb. 1, 1909.)

APPEAL AND ERROR (§ 797*)—DISMISSAL OF APPEAL—MOTION—TIME.

The rule that a motion to dismiss an appeal comes too late if filed more than three days after the filing of the transcript, or if filed after appellee has caused the appeal to be set for trial, does not apply where appellant's acquiescence in the decree on which the motion to dis-

miss the appeal is based does not take place until long after the expiration of the three days, and after the assignment of the cause for trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3140-3154; Dec. Dig. § 797.*]

Appeal from Fourth Judicial District Court, Parish of Union; Robert Brooks Dawkins, Judge.

Action between W. L. Key and R. F. McCall and others. From a judgment for the former, the latter appeals. On motion to dismiss. Granted.

Crow & Crow, for appellants. Frederick Fauntleroy Preaus and Clifton Mathews, for appellee.

On Motion to Dismiss.

PROVOSTY, J. The judgment appealed from decrees a partition, and orders a sale to be made to effect the partition, and orders \$350 to be paid to defendant out of the proceeds of the sale. Plaintiff and appellee has moved to dismiss the appeal on the ground that defendant has acquiesced in the judgment. Attached to the motion are duly certified documents showing that the judgment has been executed, the sale made, and the \$350 paid to defendant and appellant. The latter cannot, and does not, gainsay his acquiescence in the judgment; but contends that the motion to dismiss comes too late, it having been filed after the case had been fixed for trial, and more than three days after the filing of the transcript in this court. The transcript was lodged in this court on August 12, 1908; and the case was then assigned for January 23, 1909. The motion to dismiss was filed January 12, 1909.

Ordinarily a motion to dismiss comes too late if filed more than three days after the filing of the transcript, or if filed after the appellee himself has caused the appeal to be fixed for trial. *Saxon v. Southwestern Brick Company*, 113 La. 637, 37 South. 540. But, necessarily, this can be the case only where the grounds of dismissal existed within the three days or at the time of the assignment for trial. In the present instance they did not. The acquiescence upon which the motion to dismiss is based did not take place until October 12, 1908, long after the expiration of the three days and after the assignment for trial.

Appeal dismissed.

(122 La. 979)

No. 17,397.

STATE v. GREGG.

(Supreme Court of Louisiana. Feb. 1, 1909.)

CRIMINAL LAW (§ 1167*)—APPEAL—HARMLESS ERROR—AMENDMENT OF INDICTMENT.

Defendant, having been indicted for breaking and entering a store in the nighttime, with intent to steal, and for the larceny, on the same occasion, and from the same store, of a number

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of articles, described in 22 items, was found guilty as charged.

Held, that an amendment to the indictment, whereby one of the items, reading "6 pairs of house, each paid valued at 8 cents," was made to read "6 pairs of hose, each pair valued at 8 cents," becomes immaterial to the merits of the case, in the sense that defendant has sustained no substantial prejudice thereby, in view of the fact that it added nothing to the gravity of the offenses with which he was otherwise charged, that he has been convicted of the burglary and of the larceny of the other articles described in the indictment, and that his conviction upon the amended item, in the charge of larceny, carries with it no other or greater penalty than that for which he is otherwise liable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3104; Dec. Dig. § 1167.*]

(Syllabus by the Court.)

Appeal from First Judicial District Court, Parish of Caddo; Thomas Fletcher Bell, Judge.

Frank Gregg was convicted of burglary and larceny, and he appeals. Affirmed.

Hugh Conniff Fisher, for appellant. Walter Gulon, Atty. Gen., and James Martin Foster, Dist. Atty. (Ruffin Golsen Pleasant, of counsel), for the State.

Statement of the Case.

MONROE, J. Defendant was indicted for breaking and entering a store in the nighttime with intent to steal, and with the larceny, upon the same occasion, and from the same store, of quite a number of articles (embraced in 22 items), varying in value from "3 yards of calico, each of the value of 4 cents," to "one pistol of the value of \$12.50." He demurred, and for cause of demurrer alleged "that said indictment charges your defendant with stealing property not subject to larceny; that said indictment is unintelligible, especially in the description and valuation of property alleged to have been stolen."

The demurrer was founded upon the fact that among the articles charged to have been stolen were "6 pairs of house, each paid of the value of 8 cents." The court held that this was merely a clerical error, and permitted the state to amend the indictment so as to make the item in question read "6 pairs of hose, each pair of the value of 8 cents," whereupon defendant, through his counsel, reserved his bill of exception. And thereafter defendant was found "guilty as charged," and sentenced to imprisonment at hard labor for nine years for burglary, and to like imprisonment for one year for larceny.

Opinion.

An indictment may be amended on, or before, trial whenever "there shall appear to be any variance between the statement in the indictment and the evidence offered in proof thereof . . . in the name or description of any matter or thing, whatsoever, therein named or described," provided, the

court, "shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defense." Rev. St. § 1047. This law, construed in connection with Rev. St. § 1064, has been held to authorize the amendment of defects in indictments, in matters of description, or that are merely formal and not substantial.

Thus an indictment charging the stealing of "one bale of cotton, {n the lint," was allowed to be amended so as to make it read "one bale of cotton in the seed," and in an indictment for shooting "gun" was allowed to be substituted for "pistol." Marr's Crim. Juris. p. 427. In the instant case it may be conceded that, if the grand jury had only charged defendant with the larceny of "6 pairs of house, each paid of the value of 8 cents," or, in other words, had made no intelligible charge of larceny at all, it would not have been competent for the district attorney, in the name of the grand jury, to have charged him with the larceny of 6 pairs of hose upon the theory that an error, clerical or otherwise, had been committed in describing the property, though perhaps greater latitude would be allowed if defendant had been prosecuted by information, since a bill of information originates with the district attorney, and he may be supposed to know what was intended by it. Whilst, however, if the charge of larceny depended solely upon the allegation that defendant stole "6 pairs of house," etc., the substitution of the allegation that he stole "6 pairs of hose," etc., would be, in effect, to make a charge where the grand jury had made none, and hence would be to make a substantial change in the indictment. We have here a case where the property said to have been stolen consisted of many articles, catalogued in the indictment under 22 different items, of which the "6 pairs of house," etc., constituted but one, and it may reasonably be said that, as the description relates to a multitude or a mass of things, the erroneous inclusion of a single article, which has no significance, so far as the result to be attained is concerned, is an error of description.

But whether that view be correct or not, the defendant, being charged in one count with burglary, and in another with the larceny of the articles included in the 21 items, other than that which was amended, was found guilty as charged; and, as the amended allegation added nothing to the gravity of the offenses with which he was otherwise charged, and involved no other penalty than that to which he was otherwise liable, the amendment becomes immaterial, in the sense that he has sustained no substantial prejudice thereby.

"As a general proposition [say the authorities] appellant, or plaintiff in error, to obtain

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

a reversal, must show, not only that error occurred, but that he was substantially prejudiced thereby." 12 Cyc. p. 910, and note. *State v. Brown*, 16 La. Ann. 384; *State v. Mansfield*, 52 La. Ann. 1355, 27 South. 887; *State v. Williams*, 111 La. 210, 35 South. 521.

We fail to find that the appellant has sustained any substantial prejudice by reason of the error of which he complains, and the verdict and sentence from which he appeals are accordingly affirmed.

(122 La. 983)

No. 16,792.

JEFFERSON SAWMILL CO., Limited, v.
IOWA & LOUISIANA LAND
CO., Limited.

(Supreme Court of Louisiana. Feb. 1, 1909.)

1. CORPORATIONS (§ 410*)—OFFICERS—ACTS
BINDING CORPORATION.

The president of a nonresident corporation owning timber lands in this state sold with warranty certain deadened and cut trees found on lands purchased by him for the corporation. *Held*, that the sale was an act of administration, binding on the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1630; Dec. Dig. § 410.*]

2. SALES (§ 405*)—BREACH BY SELLER—DEFENSES.

Where the trees so sold could not be delivered because of adverse claims of possession and ownership, and the purchaser sued the corporation for damages for nonperformance of its contract, *held*, that the vendor cannot escape liability on the plea that the sale was null under article 2452, Rev. Civ. Code, "as the sale of a thing belonging to another person"; such nullity being relative, and in the sole interest of the bona fide purchaser, who under the very terms of the article may sue for damages.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1149; Dec. Dig. § 405.*]

3. DAMAGES (§ 40*)—BREACH OF CONTRACT—LOSS OF PROFITS.

Loss of profits may be recovered as damages for a breach of contract, if reasonably within the contemplation of the parties at the time, and if established with legal certainty.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 74-76; Dec. Dig. § 40.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1812-1820; vol. 8, pp. 7625, 7626.]

Provosty, J., dissenting.

(Syllabus by the Court.)

Appeal from Tenth Judicial District Court, Parish of Concordia; Hugh Tullis, Judge ad hoc.

Action by the Jefferson Sawmill Company, Limited, against the Iowa & Louisiana Land Company, Limited. Judgment for plaintiff, and defendant appeals. On rehearing. Original opinion withdrawn. Affirmed.

Dagg & Dale, for appellant. Hall & Monroe and Samuel Lucius Elam, for appellee.

On Rehearing.

LAND, J. Plaintiff sued the defendant for \$63,000, damages alleged to have resulted from the failure of the defendant to de-

liver a large number of cut and deadened cypress trees pursuant to a contract of sale made in March, 1902.

The defendant answered, denying that it ever made or authorized or ratified the alleged contract of sale, and, in the alternative, pleaded that, if its president had authority to bind the corporation by such contract, owing to the fact that there was doubt as to the title of the defendant to the timber or the fact that the defendant desired to make a sale notwithstanding the possible defect in the title, the title was guaranteed on condition that the defendant should take the logs and timber; that delivery was made by pointing out the land on which the logs lay, and also the logs, but that plaintiff, finding that the Burton Lumber Company still asserted its claim to the logs and timber, refused and failed to take the logs and timber, or to try to do so; and that this refusal was an active violation of the contract sued on. Defendant, further answering, averred that its representative was in good faith at the time of making such contract, believing that the defendant owned and possessed said timber, but that it subsequently developed that the defendant did not own or possess any of the felled timber on the land described in the petition; that the plaintiff was not in good faith, as it had been informed by the Burton Lumber Company that "they" intended to hold said timber at all hazards, and that said company had been advised by a prominent attorney that its title was good; and that this "defect" was not known to the defendant or its representatives at the time the option was offered or accepted.

Defendant for further answer averred that there were less than 2,000 trees on the land described in the petition, including those deadened and also those felled, and that such trees would average less than 800 feet per tree; that the damages sued for were remote, speculative, and not contemplated by the parties; that the plaintiff has never paid or tendered the agreed price for said trees, and that said trees were of less value than said price; that said logs had been cut for several years, were entangled in vines and small growth of timber, and that the cost and expenses of getting said timber to market would have left no profit to the plaintiff.

The defendant for further answer alleged that it acquired title to the lands described in the petition on March 20, 1901, but that all of the trees felled and claimed by the plaintiff herein were felled before the acquisition of said land by the defendant.

The defendant further averred that, subsequent to the time of the contract sued on, the Burton Lumber Company went upon the lands described in the petition, and commenced the removal of said timber; that the plaintiff insisted upon A. T. Averill, president

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of defendant company, getting out an injunction in order to preserve the timber for the plaintiffs herein; that said Averill, without any authority, instituted an injunction suit, claiming for defendant title to said trees or logs, and that final judgment was rendered in said suit decreeing that defendant had no title to said property.

The case was tried, and there was judgment in favor of the plaintiff for damages in the sum of \$5,000. The defendant has appealed, and the plaintiff has answered, praying for an amendment of the judgment by increasing the amount of damages.

In December, 1897, the Mississippi Delta Lands Company, one of the authors of the defendant, through its secretary, W. H. Shields, sold to Mike Walker the right to take all the merchantable cypress timber in township 6, range 8 East, of Concordia parish. Walker represented the Burton Lumber Company. A large number of trees were deadened in 1897-98, and about 2,000 of them cut in 1898-99. In April, 1900, the Mississippi Delta Lands Company conveyed its lands in said township and other townships to Richard L. Crucey, who in March, 1901, conveyed the same land to the Iowa & Louisiana Land Company, defendant herein.

On March 13, 1902, A. T. Averill, the president of defendant company, addressed the following communication to the plaintiff company, to wit:

"We own about 4,000 cut cypress trees in the parish of Concordia, being in townships 5-8, 6-8, 7-7, all of which we are willing to sell to you at \$1.50 per thousand feet, measurement to be made at the mouth of the bayou; the logs to be sold on the ground where they now lie, and to be delivered within a reasonable time. There may be some question as to the title of these logs, and hence we guarantee the title in the event you take them. We further agree to protect and defend any suits or litigation growing out of your removal and use of said logs at our own cost. Price to be paid cash. You may consider this as an option for ten days, and act on it accordingly."

This document was written in the presence of the presidents of both companies, and it was understood that Mr. Harrison, the president of the Jefferson Sawmill Company, would proceed at once to examine the timber.

Mr. Harrison, after making a partial examination, wired an acceptance of the option on March 16, 1902. It seems to have been known to both parties that Walker or the Burton Lumber Company was claiming the timber. Mr. Averill testified that at the time the option was given Mr. Harrison told him that some officer or agent of the Burton Lumber Company had told him that the logs belonged to the Burton Lumber Company. Mr. Harrison testified that he had heard such rumors, but knew nothing except from hearsay. It is evident from the very terms of the option that it was understood that the title of the defendant company might be disputed, and that the special guaranty of the title and the stipulation to defend

all suits that might arise were inserted in order to protect the prospective purchaser.

It appears that Mr. Howard Cole, president of the Mississippi Realty Company, who had participated in the negotiations which led to the sale of the logs, was empowered by the president of defendant company to represent him in the details of the execution of the contract. The acceptance of the option was wired to Mr. Cole, and many letters passed between him and Mr. Harrison relative to the execution of the agreement. On March 17, 1902, Mr. Harrison wrote that he had learned that the Burton Lumber Company was the real claimant of the timber, and intended to hold it if possible. This letter concluded:

"You know all the circumstances, and whether or not you own the timber. I, of course, do not."

Mr. Cole replied:

"I am satisfied that we have the Burton Lumber Company pretty well scared. In fact, we know exactly our position in this matter, and intend to protect ourselves."

On March 29, 1902, Mr. Harrison wrote to Mr. Cole as follows:

"There is no doubt that the Burton Lumber Company will begin to move these logs if something is not done; and, if they once get them out of the river, I am afraid we will lose them."

On April 20, 1902, Mr. Harrison wrote that he was making arrangements to have all of the timber hauled to Cocodrie bayou. On April 30, 1902, Mr. Harrison wrote Mr. Cole that he had learned that the logs were floated about the mouth of Bayou Cocodrie, and inquired whether the Burton Lumber Company had taken the logs out of the parish. This letter concludes as follows:

"What progress had been made with the lawsuit? An arrangement satisfactory to our board of directors must be made in a short time. If they cannot be assured they will get the logs they actually bought, they will insist upon settlement for the profit value."

After other correspondence, a suit was filed in the name of the defendant company against the Burton Lumber Company and Mike Walker, enjoining them from trespassing on the lands of the petitioner in townships 5-8, 6-8, and 5-9, and from removing timber therefrom. The defendants in said suit moved to dissolve the injunction on bond as to the timber already cut and severed from the soil. This motion was granted on the defendants furnishing bond and security in the sum of \$11,000, conditioned for the delivery of the property and the payment of damages. This bond was furnished, and the cut timber was left at the disposal of the Burton Lumber Company. The Iowa & Louisiana Land Company, after moving in vain for a suspensive appeal from the dissolving order, applied to the Supreme Court of the state for writs of mandamus. This application, however, was abandoned, and an attempt was made to get possession of the

logs through the Mississippi Delta Lands Company represented by Howard Cole, president, who had been acting as agent for the Iowa & Louisiana Land Company. In November, 1902, the Mississippi Delta Lands Company sued the Burton Lumber Company for 4,000 cypress trees cut on the lands in townships 5-8, 6-8, and 6-9 while they belonged to the former company, and caused a writ of sequestration to issue. Under the writ, 1,517 logs were seized. The Burton Lumber Company bonded out 1,400 of these logs which it admitted had been cut on the lands described in the plaintiff's petition. The case was tried, and in May, 1903, judgment was rendered in favor of the plaintiff for 2,200 trees or their value, fixed at \$2,200. The court held that, as the Burton Lumber Company had purchased the timber in good faith, it was liable for only the stumpage value of the trees.

The injunction suit was also decided in May, 1903, and resulted in a judgment restraining the defendants from further trespassing on the lands described in the petition. This judgment was in legal effect against the plaintiff in injunction quoad the timber, which had been cut and severed from the soil. In both suits the Burton Lumber Company claimed that it had deadened and cut only 2,200 trees on the lands in question.

It thus appears that in March, 1902, at the time the option was given and accepted, the Iowa & Louisiana Land Company did not own the cut trees which were conveyed by that instrument, and that the 2,200 trees, more or less, which had been cut on the lands described in the option, were in possession of the Burton Lumber Company under color of title. The Iowa & Louisiana Land Company had notice of this adverse claim, but nevertheless sold the trees with a special guaranty of title, and undertaking to protect the purchaser and to defend all suits that might arise over the subject-matter of the contract.

The Iowa & Louisiana Land Company was a nonresident corporation, and through its president purchased some 145,000 acres of timber land in the parish of Concordia. The sale of cut trees and logs found on the lands of the company, and presumably belonging to it was an act of administration within the general powers of its chief executive officer. The ignorance of the board of directors as to all the acts of its president in the state of Louisiana relating to the sale of the logs and as to all the litigation growing out of such sale demonstrates that the board confided all such matters to the discretion of the president.

The contention that the plaintiff violated the contract by refusing to take possession of the logs is without merit, as they were in the adverse possession of the Burton Lumber Company holding under color of title. The defendant company resorted to an injunction suit to prevent the removal of the

timber by the Burton Lumber Company, and failed.

The further contention that the sale was conditioned on the vendee taking possession of the logs is without force, as the contract recites that the same were to be delivered by the vendor in a reasonable time.

Defendant does not in his pleadings seek to rescind the contract for any error of fact as to its ownership of the cut trees, but in argument contends that the sale, being of the property of another, was therefore null and productive of no legal obligations between the parties.

The Revised Civil Code reads:

"The sale of a thing belonging to another person is null; it may give rise to damages, when the buyer knew not that the thing belonged to another person." Article 2452.

The terms of this law do not limit the liability for damages to the vendor in bad faith.

This article corresponds with article 1599 of the Code Napoléon, which has given rise to much discussion among the French jurists. Baudry-Lacantinerie argues that the sale of a thing belonging to another is not absolutely null, because such a contract produces certain legal effects, such as giving rise to damages in favor of the purchaser, to the obligation of warranty on the part of the vendor, and furnishing the purchaser with a just title for the purposes of prescription or of acquiring the fruits of the thing. In support of this proposition, that author cites Cass. 4 Mars 1891, D. 91, 1, 313; Troplong, 1, note 238; Laurent XXIV, N. 115, 116; Gullboudard, 1, N. 182; Huc, X, n. 64, 65, 66; and concludes as follows:

"La nullité est relative; elle ne peut être proposée que par l'acheteur, dans l'intérêt duquel elle a été édictée." Id. De La Vente, pp. 94, 95. "The nullity is relative. It can be invoked only by the purchaser, in whose interest it has been imposed."

This author reasons that the error of the vendor who believes himself owner is less excusable than the error of the purchaser who considers him as such, and that the vendor, having obliged himself to transfer the ownership of the property, should exert his best efforts to execute this obligation, and should be condemned in damages if he should fail to do so. Id. pp. 95, 96.

Laurent says:

"Dans notre opinion, la nullité est relative; elle est établie dans l'intérêt de l'acheteur et contre le vendeur qui vend une chose dont il lui est impossible de transférer la propriété à l'acheteur." Id. Tome 24, No. 115.

We translate as follows:

"In our opinion, the nullity is relative. It is established in the interest of the purchaser and against the vendor who sells a thing, the ownership of which it is impossible for him to transfer to the purchaser."

The same commentator says that Marcade was of the opinion that the sale of a thing of another is radically null and in-existent,

and that this opinion had been followed by some writers, but that the contrary opinion was more generally adopted and was consecrated by jurisprudence. *Id.* No. 103.

Mourlon discusses article 1599 of the Code Napoléon in his usual clear and forcible style. He says that the sale of the thing of another is null, because, the purchaser not having received the equivalent of the price, his obligation is without a cause or consideration; that in such a case the purchaser in good faith has an action in warranty even against the vendor in good faith to recover damages; and that such a sale produces several legal effects, to wit: (1) It obliges the vendor to deliver. (2) It obliges him to warrant the purchaser in good faith against eviction. (3) It serves the purchaser as a just title for acquiring the fruits and for the prescription of 10 years. Mourlon, *Examen. Du Code Napoléon.* T. 3, Nos. 515-521.

Our jurisprudence on the subject is rather meager. In *Palfrey v. Stinson*, 11 La. 77, the court held that a vendor, having assumed to sell as sole proprietor, could not afterwards say that he was only part owner. In *Lafon v. De Armas*, 12 Rob. 628, the court incidentally discussed article 20, p. 348, Civ. Code 1808, declaring that "the sale of a thing belonging to another is null," and said:

"It is null in a certain sense—that is, so as not to operate a transfer of the property against the real owner—but it is not null in a certain other sense as respects the parties, since it may give rise to damages. If it was absolutely null, it would produce no effect—*quod nullum est, non producit effectum.*"

The court then proceeds to point out that a subsequent article of the same Code makes such a sale a just title for the purposes of prescription, and concludes:

"Thus a certain effect is given to such a sale. It may be the basis of a just title, sufficient to prescribe under; and, if it was absolutely null, it would have no such effect."

In this case Judge Simon, as the organ of the court, advanced reasons which were subsequently assigned by the French commentators already cited, and which seem to have been approved by the French courts.

On the part of the defendant two cases have been cited in neither of which was article 2452 (2427) of the Revised Civil Code mentioned.

In *Williams v. Hunter*, 13 La. Ann. 476, Mrs. Hunter, widow in community, obligated herself in case she refused to make Williams good and warranted titles to a certain described tract of land to pay him \$2,000 as a forfeit or penalty. It developed that Mrs. Hunter could not make a good title because she owned only a half interest in the land; the other half belonging to her minor children. Williams thereupon sued for the penalty. The court refused to enforce the penalty, because it was legally impossible for Mrs. Hunter to comply with the agreement, citing *Rev. Civ. Code*, 2116. Among other

reasons assigned were that Mrs. Hunter acted in good faith, and was induced to promise to sell by an error of fact and of law.

In *Wilberding v. Maher*, 35 La. Ann. 1182, the court refused to enforce a specific performance of an agreement by a widow to sell certain real estate affected by a general mortgage of which she was ignorant, and which it was legally impossible for her to have canceled. It appeared that the property had been acquired by Mrs. Maher in her own name during the marriage, and that she believed it to be her separate property. The court held that there was error of law, and that the defendant was entitled to relief under *Rev. Civ. Code*, art. 1819.

We do not think that either of these cases can be considered as precedents as to the construction of article 2452 of the Revised Civil Code, which was not even mentioned in the opinions of the court. Our conclusion is that the defendant company is liable in damages to the plaintiff company for its failure to perform its obligations as vendor in the contract of sale, and that the word "damages," as used in article 2452, has the same meaning as in other articles of the Revised Civil Code, and therefore includes loss of profits not speculative or uncertain in their nature.

The things sold were described as about 4,000 "cut cypress trees," but it is admitted that this term was intended to include both deadened and cut cypress. On May 5, 1902, the plaintiff wrote to defendant's agent as follows:

"It was also my understanding that we were to have the deadened and cut cypress on your lands in Concordia parish, but, as the option does not read quite as broad, I wanted it understood. This is now satisfactory."

The deadened cypress on the lands at the date of the sale belonged to the defendant company, and, as to such trees, it cannot be contended that the company was in default as to delivery. Plaintiff's own surveyors testified that 1,825 trees had been cut on the lands, and that they found on the ground about 600 cut logs. The same surveyors also found 2,500 deadened cypress trees. The result represents 4,325 trees deadened and cut, and the contract called for about 4,000.

There can be no doubt that the parties had in view the cypress which had been cut for the Burton Lumber Company. The only trees which the defendant failed to deliver were those removed by the Burton Lumber Company. The report of plaintiff's surveyors leaves the number of trees in doubt, and anywhere between 1,225 and 1,825. In the sequestration suit of the Mississippi Delta Lands Company already mentioned 1,400 cypress trees were seized and identified as having been cut and removed by the Burton Lumber Company from the lands of the defendant. It is, however, shown by the testimony of Mr. Connell, president and mana-

ger of the Burton Lumber Company, that during the year 1903 his company received and sawed 1,921 trees taken from the lands of the defendant. Mr. Connell testified that the trees averaged 800 feet each. Mr. Harrison, the president of plaintiff company, who saw a large number of the same logs while floating in the bayou, estimated that they averaged 750 feet each. According to Mr. Connell the 1,921 trees measured 1,537,000 feet. The surveyor's guess estimates of from 1,500 to 2,200 feet per tree are entitled to but little consideration in the face of the estimates of two practical sawmill men who saw the trees. Assuming that the trees removed by the Burton Lumber Company represented 1,537,000 feet of lumber, the next question is as to the loss of profits, if any. Plaintiff's evidence shows a loss of \$450 per 1,000 feet. Defendant's evidence shows that there was no profit in the transaction. The trial judge held that the evidence showed a loss of at least \$5,000, for which he gave judgment.

The evidence is conflicting, and the finding of the trial judge is not manifestly erroneous. We cannot say that a greater loss has been established with certainty.

Judgment affirmed.

PROVOSTY, J., dissents.

(122 La. 995)

No. 17,090.

THOMASON v. KANSAS CITY SOUTHERN RY. CO. et al.

(Supreme Court of Louisiana. Jan. 18, 1909. Rehearing Denied Feb. 15, 1909.)

1. RAILROADS (§ 469*)—FIRE SET BY LOCOMOTIVES—LIABILITY.

A railroad company, on certain terms and conditions, constructed a spur track on its own property, but adjoining a planing mill belonging to the plaintiff. In that contract, the plaintiff agreed to release the company from any and all liability for property destroyed by fire communicated by locomotives operating on said track or otherwise while engaged in work connected with the use of said track, under that agreement. The railroad company was not, under that clause of the agreement, relieved from liability for property destroyed by fire occasioned by sparks emitted from one of its locomotives while on the main track not engaged in work connected with the use of the spur track.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 469.*]

2. RAILROADS (§ 480*)—FIRE SET BY LOCOMOTIVE—BURDEN OF PROOF.

It being shown that the fire by which plaintiff's property was destroyed was caused by sparks emitted from one of the defendant's locomotives then on the main line, the defendant carried the burden of proof to show that the locomotive was then engaged in work connected with the use of the spur track.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 480.*]

3. RAILROADS (§ 480*)—FIRES SET BY LOCOMOTIVE—EVIDENCE.

Where a building, near a railroad track is destroyed by a fire occurring a few minutes after

a locomotive emitting sparks has passed opposite to it, and sufficiently near for the sparks to have communicated the fire, these two facts furnish the legitimate basis for presumption that the fire was occasioned by the sparks, in the absence of any other assignable cause.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1713; Dec. Dig. § 480.*]

4. APPEAL AND ERROR (§ 1010*)—REVIEW—QUESTIONS OF FACT.

If there be testimony in the record which if believed would justify the conclusions of the trial judge touching a certain fact, conclusions in respect to that fact will be adopted, unless manifestly erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3979; Dec. Dig. § 1010.*]

(Syllabus by the Court.)

Appeal from First Judicial District Court, Parish of Caddo; Thomas Fletcher Bell, Judge.

Action by W. J. Thomason against the Kansas City Southern Railway Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Alexander & Wilkinson, for appellants. Edgar Williamson Sutherland and Thomas Charles Barret, for appellee.

Statement of the Case.

NICHOLLS, J. Plaintiff seeks in this suit to obtain a judgment in solido against the Kansas City Southern Railway Company, and the Kansas City, Shreveport & Gulf Railway Company for \$6,633, with legal interest from judicial demand.

The demand is one sounding in damages for the alleged destruction of plaintiff's planing mill and machinery appliances, and lumber and building materials therein, and stacked on the planing mill yards situated at or near Vivian station in Caddo parish, on the line of railroad, on September 14, 1906.

The petition averred that the line of railway through the parish of Caddo was built and equipped, and is owned by, the codefendant, Kansas City, Shreveport & Gulf Railroad Company, and that it was controlled, managed, and operated by the other defendant, under some sort of contract and agreement or arrangement between them which was in the possession of said two railway companies, and that plaintiff was therefore unable to state the exact substance, purport, and contents of the agreement between said two railway companies, under which the one company was managing, controlling, and operating the line of railroad owned by the other company.

The legal question involving the solidary liability of the two companies for the amount sued for was eliminated from any further discussion or investigation in the consideration of the case. For it was admitted at the inception of the trial that if

either company was liable, the other was also liable, as follows:

"It is admitted by the defendants in this case that the line of railway referred to in plaintiff's petition is owned by the Kansas City, Shreveport & Gulf Railway, and was operated during the year 1906 by the defendant the Kansas City Southern Railway Company, and that if either of said companies, defendants, is liable for the damages claimed in plaintiff's petition, the other company is also liable in solido therefor."

Plaintiff alleges in his petition, in substance, as follows:

That during the year 1906 he owned and operated a sawmill plant, buildings, machinery, fixtures, and appliances for the sawing and manufacture of lumber and planing, dressing, matching, and finishing the same, all of which were situated on or near the tracks or side tracks of said line of railway, and which was above and north of, and a short distance from, Vivian depot or station; and

That on September 14, A. D. 1906, in the forenoon of the said day, the Kansas City Southern Railway Company, through the torts, faults, carelessness, and negligence of its officers, agents, servants, and employes in charge of, managing, controlling, and operating the locomotive and engine attached to and propelling a train of freight cars on said line of railway, and passing and moving by or near to his said sawmill and planing mill, set fire to said sawmill and planing mill, and the same, with the buildings, fixtures, and tools, appliances, and improvements pertaining thereto, together with a considerable amount of manufactured lumber and other personal property and materials, located and stacked there on the mill yards awaiting shipment, were set on fire and that all of said property was thereby totally destroyed and consumed by fire, and the same was a total and complete loss to plaintiff, and

That the destruction of said property by fire, as aforesaid, was not due to any fault or negligence on his part, but that the fire originated and was created and set out and communicated to said property, whereby it was totally consumed and destroyed, as aforesaid, through the torts, faults, and carelessness and gross negligence of the officers, agents, servants, and employes of said Kansas City Southern Railway Company; and

That said freight train, controlled and operated by the servants and employes of said Kansas City Southern Railway Company, was drawn and propelled by said locomotive and engine, using steam as the motive power, the steam being generated and produced by fire, which was kept and maintained burning in said moving engine or locomotive which was moving, drawing, and propelling said train of freight cars; and

The plaintiff's sawmill and planing mill were situated and located adjacent to, or in close proximity to, the main track of said railway, or to the right of way thereof, and

not more than 80 feet distant from said main track of said line of railway; and

That said locomotive and engine used for drawing and moving and propelling said train of freight cars, while moving and passing on the main track of said line of railway adjacent and opposite to, and in close proximity to, plaintiff's said sawmill and planing mill, emitted, discharged, blew out, and threw out cinders, sparks, and fire from said engine or locomotive, and the smokestack thereof, and thereby set fire to plaintiff's mills, roofs, sheds, or buildings thereof, or to lumber or other materials adjacent and in close proximity thereto, and fire was thereby communicated to said planing mill, its roofs, sheds, buildings, and improvements, and to the manufactured lumber on the yards of the planing mill and tramways and on the yards of the sawmill and to the sawmill, its sheds, roofs, buildings, and improvements, machinery, fixtures, and appliances adjacent and attached and connected with the same and in close proximity thereto, and that all of said property was totally destroyed and consumed by fire; and

That said engine or locomotive was not efficiently or properly constructed, and was not supplied or equipped with such scientific improvements and proper and necessary appliances as would have prevented the discharge and emission of cinders, sparks, and fire therefrom, as aforesaid, and the consequent setting out of fire to, and the destruction of, his said property by fire, as aforesaid; and

That said engine or locomotive was not provided, supplied, or equipped with an adequate and sufficient spark arrester, and that the pretended spark arrester thereon was in bad condition and in a bad state of repair, and was old, dilapidated, torn, broken, and worn, and the body or portion thereof separating and connecting the small meshes or holes therein for the discharge through the same of smoke and steam were in many places worn, torn asunder, and broken away, so that there were large holes in said pretended spark arrester through which large cinders, sparks, and fire were emitted, discharged, thrown out, and blown out through the said holes in said pretended spark arrester, and through and out of said smokestack; and

That on account of the worn, torn, and broken condition of said pretended spark arrester, and its condition and bad state of repair, as aforesaid, it was not adequate or sufficient to prevent the discharge, emission, and escape of cinders, sparks, and fire from said locomotive and engine and the said smokestack thereof; and

That at the time of said fire it was a dry season, there having been no rain or moisture in that locality, and in that place, for several weeks prior to that time, and the ground and combustible materials thereon at that place, and the buildings, sheds,

roofs, and lumber, such as were destroyed as aforesaid, were very dry and quick and easy to ignite and burn; and

That on the day and at the time his said property was destroyed by fire, in the forenoon of the 14th of September, 1906, it was a windy day, and the wind was high, and blowing with considerable force and velocity, and blowing from the direction of said main track of said railway on which the locomotive and engine moved and passed, and in the direction where said planing mill, sawmill, and other property destroyed by fire, were situated and located, as aforesaid; and

That the servants and employes operating the locomotive at the time the fire was set out, whereby plaintiff's property was destroyed did not control, manage, and operate the same with skill, prudence, or caution, but operated it at the time negligently and carelessly; and

That at the time while the locomotive was passing and moving on the main track in front of, and opposite to, plaintiff's property, the servants and employes in charge of and operating said locomotive were carelessly and negligently using an unusual and unnecessary force, quantity, and volume of steam, whereby an unusual quantity and amount of cinders, sparks, and fire were discharged, driven, and blown out from the locomotive and smokestack thereof with great and unusual force, and to great and unusual distances; and

That the locomotive which caused the fire and the destruction of plaintiff's property on account of its bad and improper construction, and the bad condition and bad state of repair of the spark arrester, and on account of the negligent, careless, and improper handling and operation thereof, had habitually, about the time plaintiff's property was burned, and subsequent and prior thereto, thrown out, blown out, and discharged cinders, sparks, and fire therefrom in its movements along said line of railroad, and said locomotive had frequently and habitually scattered fire and set out fires along the line of said railroad, and which was well known to the officers and agents of said Kansas City Southern Railway Company.

On January 23, 1907, plaintiff filed an amended and supplemental petition correcting the original petition in this: That it was through the error and inadvertence of his attorney that it was alleged that the sawmill, its buildings, sheds, improvements, fixtures, and appliances and lumber on the said sawmill yard were destroyed by fire, when in point of fact the sawmill, its buildings, sheds, improvements, fixtures, and appliances and lumber on the sawmill yard were some distance from the planing mill yard, and separated therefrom, and that the fire was not communicated to the sawmill, its buildings, sheds, improvements, fixtures,

and appliances, nor to lumber on the sawmill yard, but that the only property destroyed by the fire was the planing mill, its buildings, improvements, sheds, tramways, fixtures, tools, implements, and appliances, and the lumber stacked in the planing mill and on the planing mill yards.

Defendant, after pleading an exception of no cause of action, denied generally all of plaintiff's allegations. It denied specially that the fire in question was caused by them, or that any of the engines of the defendant Kansas City Southern Railway Company was then, or had been, in a defective condition and averred that it used, on the occasion in question, the latest and best-approved apparatus, without a defect, and that same was carefully handled by an experienced engineer, and it denied that the fire could have been caused by the escape of sparks from its said engine. But, should it be held that said fire was caused by defendants, then and in that event they showed that such fire was caused while the said engine was working in and around and on the switch, which was constructed to plaintiff's plant under a special agreement that defendants should not be responsible for any fires caused thereby, or while working around or thereat, a copy of which agreement is hereto annexed and made a part hereof; that under this agreement it is exempt from any loss or damage which the said plaintiff might have sustained, which exemption it specially pleaded.

The case was tried before a jury, which by a vote of nine to three returned a verdict in favor of the defendant. On application of the plaintiff for a new trial the verdict of the jury was set aside, and a new trial was granted. By subsequent consent the case was tried before the district judge without a jury.

The district court rendered judgment in favor of the plaintiff and against the defendants in solido for the sum of \$8,600, with 5 per cent. per annum interest thereon from the date of its judgment.

The defendants have appealed.

Opinion.

The agreement referred to in the defendant's answer in its tenth section declared that the party of the second part (the plaintiff company) hereby further stipulates and agrees that, in consideration of the agreement herein contained, to be kept and performed by the said railway company, it will and does hereby release the said railway company from any and all liability for property destroyed by fire communicated by locomotives operating on said track, or otherwise, or while engaged in the work connected with the use of said track, under this agreement, and will indemnify, protect, and forever save harmless the said railway company from any and all such claims, liabilities, damages, or claims for damages. The said

party of the second part hereby assumes all risk of fire caused as aforesaid, and all liability for property destroyed by fire caused by or contributed from locomotives operating upon said track, or engaged in work connected with the use thereof. Any person or corporation having insurance against fire on property so destroyed by fire shall, upon payment of such insurance, have only the same rights as insured has under this agreement. Said second party hereby further agrees to release, and does hereby release, the said railway company from any and all liability for damages for any injuries which may incur or be done to the property of said second party by the said railroad company, or its employees while operating locomotives and cars upon said track, and under this agreement, whether said property be loaded upon the cars or not.

The following questions are submitted to this court for decision:

(1) Did or did not sparks from one of the locomotives of defendant companies cause or occasion the fire by which the property of the plaintiff, near Vivian depot, was consumed and destroyed?

(2) If it was so destroyed, where was the locomotive when such sparks escaped from it, and what was it, at that time, engaged in or doing?

(3) If plaintiff's property was destroyed by a spark escaping from one of defendant companies' locomotives, would the defendant companies be released from their liability for such act by reason of the terms and conditions of the written agreement, pleaded in defendants' answer, if, but for said agreement, they would be liable?

(4) If defendants are liable in damages for that act, what is the amount for which they are liable?

Plaintiff's planing mill, and the other property belonging to it, for which he seeks to recover damages for loss by fire, was situated in the vicinity of Vivian depot in Caddo parish, La., near the defendants' railroad tracks. The general direction of tracks at that point was north and south. Plaintiff's planing mill, which was situated about 800 yards above and north of Vivian depot, near a spur track running out or from the main track in a southwesterly direction and on the east side of that track.

Plaintiff's sawmill was about 180 feet further above the planing mill, and slightly northeast from it, and some distance further from the railroad's tracks than it was.

On the morning of the 14th of September, 1907, the regular local train plying between Shreveport and Texarkana, drawn by engine No. 140, passed Vivian going north from Shreveport to Texarkana. When that train reached Vivian, there were three loaded cars on plaintiff's short spur track leading from the main track alongside of the tramway or loading platform of plaintiff's mill.

When the local train reached Vivian depot, the agent informed the conductor that there were three loaded cars standing on the spur track, which should be taken out and put on the main track for transportation. The engine and three cars were cut off from the train, were backed in on the side track or passing track at Vivian, and one empty car thereon was coupled thereto, and the engines and cars attached were pulled up above the mill spur and backed down and coupled up with the three loaded cars then on the mill spur, and they pulled off the short spur to the main track, and the engine with the loaded cars which were pulled in from Vivian, and the three loaded cars which were taken off from the spur track, were backed down to the Vivian depot. At that place, after some switching and readjustment of the train, it pulled out from Vivian, and went north on its regular trip to Texarkana, going beyond, and passing on its way, the junction of the main track with the spur track, the train being pulled by engine No. 140. A short time after it had left Vivian on its way to Texarkana (the time being estimated from 10 to 15 minutes) plaintiff's planing mill situated near the spur track was discovered to be on fire, and was burned to the ground, together with other property.

The plaintiff contends that it was on the final departure of this engine and cars from Vivian, and when on its way to Texarkana, on the main track and on its regular trip to Roma, that sparks were thrown out from the engine, while passing opposite to the planing mill, setting the mill on fire and causing it to be destroyed; that the distance from that point to that where the fire was first seen was only about 60 feet; that the wind was then blowing towards the northwest away from, and not towards, the plaintiff's planing mill; that there was no other cause assignable for the fire; that the spark arrester on the engine was defective, and had repeatedly set fire to buildings and fences beyond its right of way; that the short interval between the passing of the engine and the discovery of the fire gave rise to a legal presumption of cause and effect.

Defendant denies that the fire was caused by sparks from its engine at any point, but maintains that, should the fire have been caused by them, they were not thrown out after the train had finally left Vivian and was on its regular trip to Texarkana.

Both parties concede that the locomotive at no time went upon the spur track, but from its position on the main track pulled the cars out which were on it. Defendant contends that when the engine left Vivian to go to the spur track, it had no other purpose than to take from it the loaded cars which were upon it and place them on the train, and therefore, when the engine had taken them off, its return to Vivian became necessary, and became part of work done by it in con-

nection with the spur track, and solely because of such work.

Defendants ascribe the burning of plaintiff's property to fire from burning shavings (or sparks from the same), which shavings had been set fire to by the plaintiffs at a point near the railroad tracks, and which was communicated from that point to plaintiff's planing mill. Plaintiff meets this theory by evidence tending to show that the shavings referred to were few; that they had been set fire to the day before; that the fire from the same had been entirely extinguished, but, if not entirely extinguished, it consisted of embers covered by ashes, from which sparks could not be thrown out; that the space between the spot where the shavings had been burned was ground which had been cleared off, and there was nothing through which fire could be communicated to plaintiff's property; that had the fire from the shavings been communicated to plaintiff's property, it would have started at the north end of the planing mill, and not at the southwest end of the building, and with no smoke visible until the fire at that end had broken into flame; that the distance from the spot where the shavings were burnt to plaintiff's buildings was ——— feet away in a northerly or northeasterly direction from them; that defendant itself contended that the wind at the time was from the south to the north; that between the place where the shavings had been burned and plaintiff's buildings there were high piles of lumber, to which the fire would have been first communicated and shown itself.

The evidence was conflicting as to the direction of the wind at the time of the fire, but all parties agree that it was then blowing from the south towards the north. The disagreement between the witnesses on that point was as to whether it was blowing towards the northwest or towards the northeast. We do not think, under the evidence as a whole, that the fire at plaintiff's mill could be attributed to having been communicated from the burning shavings. We think the distance of a locomotive from a point opposite to the place at which plaintiff's mill was set on fire was sufficiently close to have authorized the court to connect the emitting of a spark from the locomotive with the immediately succeeding fire at plaintiff's planing mill. Several persons testified to fires having been communicated, from sparks emitted from defendants' locomotive, to objects beyond the right of way, at distances varying from 25 feet to 180 or 200 feet and that sparks from engine No. 140 had done so.

This court, in *Brady v. Jay*, 111 La. 1074, 86 South. 182, recognized that sparks from locomotives could communicate a fire to a building 150 feet away. We will leave for a moment the question as to whether the evidence warranted the finding by the trial judge that the fire was caused by a spark

from the locomotive of the defendant, and pass to the question as to where the locomotive was, and what it was doing, when the sparks were emitted, on the assumption that they did cause the fire which destroyed plaintiff's property. On that assumption we think where there is conflict in the testimony as to the point at which the sparks were emitted from defendants' locomotive, and as to what the locomotive was then engaged in, that the burden is on the defendant to establish affirmatively the state of facts which would entitle it to claim exemption (under the written contract which defendant sets up in its answer) from liability.

Concerning the scope of that agreement, plaintiff, as we have stated, contends that the agreement does not release, or purport to release, defendant companies from liability to plaintiff for fires communicated to his property from its locomotive, in the general operation of the railroad at Vivian depot, or other places, and in no way connected with the use of the spur track for the purposes provided in the agreement.

In the third edition of *Thompson on Negligence*, published in 1901 (section 2237), the author, under the heading *Railway Companies may Contract against Liability for Fires Communicated by Their Locomotives*, says:

"There is no principle of public policy which prevents a railway company from entering into a contract with a property owner by an instrument under seal, or by an instrument founded on a good consideration, whereby it shall be exonerated from liability to the property owner for damages caused by fire communicated from its locomotives, even though caused by the negligence of its servants, provided the agreement contains no provision which in any way involves the relation of the railroad company as a common carrier to the other contracting party or to the public. For example, a stipulation in an instrument whereby a railway company leased to another a strip of land upon its right of way, to be used for a storage warehouse, by which the railroad company is exempted from any liability for damages caused by fire emitted from its locomotive engines, even though caused by the negligence of the company or its servants, has been held valid. So where, in such an instrument of lease, the lessee assumes 'all risks of fire from any cause whatever,' the risk of fire due to the negligence of the lessor or its servants is assumed by, and cast upon, the lessee. The rule is the same where there is a statute making railroad companies absolutely liable for all damages caused by negligent fires set out by their locomotives. It has been well said that the public has no interest in the question whether the railroad company or a lessee who erects buildings on the right of way shall bear the loss resulting from negligence of the railroad company's servants so as to raise any question of public policy in respect to a contract exempting the company from such liability. But such a clause in a lease of ground for the purpose of erecting a building for the storage of grain does not extend so far as to exempt the railroad company from liability for the destruction, by fire communicated from its locomotives, of grain stored in the building owned by persons who are not parties to the lease. Where the owner of cotton stored in a warehouse erected by him on the land of a railroad company has entered into a contract with

the company releasing it from liability for damages from fire, an insurance company which has insured the cotton for the benefit of the owner, and which has paid the loss, cannot, on the theory of subrogation, have an action against the railroad company to recover the amount so paid. So, where a railroad company occupied under a statute the position of an insurer against loss by fire communicated by its engines, it was not liable for loss occasioned thereby to partnership property contained in a grain building owned by one of the parties who had, by contract with the company, assumed all risk of loss by fire."

The text of this section refers, in a note at the bottom of the page, to the following cases in support of the text: *Griswold v. Illinois Central Railway Co.*, 90 Iowa, 265, 57 N. W. 843, 24 L. R. A. 647; *Savannah Ins. Co. v. Pelzer Mfg. Co.* (C. C.) 60 Fed. 39; *Hartford Fire Ins. Co. v. Chicago, M. & St. P. Ry. Co.* (C. C.) 62 Fed. 904; *Id.*, 70 Fed. 201, 17 C. C. A. 62, 30 L. R. A. 193; *Id.*, 175 U. S. 91, 20 Sup. Ct. 33, 44 L. Ed. 84.

In *Greenwich Ins. Co. v. L. & N. R. R. Co.*, 112 Ky. 599, 66 S. W. 411, 67 S. W. 16, 56 L. R. A. 477, 99 Am. St. Rep. 313, the Supreme Court of Kentucky in 1902, since the publication of the third edition of Thompson, rendered a decision similar to those rendered in the cases cited.

Plaintiff's counsel say that the federal cases mentioned were all based upon the duty of federal courts, in matters of local law, to follow the rulings of the Supreme Courts of the different states, and therefore those decisions are not independent original decisions of the Supreme Court of the United States or other federal courts, on the questions, but rest upon and follow the state court decision.

The decision in *Griswold v. Railroad Company*, in favor of the railway company's exemption, was rendered by the Supreme Court of Iowa on a rehearing, and reversed the one originally rendered.

In the first opinion the court quoted *Cooley on Torts* (3d Ed.) pp. 1485, 1486, as saying:

"The cases of carriers and telegraph companies have been specially mentioned because it is chiefly in these cases that such contracts are met with. But, although the reasons which forbid such contracts have special force in the business of carrying persons and goods, or of sending messages, they apply universally, and should be held to defeat all contracts by which a party undertakes to put another at the mercy of his own faulty conduct."

It also referred to 86 Va. 975, saying:

"In *Johnson's Adm'r v. Richmond & D. R. Co.*, 86 Va. 975, 11 S. E. 829, the administrator sought to recover damages for the death of his intestate, which was claimed to have been caused by the negligence of the railway company. The decedent had been a member of a firm of quarrymen, which agreed with the railway company to remove a certain granite bluff from its right of way. He was killed by a train of the company while he was engaged in doing the work required by the agreement. There was evidence which tended to show that the accident was caused by negligence on the part of the company. It claimed exemption from liability,

however, on the ground that the agreement provided that it should 'in no way be held responsible for any injuries to or death of any of the members of the said firm, or any of its agents or employes, sustained from said work should such death or injury occur from any cause whatsoever.' The court, in commenting on this provision of the agreement said:

"To uphold the stipulation in question would be to hold that it was competent for one party to put the other parties to the contract at the mercy of its own misconduct, which can never be lawfully done where an enlightened system of jurisprudence prevails. Public policy forbids it, and contracts against public policy are void. Nothing is better settled, certainly in this court, than that a common carrier cannot, by contract, exempt itself from responsibility for his own or his servant's negligence in the carriage of goods or passengers for hire."

Plaintiff differentiates the cases quoted from the one before the court, on the ground that their building is not on defendants' right of way, nor upon property leased to it by the railway company. They maintain that the companies, in their operations on the main line (general operations not connected with operations on the spur track), defendants, occupied quoad the plaintiff the same position as they did to any other person. To that contention we give our assent.

There is conflict in the evidence as to the condition of the spark arrester of engine No. 140 on the 14th of September, while operating at Vivian and its vicinity. We are satisfied under the evidence that it was defective at that time, and that defendant companies were negligent in making use of it in the condition that it then was; that it was, at the time of passing plaintiff's planing mill, throwing out sparks to an extent that a spark arrester in good condition would not have allowed; that the fireman improperly and incautiously increased the danger of the situation by increasing the fire at the engine just before reaching plaintiff's mill, which was not many feet distant from the track, and in sight.

We return now to the question as to whether sparks from the spark arrester on the defendants' engine caused the fire. There is no other attributable cause for it. As we have stated, we cannot accept the theory of the defendant that it was occasioned by the burning shavings. A locomotive passing and emitting sparks (at a distance from buildings which have been shown and have been recognized as sufficiently near for those sparks to have been the means of communicating fires) and a fire occurring at a building directly opposite, just after the passing of the locomotive, furnish facts on which to base a reasonable presumption that the sparks caused the fire. Defendant urges that the direction from which the wind was blowing precludes the idea that the sparks reached the building. The testimony is conflicting on that point. The fickleness of the wind is proverbial; it changes frequently and rapidly at the same place. There is evidence in

the record which, if believed, would justify the conclusion reached by the trial judge.

We are not able to say in the present case, under the evidence adduced, that he manifestly erred.

If the fire was in fact caused by sparks from the defendants' engine, we do not understand them to seriously contest the extent of the loss suffered.

For the reasons assigned, it is hereby ordered, adjudged, and decreed that the judgment of the district court be, and the same is, affirmed.

(122 La. 1012)

No. 17,263.

HANAGRIFFE v. HANAGRIFFE.

(Supreme Court of Louisiana. Feb. 1, 1909.)

DIVORCE (§ 240*)—ALIMONY—AMOUNT.

The wife obtained judgment of divorce awarding her the custody of four minor children, issue of the marriage, and, she and they being without means, alimony at the rate of \$40 per month is not out of proportion to the wants of the minors or to the circumstances of the father, when it appears that the latter is employed at an annual salary of \$1,800 and board, for which he works about six months in the year, and that he has no one else dependent upon him for support.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 678; Dec. Dig. § 240.*]

(Syllabus by the Court.)

Appeal from Twenty-Third Judicial District Court, Parish of St. Mary; Albert Campbell Allen, Judge.

Action by Marie A. Hanagriffe against Charles T. Hanagriffe. Judgment for plaintiff, and defendant appeals. Affirmed.

Henry Mayer and Emmet Alpha, for appellant. Paul Kramer, for appellee.

Statement of the Case.

MONROE, J. Plaintiff sued defendant for separation a mensa et thoro, and incidentally obtained judgment, by rule, condemning him to pay alimony at the rate of \$45 per month for the support of herself and four minor children, of whom the eldest (a girl) is 14 years old. She obtained judgment as prayed for, awarding her the custody of the children and continuing the alimony, and, after the necessary delay, sued for and obtained a judgment of final divorce, again awarding her the custody of the children, but rejecting her demand that the alimony for their support be continued "with full reservation of her right to demand the same in an action instituted for that purpose." Thereafter she instituted the present action "for that purpose," to which the defendant answers that he is willing to provide for the children at his own home, but is unable to maintain them elsewhere. He also sets up another defense, which, being wholly unsus-

tained by proof, need not be further noticed.

The evidence shows that plaintiff has no means, and is endeavoring to support herself and the children by working in a canning factory at Houma, where she earns \$35 per month when she is employed, but that at the date of the trial the factory had been "shut down" for two months, and that she was being assisted by her father, who is but little better off than she. Defendant is employed as an engineer on a sugar plantation at an annual salary of \$1,800 and board, for which he works about six months in the year, being at liberty to employ the balance of the year as he sees fit. He has two grown sons (by a previous marriage), who are able to, and are, supporting themselves, and two daughters who are married and are supported by their husbands. Upon the facts thus presented the judge a quo gave judgment condemning him to pay alimony at the rate of \$40 per month, and he has appealed.

Opinion.

Counsel for defendant refers us to Rev. Civ. Code, art. 233, which provides that:

"If the person whose duty it is to furnish alimony shall prove that he is unable to pay the same, the judge may, after examining into the case, order that such person shall receive in his house and, there, support, and maintain the person to whom he owes alimony."

But in this instance the judge, "after examining into the case," reached the conclusion that the defendant is able to pay the alimony, and we agree with him.

"Alimony shall be granted in proportion to the wants of the person requiring it and the circumstances of those who are to pay it." Rev. Civ. Code, art. 231.

The amount allowed is neither in excess of the needs of the four minor children nor out of proportion to the circumstances of the defendant.

Judgment affirmed.

(122 La. 1014)

No. 17,402.

STATE v. WOOD.

(Supreme Court of Louisiana. Feb. 1, 1909.)

CRIMINAL LAW (§ 520*)—EVIDENCE—CONFESSIONS—INDUCEMENTS.

Where a sheriff having the custody of accused obtained a confession from him by promises of assistance, and statements that he would do all he could to save accused from being hung, other confessions subsequently made to different persons, but in the presence of such sheriff, would be regarded as tainted with the same improper influence, and were inadmissible against accused, though he was warned before making them.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1166; Dec. Dig. § 520.*]

Appeal from Eighteenth Judicial District Court, Parish of Acadia; Philip Sidney Pugh, Judge.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Armas Wood was convicted of murder, and he appeals. Reversed and remanded.

Howard Edwin Bruner and James Albert Gremillion, for appellant. Walter Guion, Atty. Gen., and William Campbell, Dist. Atty. (John Joseph Robira and Ruffin Golson Pleasant, of counsel), for the State.

PROVOSTY, J. Defendant, a negro, was convicted of murder, and sentenced to be hanged.

Defendant was arrested on suspicion. While he was in jail, the sheriff told him that:

"The court would be lenient on him if he made a confession. I told him if he would make a man out of himself, and make a confession, that I thought I would be able to help him out; that the probabilities were his neck might be saved if he made a confession; that I would do all I could to save his neck. Q. Did you not tell him not to mention anything about your having made that promise to him? A. Probably I might have told him that. Q. Did you not tell him, if asked if any promise was made or any inducement held out to him, to answer 'No'—that no promise had been made to him for the purpose of obtaining this confession. Try to refresh your memory. A. I may have told him so. I would not say for sure whether I did or not. The probabilities are I did."

These promises failed to elicit a confession. But a week later, on October 15, 1908—the defendant having in the meantime been transferred from the jail of the parish of Acadia, where the crime was committed and where he was arrested, to the jail of the parish of Calcasieu for safekeeping, and there lodged in the "death chamber" or cell for prisoners condemned to die—he asked to see the sheriff, and made a confession to him in the presence of several persons, including the sheriff of Acadia who had made him the promises and warned him against letting the fact be known. This officer about 20 minutes before the confession was made visited defendant in his cell and told him to remember the promises which he had made him. Not knowing of these promises, the sheriff of Calcasieu, Mr. Reid, warned the defendant that any confession he might make would be used against him on the trial, and to take notice that he made no promises in that connection. Afterwards, on November 8, 1908, in the parish jail of Acadia, the defendant repeated to the sheriff of Acadia the confession he had made in the jail of Calcasieu, and on November 11th, a few days before his trial, he repeated this confession to the district attorney without that officer having made him any promises, in the presence, however, of the sheriff of Acadia who had made him the promises. It nowhere appears that the latter officer at and time revoked the promises he had thus made. The first confession, that made to Sheriff Reid and others in the jail of Calcasieu, was excluded as having been induced by promises, but the other two were

admitted. We think the latter two were just as objectionable as the first.

"When once a confession under improper influence is obtained, the presumption arises that a subsequent confession of the same nature flows from the like influence; and this though the subsequent confession was made to a different person from the one holding out the inducement." 6 A. & E. E. 542.

Judgment set aside, and case remanded for further trial.

(122 La. 1016)

No. 17,195.

W. F. TAYLOR CO., Limited, v. SAMPLE et al.

(Supreme Court of Louisiana. Jan. 4, 1909. Rehearing Denied Feb. 15, 1909.)

1. HUSBAND AND WIFE (§ 15*)—SEPARATE PROPERTY OF WIFE—MORTGAGES—EFFECT.

A petition by a married woman for authorization to execute a mortgage of her plantation so described it as to include her husband's land. The mortgage similarly described the land, and recited: "Came and appeared * * * a wife of B. herein joined, aided and authorized by her husband." Held, that the participation of the husband was solely to give his marital authorization to the mortgage, and there was no intent that the wife should mortgage any other property than her own.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 15.*]

2. MORTGAGES (§ 171*)—NOTICE TO THIRD PERSON.

Under Rev. Civ. Code, art. 3342, relating to the registry of mortgages so as to affect third persons, the record of a mortgage professing on its face to relate exclusively to a married woman's property, but so describing the same as to include the land of the husband joining therein, does not as against third persons operate as a mortgage on his land, and does not affect one subsequently accepting a mortgage on his land.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 171.*]

3. ESTOPPEL (§ 27*)—BY DEED.

Under the rule that one who signs as a witness an act creating a mortgage on his property is estopped from contesting the mortgage, a husband joining in and authorizing his wife to mortgage her land so described as to include his land is estopped from contesting the mortgage.

[Ed. Note.—For other cases, see Estoppel, Dec. Dig. § 27.*]

Appeal from First Judicial District Court, Parish of Caddo; Thomas Fletcher Bell, Judge.

Action by the W. F. Taylor Company, Limited, against A. N. Sample and others. From a judgment for plaintiff, defendant O. H. P. Sample appeals. Affirmed.

Hall & Jack, for appellant. Alexander & Wilkinson, for appellee.

PROVOSTY, J. In January, 1905, Mrs. Stringfellow, wife of H. C. Stringfellow, and Miss Robinson, owners in indivision of the Cotton Point and Grand Bend plantations, executed two mortgages on said plantations—

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

a first mortgage in favor of A. N. Sample for \$57,330, and a second in favor of Ardis & Co. for \$15,762.

Said plantations are described in the act of the mortgage by the numbers of the sections and fractions of sections composing them, according to the maps of the United States surveys, and are said to contain 3,800 acres. Among the fractions of sections included in the description of the Cotton Point plantation is the N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 10, township 14, range 11, containing 80 acres.

This 80 acres did not belong to the mortgagors, but to the husband of one of them, Mr. Stringfellow, and in reality formed no part of said plantation.

In July, 1906, Mr. Stringfellow mortgaged same to the plaintiff company.

In January, 1908, he and his wife and Miss Robinson joined in an act of giving in payment by which they conveyed the two plantations (including the said 80 acres) to A. N. Sample in satisfaction of the said first mortgage of \$57,330.

In the instant suit the plaintiff company has cited O. H. P. Sample, who now holds the Ardis & Co., or \$15,762, second mortgage, A. N. Sample and H. C. Stringfellow, and asks that its said mortgage be recognized and enforced, and be decreed to be paramount to the \$15,762 mortgage of O. H. P. Sample, for the reason that the latter mortgage in so far as said 80 acres are concerned, and as against third persons, is null; it not having been given by H. C. Stringfellow, the owner of the said 80 acres.

To this the defendants answer that H. C. Stringfellow authorized his wife to mortgage the property; in other words that she did so as his agent, and that, therefore, the case stands just as if he himself had acted.

The issue thus made is one of fact, to be determined from the evidence in the case.

The record contains no evidence on the subject, except that which is to be found in the act of mortgage itself. Forming part of this act of mortgage is the petition which Mrs. Stringfellow presented to the judge to obtain his authorization to execute the mortgage. In this petition the two plantations are described precisely as in act of mortgage (i. e., including this 80 acres), and it is alleged that Mrs. Stringfellow "is owner, in her own separate, paraphernal right of an undivided half," of the property thus described, and that she desires to mortgage her said interest. The act of mortgage declares that the property mortgaged is the same which the mortgagors acquired from Mrs. G. W. Stringfellow; and it makes no mention of H. C. Stringfellow except as follows:

"Came and appeared Miss Georgie Robinson and Mrs. Howard C. Stringfellow, wife of Howard C. Stringfellow, herein joined, aided and authorized by her husband."

From the foregoing the only possible conclusion is that the participation of the husband in the act was solely for the purpose of giving his marital authorization to the contract of his wife, that there was no intention that she should mortgage any other property than her own, and that this 80 acres of land was included in the mortgage either through mistake or because it was at that time erroneously supposed to form part of the plantation. A mistake of this kind easily occurs in a long description by numbers of sections and fractions of sections, and the probability of a mistake in the present case is all the greater from the fact that this 80 acres is in the center of the plantation, which is a large tract of land; it and Grand Bend containing together, as already stated, 3,800 acres. As to the land having been supposed to be part of the plantation, that is hardly probable in view of the fact that at that time it was in process of acquisition by H. C. Stringfellow under the federal homestead law.

The act being one which on its face professes to relate exclusively to the wife's contract and to the wife's property, its recordation cannot be said to have operated the registry of a mortgage upon the property of the husband. Hence it cannot affect third persons subsequently accepting a mortgage upon the property of the husband. The husband himself is bound by it, on the principle that one who signs, even as a witness, an act creating a mortgage upon his property, is estopped from contesting the mortgage; but this estoppel cannot be extended to third persons dealing with the property. Rev. Civ. Code, art. 3342; *Brian v. Bonvillain*, 52 La. Ann. 1794, 28 South. 261.

Judgment affirmed.

(122 La. 1019)

No. 17,202.

GILL et al. v. CITY OF LAKE CHARLES et al.

(Supreme Court of Louisiana. Jan. 4, 1909.
Rehearing Denied Feb. 15, 1909.)

MUNICIPAL CORPORATIONS (§ 683*)—RAILROADS (§ 75*)—STREETS—GRANTING OF FRANCHISES IN—CHARTER PROVISIONS.

Where the charter of a city, after vesting in the city council the power to grant street franchises to railroads, street railways, telegraph, telephone, and other corporations, provided that every application for a franchise should be published for three days, and competitive bids invited by proclamation of the mayor, and that if the franchise was granted it should be awarded to the highest responsible bidder for the amount of his bid, and on such terms and conditions as might be agreed upon, including the annual payment of 2½ per cent. of the gross income derived by the grantee from the franchise, held, that the prescribed manner for the exercise of the municipal power to grant street franchises was mandatory and exclusive of all other methods, and that this implied prohibition ap-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

plied to all railroads seeking street franchises for any purpose whatever.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1471-1476; Dec. Dig. § 683; * *Railroads*, Dec. Dig. § 75.*]

(Syllabus by the Court.)

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; Edmund Dennis Miller, Judge.

Action by H. C. Gill and others against the City of Lake Charles and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Edwin Franklin Gayle, City Atty., for appellant City of Lake Charles. Hudson, Potts & Bernstein, for appellant St. Louis, W. & G. Ry. Co. Schwing & Moore, for appellees.

LAND, J. This suit was heretofore dismissed on an exception of misjoinder of parties, and plaintiffs appealed. The judgment was reversed, and the cause remanded for trial on the merits. See *Gill et al. v. City of Lake Charles et al.*, 119 La. 17, 43 South. 897.

The city of Lake Charles by ordinance granted to the St. Louis, Watkins & Gulf Railway a franchise to construct and operate a steam railroad on Front street, so called, from Clarence street to Broad street. Plaintiffs as taxpayers, and as property holders along Front street, and as the owners of the land used as a highway, commonly called Front or Lake street, along the shore of Lake Charles, sued to annul said ordinance as ultra vires and violative of the city charter, and on the further ground that the so-called Front street has never been dedicated or expropriated as a public highway, but at most it is a mere easement permitted by the owners for passage on foot and in ordinary vehicles. The petition also urges the further objection that said ordinance is null because it both takes and damages the property of the plaintiffs without just compensation first paid as required by the state Constitution. The railroad was constructed on Front street after the institution of the suit, and plaintiffs amended and supplemented their original petition by setting forth the facts and praying that the tracks be removed at the expense of the railroad.

The defendant railroad answered, setting forth the ordinance granting to it the right to construct and operate a railroad along the lake front from Clarence and Front street to Broad street; the construction and operation of its tracks at great expense in said street, in compliance with the terms of the ordinance; and that Front street, on which said track is located, is a public street of the city of Lake Charles. The answer avers the legality of said ordinance, that the grant in question was based on a valuable considera-

tion, and that the railroad has performed all the obligations imposed upon it by the terms of the ordinance at great cost and expense, amounting to many thousand dollars, and abandoned valuable rights and privileges on Broad street granted by previous ordinances.

The city of Lake Charles answered, adopting all the defenses set up by the defendant railroad company, and pleaded estoppel against plaintiffs denying the public character of the street located on the banks of Lake Charles, a navigable waterway. The city further averred that its council had, in making the grant, acted in good faith and within its power under the Constitution and laws of the state and the charter of the city.

On the final trial below, judgment was rendered in favor of the plaintiffs, annulling and avoiding the ordinance in question, and ordering the defendant railroad company to remove its rails and cross-ties from said premises at its own expense, and leaving the premises in as good condition as it formerly was within six months from the finality of the judgment.

Defendants have appealed. Plaintiffs have answered the appeal, and prayed that the judgment be amended by shortening the time for the removal of the rails and track of the defendant company, and—

“by reserving plaintiffs' right to sue for damages actually incurred and to occur in separate suits, reserving said claim for past damages free from prescription pending this suit.”

The first question, both in importance and logical order, is whether the enactment of the ordinance in dispute was within the legislative powers conferred by law on the council of the city of Lake Charles.

Section 5 of the charter of the city of Lake Charles enumerates the powers conferred on the city council. We excerpt the following paragraphs as germane to the proposition under consideration:

“Sixth. To regulate parks, public grounds, depots, depot grounds, and places for the storage of freight and goods within the corporate limits, and to provide for and regulate the construction and passage of railroads and street railways through the streets, avenues, alleys, lanes and public grounds of the municipality; but no person, persons, company or corporation to whom the right and privilege shall at any time be granted by the authorities of the city to construct railroads and street railways through the municipality, shall have the exclusive right and privilege to do so.

“Seventh. To grant the right for the erection of telegraph, electric light and telephone poles, posts and wires along and upon any of the streets, alleys and ways of the municipality, and to change, modify and regulate the same, and to compel the laying of all such wires underground, but no such right or privilege shall be exclusive.”

Under the head of “Future Franchises, Regulating Conveyance of,” section 23 reads in part as follows:

“No franchise shall ever be granted by the city council merely for consideration of public

utility or advantage, nor for merely pecuniary consideration, nor merely for both considerations. Every application to the city council for a franchise shall be in writing, shall contain all the terms, conditions and specifications proposed to be complied with by the applicant thereof, and shall be signed by the applicant therefor to whom or to which such franchise is sought to be conveyed."

This section further provides for the publication of such application for not less than 30 days, together with a proclamation from the mayor inviting sealed proposals for the conveyance of such franchises; that the applicant for such franchise shall submit a sealed proposal therefor; that all sealed proposals shall be opened and read at a regular meeting of the council; that, if the council should determine to grant such franchise to any of the bidders or applicants, it shall be granted to the highest responsible bidder therefor on such terms and conditions, in addition to the amount of the successful bid, as may be agreed upon by the council and the bidder; but one of the essential conditions of the granting of such franchise shall be the annual payment to the city council by the grantee, during the duration of the franchise—

"of a sum of money equivalent to not less than two and one-half ($2\frac{1}{2}$) per cent. of the amount of the annual gross income of such grantee, and of such grantee's heirs, assigns, successors and legal representatives from or on account of such franchise."

It is admitted that the defendant railroad company did not acquire its franchise in the mode pointed out in section 23 of the charter, but acquired the same by direct grant from the city council without publication or competition, and on terms different from those prescribed by said section.

It is, however, contended by defendants that section 23 has no application to a right of way granted to a railroad common carrier passing through the city, or to its terminal tracks therein, whose earnings come from hauling passengers and freight to and through the municipality. It is argued that for such rights of way there could, in the nature of things, be but one bidder; that the gross annual income from such a franchise cannot be estimated; and that in the instant case the franchise granted was one which produces no revenue, and was purely a matter of convenience for the carrier and the wholesale trade at Lake Charles.

Section 23 makes no exceptions, and emphatically declares that no franchise shall be granted by the city council merely for consideration of public utility and advantage, and provides that every application for a franchise shall be published and competitive bids invited, and that such franchise, if granted at all, shall be awarded to the highest responsible bidder. If this section does not apply to railroads, it also does not apply to telegraph, telephone, pipe line, and other companies doing business beyond the limits of the city and using its streets and public

places as links in their right of way. This construction would restrict the operation of section 23 to persons and corporations doing business wholly within the limits of the city of Lake Charles.

Section 5, par. 6, in express terms refers to the construction of railroads and street railways "through the municipality"—the very term "railroad" as thus used indicates the common carrier of passengers and freight.

The charter provisions place all street franchises on the same plane of equality. The power to grant such franchises is subject to the same limitations, and a special mode is provided for the exercise of such power. The requirements of section 23 are mandatory, and must be duly observed under penalty of nullity. *McQuillin, Municipal Corporations*, 574; 28 Cyc. 877, 878.

"If the statute conferring a municipal power prescribes the manner in which it shall be exercised, this is generally mandatory and exclusive of other methods; * * * and this rule is especially applicable where there are negative words in effect prohibiting the doing of the thing unless it is done in the manner prescribed." 28 Cyc. 275.

Section 23 starts out with a prohibition, and then declares that every application for a franchise shall be advertised, that competitive proposals shall be invited, and that the franchise shall be awarded to the highest responsible bidder. The object of these requirements is to obtain for the municipality the highest possible price for any franchise that may be petitioned for by any applicant. The only discretion left to the council is to reject any and all bids, and in case of an award to agree upon terms and conditions. The essential condition that the grantee shall pay annually $2\frac{1}{2}$ per cent. of the gross income derived from the exercise of the franchise is mandatory, and must be incorporated in every grant. If, in point of fact, no income should ever be derived from the franchise, the grantee would have nothing to pay on that score. To hold, however, that the city council may predetermine that a certain franchise will never yield any income or revenues, and on this assumption may grant such franchise at their discretion, would vest in that body the power to nullify all the requirements of section 23.

Defendants' counsel have in their brief cited no authorities in support of their proposition that the ordinance in question was a legitimate exercise of the police power of the city council. In plaintiffs' brief it is stated that in the court below defendants' counsel relied upon the cases of *East L. R. v. City of New Orleans*, 46 La. Ann. 526, 15 South. 157, and *N. O. & City R. R. Co. v. Watkins*, 48 La. Ann. 1550, 21 South. 199. In the first case, the decision was based on section 4, p. 193, Act 135, Laws 1888, providing that the city council of the city of New Orleans shall have no power "to sell or dispose of any street railroad franchises," except after publication and adjudication

to the highest bidder, the court holding that the section did not apply to railroads transporting mails, passengers, and freight long distances beyond the limits of the city. In the second case, the court construed the words "street railroad" as including any local railroad seeking a franchise or privilege which was valuable. In the case at bar there can be no doubt, as both railroads and street railways are specifically enumerated in the grant of powers to the city council, that the first term includes all railroads performing the duties of common carriers. Terminal facilities in cities are indispensable to railroads for the speedy and economical handling of freight in car load lots, and are, in many instances, of enormous pecuniary value. The privilege of using for 20 years the lake front of the city of Lake Charles for the transportation of freight is an additional franchise or privilege which the defendant railroad is seeking to acquire. This franchise must be of considerable value, as it is alleged that the defendant railroad has expended thousands of dollars for the privilege in dispute. But as we construe the charter, the value or extent of the franchise has nothing to do with the question, as every franchise must be let in the manner provided in section 23 of the charter.

This conclusion compels us to avoid the ordinance as *ultra vires*. The judge below assigned no special reasons for his decree. It is admitted by counsel that the judge in his oral reasons stated that his decree was based on the finding that Front street, or a greater part of the same, was not a public highway. Our conclusion that the ordinance is void renders it unnecessary to pass upon the question whether Front or Lake street (so called) is a *locus publicus* in whole or in part.

We cannot amend the judgment as prayed for, because plaintiffs' claims for damages were reserved, and therefore were not affected by the decree; because the question of the suspension of prescription quoad such claims during the pendency of this suit is not at issue; and because the prayer for the shortening of the time allowed for the removal of the railroad track is too indefinite to warrant an amendment of the decree in that particular.

It is therefore ordered that the judgment appealed from be affirmed, and that the defendants pay the costs of appeal.

time within which to comply with the terms and conditions of the agreement, and then the deed was to be signed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 21.*]

2. PAYMENTS ON PRICE.

The plaintiff accepted amounts paid on the price.

3. VENDOR AND PURCHASER (§ 214*)—CONTRACT OF SALE—TRANSFER BY VENDEE.

The promisee acquired a right to the property, subject to the condition expressed, which he could sell.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 442, 443; Dec. Dig. § 214.*]

4. VENDOR AND PURCHASER (§ 214*)—CONTRACT—TRANSFER BY VENDEE—ACQUISITION.

The plaintiff consented to the conveyance made by the promisee to the defendant.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 214.*]

5. VENDOR AND PURCHASER (§ 214*)—CONTRACT—CONDITIONS—TRANSFER—SPECIAL SKILL IN VENDEE.

The personal grounds urged as precluding the promisee from selling are not sustained by the facts, and are not supported by the terms of the Code; the alleged special skill expected by the plaintiff finds no support in law or fact.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 214.*]

6. PARTNERSHIP (§ 53*)—EVIDENCE TO ESTABLISH.

The contemplated partnership was not formed. It never had any right to any amount paid by defendant on the written agreement referred to as the "Toomer contract."

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 53.*]

7. AMOUNT OF DAMAGES.

The question of damages raised not considered in this case.

(Syllabus by the Court.)

Appeal from Twenty-Sixth Judicial District Court, Parish of Washington; Thomas Moore Burns, Judge.

Action by Daniel E. Sheridan against Samuel E. Reese. Judgment for plaintiff, and defendant appeals. Reversed.

See, also, 121 La. 226, 46 South. 218.

Thomas E. Salter, Prentiss Bernard Carter, and Benjamin Moore Miller, for appellant. Gayer & Ott, for appellee.

BREAUX, C. J. Proceeding by injunction, plaintiff seeks to hinder and stop the defendant from felling and taking timber from the land he claims.

The statement of the case begins with a written agreement entered into by plaintiff, Sheridan, with Judson R. Toomer, in which the former sold the land in question to the vendee above named for \$26,074.14, to be paid on estimated stumpage of timber standing on the land, at the rate of \$6 per thousand feet, which the buyer was to manufacture into lumber at his sawmill on the land. This price was to be arrived at, and the deal consummated, immediately after the payment just stated.

(22 La. 1087)

No. 17,114.

SHERIDAN v. REESE.

(Supreme Court of Louisiana. Feb. 1, 1909.)

1. VENDOR AND PURCHASER (§ 21*)—PROMISE TO SELL—VALIDITY OF AGREEMENT.

A written promise of sale was signed to the defendant, promisee. It contained all the elements of a sale, save to the defendant was given

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The vendee agreed to own a sawmill on the land, and it was further agreed that he would begin operations of the sawmill by the 1st of June, 1907. With this agreement he complied.

Toomer agreed to complete the cutting and manufacture of the timber within 12 months from the date he would begin; and he further agreed to assign all invoices and bills of lading, representing the timber cut from the land, to the bank of Franklinton for collection, and to be credited to plaintiff. The mill on the land was to remain as a security for performance of the contract.

The agreement was recorded in the conveyance book of the recorder's office.

Toomer, the vendee, assigned all of his rights to the defendant on the 3d day of January, 1908.

We pass for a few moments to the pleadings. We will return to the summary of the facts later.

Plaintiff in his petition for an injunction alleged that on the 3d day of June, 1908, he and defendant formed a partnership to operate a sawmill; that defendant, Reese, was to buy the sawmill of one Gary, and was to saw the trees on the same terms as those mentioned in the Toomer contract.

Plaintiff states that upon his demanding a statement which defendant had promised to give him he met with a refusal from defendant; that he then informed defendant, since it was not considered that there was a partnership, as he contended there was, he must stop cutting plaintiff's timber; that thereafter defendant proposed to enter into an agreement with plaintiff, and, after discussing the terms and the conditions, there was an agreement arrived at, viz., it was agreed that the contract agreed upon be reduced to writing. Plaintiff wrote the agreement, Reese refused to sign it. Plaintiff then notified defendant that he withdrew from all contracts between them.

Plaintiff testified that defendant would not discontinue cutting timber on the land in question unless enjoined; that Reese claimed the right to continue operations of the sawmill under the terms of the agreement entered into between plaintiff and Toomer in April, 1907, which the latter and John H. Gary, plaintiff said, attempted with his knowledge to assign to defendant, Reese, on the 5th of January, 1908; that if, to quote from the petition,

"any valid assignment of said contract was made, which petitioner denied, the same was made to the partnership which existed between plaintiff and defendant."

Plaintiff also stated that if there was an agreement it had been repeatedly violated, because Toomer failed and neglected to begin operations by the 1st of June, 1907, as originally agreed upon; that he had not complied with his obligation by delivering invoices and bills of lading to the bank for collection; that the attempted assignment was,

in itself, a violation of the contract referring, as we take it, to the verbal agreement which was to be reduced to writing, but which defendant refused to sign.

The complaint is further that since the attempted assignment on the 3d day of January, 1908, although defendant has manufactured and shipped a quantity of feet of timber he has never complied with the stipulations of the contract. That in all their dealings the Toomer contract was not mentioned. Reese always proposed to transact with him, plaintiff.

Plaintiff then resorted to the court for an injunction and to assert the right he claims.

The defense of Reese is that he holds under the Toomer contract; that the land and timber were sold by plaintiff to Toomer, in April, 1907, and by him, defendant, they were bought on January 1, 1908, plaintiff actually acting as an intermediary and agent.

Defendant denies that there ever was a partnership entered into by him with plaintiff, but admits that there was a tentative agreement between them to form a partnership for the manufacture and sale of lumber—plaintiff to furnish one-fourth of the necessary funds to operate the business, and to receive one-fourth share in the profits. He was also to receive one-fourth of the purchase price of the mill bought by defendant from John H. Gary. That plaintiff refused to advance any part of the amount mentioned above. That in consequence the partnership fell of its own weight, and respondent paid the full price for the mill, and furnished all funds for operating expenses.

The defendant's further contention is that he has paid plaintiff for all the lumber cut and shipped under the Toomer contract, and that he has complied with the terms and conditions of this contract; that the assignment was not made by Toomer to the partnership, as contended by plaintiff, but to him, defendant; that the plaintiff received payment for all the timber cut and shipped at the rate stipulated.

Defendant claims damages in the sum of \$5,225.

Issue having been joined, as shown by these pleadings, testimony was taken.

We applied ourselves to making a summary of the facts, as we above said we would.

Plaintiff testified that it was agreed to form a partnership between him and the defendant.

It happened that on January 3, 1908, he was at Rio station, where the mill subsequently bought by defendant is located. On that day defendant met plaintiff.

Before that time—that is, on the 5th of April, 1907—the plaintiff had entered into the Toomer agreement, as before stated.

Plaintiff was interested in pine lands as an owner, and defendant wished to buy a place to locate a sawmill.

Very soon after meeting, they began talk-

ing about a mill location. They went over the grounds at some length, even stepped over to the sawmill property of John H. Gary, who was working under the Toomer agreement and sawing the timber conditionally transferred by plaintiff to Toomer.

The parties, plaintiff and defendant, thought, as we infer, that the mill operations at the Gary mill would pave the way to forming a contract of partnership.

In addition, a sale was spoken of; plaintiff said to the defendant that the Toomer contract was in the way of his selling.

No Contract of Partnership was Signed.

The defendant testified that he had not signed and had not undertaken to carry out the terms and agreement of the contemplated partnership because plaintiff had not performed his part of the agreement; that he was to furnish cash to effect the purchase of the Gary mill, and was to perform other conditions of minor importance. This he failed to do. Defendant bought the mill.

Whatever there may have been connected with this embryo partnership, it never was considered as a concluded contract. Nothing ever came of this partnership; plaintiff and defendant disagreed about it, and nothing was done.

Plaintiff testified as to his understanding of the agreement to form a partnership, and defendant as to his. The result was conflicting testimony which proves nothing, being testimony of parties to the suit of about equal standing, so far as we know. Besides, the agreement was that the contract of partnership would be written. This was in its nature a condition precedent without which there could be no partnership.

Our only reasons for referring to this contemplated partnership is that the plaintiff's contention that, if he seemingly sanctioned the sawmill operations by defendant under the Toomer agreement, it was not that he thought that the defendant was carrying out the terms and conditions of the Toomer contract, but because, as he thought, the defendant was his partner, and that, in accounting as he did, he had reason to believe that the work was done under the partnership, and not under the Toomer agreement; that he received the amount paid for account of the partnership.

As there was no partnership, the credit which the plaintiff seeks to give to it instead of to the Toomer contract can be of no avail in this suit. He could not place the amount to the credit of a nonexistent partnership. The fact is that there was no partnership, not even in name.

The Agreement of the Toomer Contract.

That presents the serious issue of the case.

The original contract with Toomer, the contract assigned, was as complete as such a contract could be made. It contains all the essentials of a sale, except that it was agreed that the deed itself would be signed after

payment of the price. The defendant, realizing, perhaps, that he must hustle in order to be equal to the performance of his part of the contract, seems to have been anxiously active to unload the weight of his obligation. He, with the consent of plaintiff, sold his right under the contract to John H. Gary, who constructed a sawmill to the end of carrying out the agreement under the Toomer contract. The contract transferred was a complete promise to sell. It was a strong and positive promise to sell. The property had been delivered to the promisee, and it remained for him to operate the mill under its terms and conditions. There was a complete agreement; object and price were clearly stated, and the defendant, as well as his predecessor, from all appearances endeavored to earn the price in accordance with the agreement.

It fell squarely within the terms of article 2462 of the Civil Code relating to a promise to sell. The promise to sell had been clearly given by the plaintiff, and had been clearly accepted by the defendant's predecessor in right.

The next proposition for discussion is whether the promisee, Toomer, had the right to assign his contract, although plaintiff did not sign the written agreement.

In our opinion, Toomer had acquired a right which he could assign. He, as before stated, assigned his right under the agreement to John H. Gary, who became subrogated to it with the sanction of plaintiff.

Plaintiff's assent is mentioned in the testimony as a "permission"; that the plaintiff had given his "permission."

Plaintiff consented to the assignment, whether called assent, permission, or sanction. The evidence on this point leads to that inevitable conclusion.

We quote from the testimony of plaintiff on this point:

"Some time in August, if I remember right, Mr. Toomer came to me and said that he wanted to sell the mill to Mr. Gary, and asked me if it would be satisfactory if Mr. Gary should take the contract. The mill then was finished and completed, and he, Gary, operated a while supposing to be under the contract.

"Q. With your permission?

"A. Yes, sir."

On the 3d of January, Toomer sold and transferred all their rights under the Toomer contract to defendant.

Plaintiff states as a witness that he talked "the matter" over with defendant as to how the contract was to be drawn.

We quote from the testimony:

"Q. Mr. Sheridan, when this contract or assignment from Mr. Toomer and Mr. Gary to Samuel E. Reese was drawn and signed on the 31st day of January, were you present?

"A. No, sir, I was not.

"Q. Were you present at the beginning of the contract?

"A. I did not think the contract was started. I was there and talked the matter over with Dr. Reese as to how the contract was to be

drawn with Toomer and Gary; there was nothing said about the timber contract, or transfer either."

There was only one transfer made. It included all the rights, whatever they were, under the original contract. It must have included timber and "transfer" as well.

Defendant fully confirms the statement of plaintiff, and expressly states that plaintiff made the contract with Toomer and Gary for him.

Plaintiff before the assignment said that he would not consent to let the work be done under the Toomer contract unless the defendant bought the Gary mill.

To comply with this condition, the defendant bought the mill, and about the same time bought such right as Toomer and Gary had.

Another of plaintiff's grounds against the validity of the assignment is that the contract between him and Toomer was personal, and he seeks to bring it within the provisions of article 1887 of the Civil Code.

He thought, as testified to by him, that Toomer had special skill and ability to perform his part of the contract.

The weak point, as relates to a question of fact here, is that plaintiff had given his consent to Toomer to assign the contract to Gary, and that in consequence he is not in a position to invoke the cited article supra.

There are letters in the record of a date subsequent to the assignment in which plaintiff inquires about defendant's business, and in one of these letters he somewhat insistently asked for the remittance by defendant of amount due on stumpage under the Toomer contract. Another request to remit stumpage was made as late as February 1, 1908, a month less than two days after the date of the assignment on January 3d.

It was plaintiff who advised defendant to buy the Gary mill to the end of sawing the timber that the first assignee had promised to saw under the Toomer contract.

The mill had been put up mainly to cut plaintiff's timber.

Plaintiff accepted the benefit the contract afforded. He must be held bound by it. *Moorman v. Lumber Company*, 113 La. 429, 37 South. 17.

Both plaintiff and defendant offered parol testimony, and the issues took such a turn while the witnesses were testifying that there is scant ground for holding that the verbal testimony should not have been admitted. But even if, technically speaking, parol testimony (and that is not manifest) was not admissible, the defendant having gone into possession of the property, and was invoking under the terms of his contract, parol testimony was admissible to the extent admitted.

Now as to damages: The defendant in effect concedes that his proof is not in all respects as complete as it should have been.

He asks, after allowing damages proven, that his right be reserved him to claim further damages.

Damages *vel non* should not be tried piecemeal.

We, therefore, will reserve to defendant the right to claim and prove such damages as he may have suffered.

The law and the evidence considered, it is ordered, adjudged, and decreed that plaintiff's demand is rejected and his injunction dissolved in both courts.

It is further ordered, adjudged, and decreed that defendant's right to sue for and recover such damages as he may be entitled to be reserved.

(122 La. 1086)

No. 17,013.

FIDELITY & DEPOSIT CO. OF MARYLAND v. NEELY.

(Supreme Court of Louisiana. Feb. 1, 1909.)

JUDGMENT (§ 570*)—RES JUDICATA.

Where the judgment dismissing an action was rendered pursuant to a compromise, but plaintiff did not understand that he was compromising his claim against one of the defendants, while the other parties understood differently, and such defendant paid to plaintiff a part of the money to be paid under the compromise, the judgment, until set aside in a proper action, was *res judicata* as between plaintiff and such defendant.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1028-1045; Dec. Dig. § 570.*]

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; Edmund Dennis Miller, Judge.

Action by the Fidelity & Deposit Company of Maryland against M. A. Neely. From a judgment for defendant, plaintiff appeals. Affirmed.

Williams & Williams, for appellant. McCoy, Moss & Knox (Wilbur F. Browder, of counsel), for appellee.

PROVOSTY, J. Defendant was sheriff of Logan county, Ky., in the years 1898 to 1901, inclusive, and the plaintiff company was surety on his official bond. In August, 1901, he furnished to plaintiff an indemnity bond of \$25,000, signed by 25 sureties or indemnitors. In February, 1905, the county obtained judgment against the plaintiff company for \$17,617.22 for taxes and penalties which he had failed to collect, and the company at once paid the judgment. A few days thereafter some of the sureties, or indemnitors, on the indemnity bond brought suit to have the indemnity bond annulled, and in the alternative to have the liability thereunder restricted to those of the uncollected taxes which had fallen due subsequently to the date of the bond. What this restricted liability would have amounted to, the record does not show. For the entire year 1901 the uncol-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

lected taxes amounted to \$6,808.23. To that suit the plaintiff company, the defendant, Neely, and the co-sureties or co-indemnitors, were made parties defendant. The company added to its answer in that suit a cross-petition in which it asked for judgment against the indemnitors and Neely for the amount of the said judgment which it had paid, plus sundry other sums, the whole amounting to \$21,353.11. The defendant, Neely, could not be cited in that suit, as he had already removed to this state, but he voluntarily entered his appearance both to the main suit and to the cross-petition, and waived service of the two petitions. The suit terminated in a compromise, to evidence which the following instrument was executed:

"(Triplicate.)

"Received of J. L. Simmons, R. W. Newman, T. L. Hardy, Wilbur F. Browder, M. E. Alderson, T. J. Woodward, Chas. E. Bates, administrator of A. E. Griffith, deceased, M. A. Neely, W. M. Blakey, representing the heirs at law of Geo. T. Blakey, deceased, G. W. Richardson, J. S. Smith, M. L. Fugate, I. G. Mason, J. W. Dickason, Virgil Bailey, G. Wash Bailey, Hiram Bailey, E. S. Cooper, J. C. Browder, H. Brister, D. B. Hardy, & J. W. Simmons, the sum of eight thousand dollars (\$8,000.00) in full settlement, discharge and satisfaction of the claim or claims and demands sued on by the Fidelity & Deposit Company of Maryland in equity action #3,638 now pending in the Logan circuit court at Russellville, Ky., wherein I. G. Mason is plaintiff and Fidelity & Deposit Company of Maryland et al. are defendants. The claim, or claims sued on in said action are set out in the answer and cross-petition of the said Fidelity & Deposit Company of Maryland filed in said equitable action and all of said claims arise out of the indemnifying bond executed to the Fidelity & Deposit Company of Maryland of the 3rd day of August, 1901, by the parties to whom this receipt is now executed in connection with A. S. Davis, Sam Hooker, Joe Hardy and J. I. Cooper. The last four named obligors do not pay any part of the amount hereinabove enumerated as having paid same. The action of I. G. Mason, Plaintiff, v. Fidelity & Deposit Company of Maryland et al., Defendants, above referred to is to be dismissed settled at cost of plaintiff and the 21 defendants above named as having paid the \$8,000.00.

"Executed in triplicate, this the 18th day of May, 1903.

"Fidelity & Deposit Company of Maryland,
 "[Signed] By Fairleigh, Straus & Fairleigh,
 "Attorneys."

One of the originals of this instrument was transmitted to the home office of the plaintiff company.

Thereafter, on the joint motion of Neely and the indemnitors, and on presentation of said document to the court, judgment was rendered dismissing the main suit and also the cross-demand of the plaintiff company as having been settled in full. That judgment is to-day in full force and effect.

In the instant suit, the plaintiff company demands of the defendant the same \$17,817.22 demanded in that suit. The defendant pleads the said compromise in bar, and the said judgment as *res judicata*.

The plaintiff company replies that the compromise was with the indemnitors alone, and not with the defendant, Neely; that the

attorney through whom it was made had no authority to compromise with Neely; that the fact of Neely's name having been included in the foregoing receipt was not known until advice to that effect came from the Louisiana counsel employed to bring the present suit.

This replication is borne out by the testimony of the local attorney who represented the plaintiff company in making the compromise and who signed the foregoing instrument, and also by the testimony of the vice president of the plaintiff company, who acted for it in the matter at the home office. On the other hand, the attorney who represented Neely in the suit and who represented Neely and the indemnitors in making the compromise testifies that the compromise was intended to include Neely. The authority of plaintiff's attorney to make the compromise resulted from, and is contained in, an extended correspondence covering a period of over six months between the said local counsel and the plaintiff company. In this correspondence there is nothing said expressly about compromise with Neely, and there are some expressions which might lead one to believe that the plaintiff company was under the impression that the suit was against the indemnitors alone, and that the proposed compromise was to be with them alone. But the plaintiff company and its local attorney could not but have known that Neely was a party to the suit, and that what was proposed to be compromised was the suit, i. e., the entire suit. Again, it would be strange if they should not have noticed that the instrument drawn up to evidence the compromise included Neely; included him not only by name, but by necessary implication as one of the 22 persons who furnished the money for the compromise. As a matter of fact, one-fourth of the sum was contributed by Neely.

We need not, however, pass upon these issues of fact, for, granting that the lawyer who represented the plaintiff company in making the compromise had no authority to compromise with Neely, and granting that he did not understand he was doing so, the fact remains that the person who represented the other parties to the compromise understood differently, and that, as a matter of fact, one-fourth of the money paid by virtue of the compromise was paid by Neely; so that the most that the plaintiff company could say would be that there had been a misunderstanding, and, therefore, no compromise; and the most the plaintiff company could ask would be that the so-called compromise be set aside and things restored to their original position; and this the plaintiff is not asking. In fact, non constat that plaintiff would be willing to restore the status quo ante.

Furthermore, the demand of the plaintiff company against Neely in its cross-petition in the indemnitors' suit having been the same

as in the instant suit, and Neely having put in an appearance to that suit, the judgment in that suit, until set aside in a proper action, must, as a matter of course, be held to be res judicata of the present suit.

Judgment affirmed.

(112 La. 1040)

No. 17,183.

TELL v. SENAC et al.

(Supreme Court of Louisiana. Feb. 1, 1909.)

1. ABSENTEES (§ 5*)—CURATOR AD HOC.

In partition proceedings, the curator ad hoc has the authority of a general curator. He represents the absentee if alive, and represents the interest of the absentee in the property if he has departed this life.

[Ed. Note.—For other cases, see Absentees, Cent. Dig. §§ 5, 7; Dec. Dig. § 5.*]

2. PARTITION (§ 10*)—NATURE OF PROCEEDINGS.

The proceedings are in rem.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 33; Dec. Dig. § 10.*]

3. ABSENTEES (§§ 2, 7*)—MEANING OF TERM—PARTITION—JURISDICTION.

The court had jurisdiction. The proceedings are not null and void. The purchasers were innocent third persons.

[Ed. Note.—For other cases, see Absentees, Cent. Dig. §§ 1, 14; Dec. Dig. §§ 2, 7.*]

4. CORPORATIONS (§ 122*)—JUDICIAL SALE OF STOCK—EFFECT—LIABILITY OF CORPORATION.

The company in which the de cujus had stock was not responsible for the stock, and could not be sued for its delivery, as it was not in possession of the stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 535; Dec. Dig. § 122.*]

Land, J., dissenting.

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Thomas C. W. Ellis, Judge.

Action by Catherine Tell against Emile Senac and others. Judgment for defendants, and plaintiff appeals. Affirmed.

See, also, 121 La. 534, 46 South. 618.

Benjamin Rice Forman, for appellant. Buck, Walshe & Buck, for appellee New Orleans Gaslight Co.

BREAUX, C. J. The case is before us on appeal from a judgment dismissing the suit on the ground pleaded; that plaintiff has no ground of action.

The suit was instituted to the end of annulling a judgment of partition and setting aside proceedings in partition.

The facts of the case are: That Dominique Verges departed this life testate in the year 1887.

His will was probated in 1888.

He left a piece of real estate and 50 shares of stock of the New Orleans Gaslight Company to be divided in equal parts among six legatees, five residing in France, and one,

Marie Verges, wife of David Klein, an absentee.

They went into possession under a judgment of the civil district court for the city.

When the suit for a partition was brought the late Mrs. Klein, one of the heirs, was dead. Plaintiff is her sole heir. Mrs. Klein, the mother, had been a resident of Galveston, Tex., to the date of her death, and plaintiff, Mrs. Tell, the daughter, was a resident of the same place.

Mr. Jerome Meunier, an attorney at law, was appointed to represent the alleged absent defendant (in the partition proceedings assailed), the said Marie Verges (Mrs. Klein), who had departed this life.

Mr. G. Tujaque, who was absentee's agent to accept the legacy, wrote to and addressed his letter to Mrs. Klein at Galveston, as stated by him as a witness in the partition proceedings. He received no answer. He did not know where she was.

This suit by Mrs. Tell, plaintiff, was filed over a year after the judgment for a partition had been rendered, and the real estate and shares of the gas stock sold to third persons at public auction. The stock was transferred, and the title to the property was delivered to the buyer.

She prays to be decreed the owner of an undivided one-quarter of the property mentioned in the inventory of Dominique Verges, referred to as having been bequeathed to Marie Verges, the wife of David Klein, and, in the alternative:

"If it be proved that the said Marie Verges left by will property of which she died possessed to any other person, that, in that event, your petitioner be decreed to be her forced heir, and as such entitled to one-third of the said one-fourth of said succession, and the said judgment decreeing a sale of said property of February 8, 1906, be decreed null and void."

The petitioner must have had some cause to think that her mother had left a will, and that in that event her share by the terms of the will was one-third; hence the prayer in the alternative.

Joseph C. Boylan, in possession of the land, and the gas company, were cited as defendants.

We find no difficulty in holding:

An absentee who is a joint owner of real property may be made a party in partition of the property by substituted service.

The curator ad hoc represented the absentee. This does not directly give rise to the controversy here.

Plaintiff seeks to treat the judgment and the sale in these partition proceedings as absolute nullities on the ground that the absentee was dead at the date that the judgment was rendered and the sale made.

Partition proceedings are in rem. *Laughlin v. Ice Company*, 35 La. Ann. 1184; *Wunstel v. Landry*, 39 La. Ann. 312, 1 South. 893.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The decisions of the federal Supreme Court are cited in support of plaintiff's contention that the substituted service was void.

The leading case is *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565.

The proceedings in the just cited case were in personam, and for that reason the decision is not pertinent.

The other decisions cited are equally in personam, in great part at least.

Proceedings for a partition are special under the laws of this state, and jurisprudence must necessarily be of that character.

The curator represents the absentee as relates to the real estate as fully as if he were a general curator.

In the first article of the Code of Practice on the subject, provision is made for the appointment of a general curator, and in the article following a special curator is intrusted with similar functions to the extent that he is a special curator. Code Prac. Arts. 963, 964.

The Civil Code contains similar provisions to the end that the absentee be represented on his return or on his claiming the property, or, in the event of his never returning, because of his death or for any other cause. Rev. Civ. Code, art. 47.

The curator continues to represent the property after the death of the absent owner until the heir asks to be placed in provisional possession contradictorily with the curator. The will also is probated contradictorily with the curator. Civ. Code, art. 62. The dissolution of the community also is contradictorily with him, if there is such a community. Civ. Code, arts. 65, 68, 72, 73.

The curators may bring an action in their own names without having to mention the names of the heirs they represent because it is often uncertain whether such heirs exist and their names are generally unknown.

The word "absentee" has a broad meaning. One of the meanings is according to 1 Toulhier, p. 247, No. 381:

"Those of whom little or nothing may be known. They may be dead."

The special curator, having the same authority as the general curator under the articles cited, represents the absentee's interests in property, although his principal, the absentee, is dead.

We considered for a moment the practical effect of partition proceedings.

The property is sold at public auction. The proceedings are regular. No one knows that the absentee is dead. An innocent third person buys the property and pays the price.

He is entitled to protection under the law which provides that he has no reason to be concerned about irregularities not apparent.

Despite this, were we to maintain plaintiff in his demand, the absentee would be privileged to consider all that has been done in his name as absolutely null.

This cannot be done. We will go one step further, and hold that, while she may claim

from her coheirs her share, she has no right to the property sold to effect a partition.

This was substantially the view expressed in *Crawford v. Binlon*, 46 La. Ann. 1261, 15 South. 693; *Hansell v. Hansell*, 44 La. Ann. 549, 10 South. 941; *Covas v. Bertoulin*, 44 La. Ann. 683, 11 South. 143; *Win v. Dickson*, 15 La. Ann. 273.

If any other view were taken, it would become necessary in partition proceedings to prove that the absentee is not dead.

In a decision of this court rendered years ago, the court of probates appointed a curator ad hoc. Suit for a partition was brought contradictorily with him. The property was sold. The sale was attacked on the ground that the necessary parties were not before the court in the partition proceedings. The court held that the proceedings were not absolutely null, maintained the plea of prescription, a decision that could not have been rendered if some effect had not been given to the appointment, although the curator ad hoc was not appointed to represent one branch of the absent heirs eo nomine.

We agree with our learned Brother of the district court in the following from his thoroughly prepared opinion, copied by appellee in his brief:

"Plaintiff has no right to claim the property which was sold to effect a partition"—citing Rev. Civ. Code, art. 56; Code Prac. art. 111; Rev. Civ. Code, arts. 75, 76, 77, 1315, 1399; *Crawford v. Binlon*, 46 La. Ann. 1261, 15 South. 693; *Hansell v. Hansell*, 44 La. Ann. 549, 10 South. 941; *Covas v. Bertoulin*, 44 La. Ann. 683, 11 South. 143; *Win v. Dickson*, 15 La. Ann. 273—and in the further statement, in substance, she may have the right of an action against her coheirs.

The French commentator has expressed similar opinions. There is a corresponding article in our Code to article 840 of the French Code. See 10 Laurent, p. 280, verbiis "Du Partage."

It is to the interest of the state that property be owned by those who take a sufficient interest to look after it themselves or appoint agents to represent them.

For any owner to remain indifferent while property is of little value, allow it to pass into other hands in partition proceedings, and, after it is discovered that it has enhanced in value, sue for the property as if no disposition whatever had been made of it, ignoring the price that has been paid for it, are not entirely right things to do.

The heir and joint owner knows, or should be held to know, that his coheir or joint owner has a right to a partition and that the state can enact laws the effect of which will require owners to pay some little attention to their property within her limits.

As relates to the gas stock sold at the sale for a partition, the gas company, made defendant, and from whom plaintiff asks

delivery and restitution of this stock, is not the owner; therefore cannot be condemned as if it were the owner.

For reasons assigned, the judgment of the district court is affirmed.

LAND, J. (dissenting). The plaintiff sues as forced heir of her deceased mother, Mrs. Marie Klein, born Verges, late of Galveston, Tex., to annul a judgment of partition rendered in the suit of Emile Senac et al. v. Marie Verges, Wife of David Klein, civil district court, parish of Orleans, in February, 1905, and to recover the undivided sixth interest of the said Mrs. Marie Klein in and to certain real estate and shares of stock of the New Orleans Gaslight Company sold pursuant to said judgment for the purposes of effecting a partition between the universal legatees of Dominique Verges. The grounds of nullity are that Mrs. Klein died in April, 1901, more than three years before the institution of the suit for a partition, and that the plaintiff as her heir was never cited or made a party to the proceedings.

The defendants herein are the colegatees of Mrs. Klein, who were the plaintiffs in the partition suit, Joseph C. Boylan, who is alleged to be in possession as owner of the real estate sold under the decree of partition, and the New Orleans Gaslight Company.

All of the defendants filed an exception of no cause of action. The gaslight company and Boylan further excepted that the suit was premature, that there was an improper cumulation of actions, and that there was an improper joinder of parties defendant.

On the trial of the exceptions the record and evidence in the partition suit were received in evidence to prove that such proceedings were had.

The judge below sustained the exception of no cause of action and dismissed the suit. Plaintiff has appealed.

It appears that on December 19, 1904, more than three years after the death of Mrs. Marie Klein, Emile Senac et al. instituted a suit for a partition against Mrs. David Klein, as an absentee, formerly residing in the city of Galveston, Tex., but whose present whereabouts were unknown to the petitioners, and on their prayer a curator ad hoc was appointed by the court to represent the "absent defendant Mrs. Marie Verges, wife of David Klein." On December 19, 1904, the curator ad hoc answered that he had no objection to the plaintiffs' petition. Judgment was rendered as prayed for on February 2, 1905, and was signed on February 8, 1905.

On the trial the agent of the plaintiffs in the suit testified that he had written to Mrs. Klein at Galveston, Tex., but had received no answer; that Mrs. Klein had always resided in Texas, and was in Texas, when last heard from. It does not appear when the agent wrote to Mrs. Klein. The curator ad hoc did not testify as to what steps, if any,

he had taken to communicate with the absentee.

The partition suit was instituted against Mrs. Klein as a living person residing in an adjoining state, and a curator ad hoc was appointed to represent her as such.

In the case of Garrard, Ex'r, v. Reed, 5 Rob. (La.) 508, the court said:

"No judicial proceeding can be carried on in the name of a dead man, nor can the property he leaves be taken from his heirs or legal representatives without proceeding against them as directed by law."

In Succession of Pickett et al. v. Pickett et al., 41 La. Ann. 885, 6 South. 655, the court said:

"No judicial proceeding can be carried on in the name of a deceased person. No valid judgment can be rendered for or against him."

See, also, Railroad Co. v. Bosworth, 8 La. Ann. 80; Norton v. Jamison, 23 La. Ann. 102; McCloskey, Bigley & Co. v. Wingfield & Bridges, 29 La. Ann. 141; Edwards v. Whited, 29 La. Ann. 647; Succession of Hoggatt, 36 La. Ann. 337.

It is a self-evident proposition that a dead person can neither sue nor be sued.

"If one against whom there was a cause of action die, leaving one heir only, the suit shall be carried on against such heir as it would have been against the deceased. If the suit had already been brought against the deceased, and he had not answered, it shall not be interrupted, but shall be continued against the heir by a mere citation or notice," etc. Code Prac. art. 120.

Where a defendant dies, a curator ad hoc cannot be appointed to represent the interests of such defendant, but the heir must be cited. McMicken v. Smith, 5 Mart. (N. S.) 530.

In a suit for a partition "the coheirs or their representatives must be cited, in order that the partition may be ordered, and the form thereof determined, if there should be any dispute in this respect." Civ. Code, art. 1329.

At the date of the institution of the suit Mrs. Klein's succession had been opened by her death, and was "vacant," as no one claimed it, and the heirs were unknown. Civ. Code, art. 1095. In such a case the law provides for an administration of the estate by a curator appointed by the probate judge after due notice by publication. Such a curator is required to take an oath and give bond, and is essentially an administrator of the decedent's estate. The law provides that all actions which could have been brought against the deceased shall be brought against the curator appointed by the judge. Civ. Code, art. 1113.

Other articles of the Civil Code provide for the curatorship of living absentees; that is, of persons possessed of property within the state, who are absent or reside out of the state, without having appointed some one to take care of their estate. A curator of this kind must cause a good and faithful invento-

ry to be made, and must take an oath and give security. Civ. Code, art. 49. Such a curator has no other power than that of administering the estate of the absentee, and is subject to the obligations of a tutor or guardian. So long as his curatorship continues, all suits in which the absentee is interested must be prosecuted by or against the curator. The curatorship terminates when the absentee appoints an attorney in fact to administer his estate, or when after five years, without hearing of the absentee, his heirs cause themselves to be put provisionally in possession of his estate conformably with the law. Articles 50, 51, 52.

A curator ad hoc is appointed for the special purpose of representing the defendant in a particular suit. Article 56 of the Civil Code reads:

"If a suit be instituted against an absentee who has no known agent in the state or for the administration of whose property no curator has been appointed, the judge before whom the suit is pending shall appoint a curator ad hoc to defend the absentee in the suit."

A curator ad hoc may be appointed to defend unrepresented minors and absent persons. Code Prac. arts. 116, 964. In such a case the citation is addressed to the curator ad hoc as representing the minor or absent person, and is served on him in person or left at his domicile. Code Prac. art. 195. The absentee or minor is thus cited and brought into court through the curator ad hoc. As citation is indispensable, and as there can be no real citation of a person residing out of the state, our Codes have provided for a fictitious citation in the place of a real one, and the formalities required by law must be strictly observed. McDonald v. Vaughan, 13 La. Ann. 406. The curator ad hoc of a minor or absentee made a defendant in a suit represents the person sued, and not the property seized or within the jurisdiction of the court. No curator ad bona can be appointed in this state. Code Prac. art. 968.

A curator ad hoc is intended by law to represent the absent defendant and to protect his interests. The powers of a curator ad hoc must be strictly limited to the performance of acts such as tend to the defense of the right and interests of the absentee whom he represents. 1 Hennen's Digest, pp. 4, 5. It follows that a curator ad hoc can stand in judgment only for the particular defendant whom he was appointed to represent in the suit, and cannot possibly represent strangers to the litigation or dead persons. The theory of our law is that the curator ad hoc will communicate with the absentee and give him notice of the pendency of the suit. Code Prac. art. 260. In all kinds of judicial proceedings some kind of notice must be given to parties in interest. In proceedings in rem the Code of Practice requires notice by publication, and, if the ab-

sent owner does not appear, the plaintiff may require that an advocate be appointed to defend him. Articles 290-294.

In the case at bar no notice of any kind was given to the absent heir or heirs of the deceased. The plaintiff cannot be deprived of her property without due process of law, which necessarily implies notice and an opportunity to be heard.

The judgment below is predicated on three propositions, to wit:

(1) That a partition suit may be brought against a deceased coheir.

(2) That a curator ad hoc may be appointed to represent a deceased coheir.

(3) That a curator so appointed represents the interest of the heirs in the property.

The articles of the Civil Code and of the Code of Practice and the authorities which have been cited demonstrate, in my opinion, that the above propositions are unfounded in law, and, if recognized, would deprive the plaintiff of her property without due process of law, in plain violation of her right under the Constitution of the United States and of the state of Louisiana.

Arguments ab inconvenienti from the standpoint of the purchaser at a judicial sale can have but little weight in a case of this kind. The real owner of the property has a prior right, which cannot be divested by judicial proceedings without citation or notice. A decree absolutely void can afford no protection to the purchaser at a judicial sale. In the case at bar there was in law no partition suit and judgment for want of a defendant in esse. Where the law requires personal citation, the fact of the existence of the defendant is jurisdictional. The converse of the proposition that a dead person can neither sue nor be sued is that a living person cannot be judicially proceeded against as if dead. Scott v. McNeal, 154 U. S. 84, 14 Sup. Ct. 1108, 38 L. Ed. 396; Burns v. Van Loan, 29 La. Ann. 560. Such proceedings are void ab initio even as to third persons. Id.

I therefore dissent.

(122 La. 1046)

No. 17,152.

KENT v. DAVIS BROS. LUMBER CO.,
Limited, et al.

(Supreme Court of Louisiana. Jan. 18, 1909.
Rehearing Denied Feb. 15, 1909.)

1. LOGS AND LOGGING (§ 3*) — CONTRACTS — ACCEPTANCE.

The instrument signed by Kent, the plaintiff, and J. M. & V. M. Davis, defendant, contains (1) a written proposition from Kent to sell to J. M. & V. M. Davis all the pine trees of a designated size and on particular tracts of land, on terms and conditions specified; (2) an agreement by Kent to keep this proposition open for acceptance for 60 days. Assuming that a consideration of some kind was necessary to bind Kent to hold his offer open for acceptance, a consideration of \$1 was agreed upon and paid for that purpose. Both parties signed the writ-

ten proposition to evidence their consent to this agreement to keep the agreement open. It was agreed that the acceptance of J. M. & V. M. Davis to the proposition to sell should be evidenced by the payment by them to Kent of \$100 within 60 days. This payment was made within the time stipulated, and, when that payment was made, what was before an offer to sell became a closed contract. Having accomplished its purpose, the consideration of \$1 disappears from the case, and the rights and obligations of parties have to be determined upon the contract so closed. The agreement was not a nullity for the reasons assigned.

[Ed. Note.—For other cases, see *Logs and Logging*, Dec. Dig. § 3.*]

2. LOGS AND LOGGING (§ 3*)—CONTRACTS—CERTAINTY.

The things sold were certain. The price agreed to be paid was certain. The consent of all parties was given to the agreement. J. M. & V. M. Davis are bound absolutely as purchasers, and cannot recede from the agreement by invoking that obligations are subject to a potestative condition.

[Ed. Note.—For other cases, see *Logs and Logging*, Dec. Dig. § 3.*]

3. CONTRACTS (§ 9*)—VALIDITY—CERTAINTY.

There was indefiniteness in some of its "accidental stipulations of the agreement," but they were susceptible of being made definite by timely action.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 9.*]

4. CONTRACTS (§ 261*)—RESCISSION—DEFAULT.

The action as brought is one to declare an agreement a nullity, and cannot be dealt with as an action for rescission. For that purpose placing defendant in default was a prerequisite, and that has not been done.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1174-1180; Dec. Dig. § 261.*]

(Syllabus by the Court.)

Appeal from Fourth Judicial District Court, Parish of Lincoln; Robert Brooks Dawkins, Judge.

Action by Z. T. Kent against the Davis Bros. Lumber Company, Limited, and others. Judgment for plaintiff, and defendants appeal. Reversed.

Stubbs, Russell & Theus, for appellants.
Dormon & Reynolds, for appellee.

Statement of the Case.

NICHOLLS, J. Plaintiff alleges that on or about the 11th day of November, 1899, he entered into a written agreement with J. M. & V. M. Davis, residents of Jackson parish, La., in regard to the sale of all of the pine timber 10 inches in diameter and greater at the stump, growing, standing, and being on the following described land, to wit: N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, E. $\frac{1}{2}$ of S. W. $\frac{1}{4}$, S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$, section 13, and N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, section 24, township 17 N., R. 5 W., La. Mer., situated in Lincoln parish, La., and right of way for railroads, tramroads, and wagon roads over said land, all of which and the terms and conditions of said agreement will more fully appear from

a certified copy of said agreement hereto annexed and made a part hereof to show *rem ipsam* and form basis of this attack.

Petitioner alleged that said written agreement is illegal, null, and void, and should be set aside and canceled on the records of Lincoln parish, La., for the following reasons:

(1) There is no legal or valid consideration.

(2) There is no mutuality of obligation, and said agreement is a nudum pactum.

(3) It contains and is based on a potestative condition entirely dependent on the will of J. M. & V. M. Davis or of their successors, heirs, or assigns.

(4) That in said written agreement petitioner purports to sell unto J. M. & V. M. Davis, and their successors, heirs, and assigns, all of the pine timber 10 inches and greater in diameter situated on said land, and right of way for railroads, tramroads, and wagon roads over said land, for the price and sum of \$1, which is a vile and insignificant price, and is on its face, a fraud, and can form no valid consideration for the sale of said timber.

(5) That further on in said agreement it provides that J. M. & V. M. Davis, or their successors, heirs, and assigns, shall pay unto your petitioner the price of 50 cents per 1,000 feet, board measure, as cut for said timber, which is a vile price and less than one-fourth of the value of said timber, but do not bind or obligate themselves to ever cut same.

(6) That there has been no acceptance of said purported sale or offer to sell on the part of J. M. & V. M. Davis, or their successors, heirs, or assigns, so as to put said timber at their risk, and it is left optional with them whether or not they ever accept it, and that such an agreement is terminable at the will of any of the parties thereto.

(7) That there is no certain or fixed price.

(8) That said agreement is a fraudulent attempt to take advantage of the ignorance and inexperience of your petitioner, in that it is attempted to force him to hold \$3,000 worth of timber for an indefinite length of time at his own risk, without any legal or valid consideration, or any consideration whatever therefor. Your petitioner specially alleges that said agreement is iniquitous and unconscionable, and contrary to public policy and good morals.

Petitioner alleges in the alternative that, if the court should not annul and set aside said agreement for any of the above reasons, then, and in that event, said agreement is null and void for lesion beyond moiety, as the timber described in said agreement was and is well worth the sum of \$3 per 1,000 feet at the stump, and that the entire lot of said timber is worth the sum of \$3,000.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

That the firm of Davis Bros. Lumber Company, Limited, a commercial corporation domiciled and doing business at Ansley, Jackson parish, La., with J. M. Davis as president, are claiming to own said timber under and by virtue of a sale by J. M. & V. M. Davis to them, and are with said J. M. and V. M. Davis necessary parties to this suit.

That J. M. and V. M. Davis paid to him the sums of \$1 and \$100 mentioned in said agreement, and that your petitioner has, through his attorney, J. E. Reynolds, on July 23, 1907, made a legal tender of \$101 aggregate amount of said \$1 and \$100, to Davis Lumber Company, Limited, by making said tender to J. M. Davis, president of said company, at its domicile, in the presence of two witnesses, and demanded a rescission of said agreement, which tender and rescission was refused.

That said illegal agreement has been recorded in Book Q of Conveyances in and for Lincoln parish, La., on page 261, and that said recorded agreement casts a shadow upon your petitioner's title to said timber, and prevents him from selling same, and that he is entitled to have said agreement rescinded and set aside and canceled on the records.

Petitioner alleges in the alternative, that if the court should not hold said agreement to be null and void, and should not rescind same for any of the above reasons, then and in that event he alleges that said agreement is a mere solicitation or agreement to sell, and that said J. M. & V. M. Davis paid to your petitioner the sum of \$1 and \$100 as earnest money, and that petitioner is at liberty to recede from said agreement by returning to said J. M. & V. M. Davis or their successors, Davis Bros. Lumber Company, Limited, double the amount so paid to him. He alleges that he has made on July 23, 1907, a legal tender to Davis Bros. Lumber Company, Limited, through his attorney, J. E. Reynolds, by making said tender to J. M. Davis, president of said company, at its domicile, in the presence of two witnesses, of the sum of \$402, and demanded the rescission of said agreement, which tender and demand were refused.

In view of the premises, petitioner prayed for service and citation hereof and according to law upon Davis Bros. Lumber Company, Limited, and upon J. M. Davis, and that petitioner have final judgment against Davis Bros. Lumber Company, Limited, and J. M. & V. M. Davis, decreeing that the agreement, a certified copy of which he annexed and made a part hereof, and attached, be annulled, rescinded, and set aside and canceled on the records of Lincoln parish, La., for the reasons first alleged, and that plaintiff pay to defendant the sum of \$101.

Petitioner prayed, in the alternative, that, if the court should not annul and rescind said agreement for any of said reasons, then he prayed that said agreement be annulled, rescinded, and set aside for lesion beyond moiety.

He further prayed, in the alternative, that if the court should not hold said agreement to be null and void, and should not rescind same for any of the above and foregoing reasons, then and in that event that said agreement be decreed to be in the nature of a solicitation or agreement to sell, with a giving of earnest, and that same be rescinded, annulled, set aside, and canceled, and that plaintiff pay to the defendant the sum of \$202 and prayed for costs, all orders and decrees necessary, and for general relief.

On the 30th of August, 1907, the Davis Bros. Lumber Company and V. M. Davis appeared, declaring that John M. Davis, a resident of Arkansas, was a necessary party to the suit; that he and V. M. Davis constituted the firm or partnership which purchased the timber in controversy; that the J. M. Davis, on whom service has been made under the prayer of plaintiff's petition, was not then and never had been a member of the partnership or firm of J. M. & V. M. Davis, and was no party to said timber purchase. They prayed that plaintiff be ordered to make John M. Davis a party to the suit.

The plaintiff filed an amended and supplemental petition by alleging that J. M. Davis, of the firm of J. M. & V. M. Davis, was a resident of Arkansas, instead of Jackson parish. Reiterating the allegations and prayers of the original petition, except in so far as might be changed by the amended and supplemental petition, he alleged that it was necessary that a curator ad hoc be appointed to represent him in the suit. He prayed that a curator ad hoc be appointed to represent the said John M. Davis in the suit, that citation be made upon the Davis Bros. Lumber Company, and that there be judgment in his favor as prayed for in the original petition.

The defendants Davis Bros. Lumber Company, Limited, John M. Davis, and V. M. Davis appeared to plead, and pleaded the prescription of four years in bar of plaintiff's action to annul the contract. They further alleged that, after eliminating the action of nullity for lesion beyond moiety against which the prescription of four years was pleaded, plaintiff's petition disclosed no cause of action. They prayed that their pleas of prescription and their exception of no cause of action be sustained, and the suit be dismissed.

The defendants answered under reservation of their exceptions and pleas of prescription. After pleading the general issue, they admitted the execution of the timber deed attack-

ed (of which they averred the legality and regularity). They averred that defendant the Davis Bros. Lumber Company, Limited, had acquired all of the rights of J. M. & V. M. Davis in and to said timber, and that Davis Bros. Lumber Company, Limited, was then claiming the ownership thereof.

They averred that immediately after the purchase of said timber by the said J. M. & V. M. Davis, they went into actual possession of same, and caused it to be returned for assessment with their other property, and regularly paid the taxes thereon, and exercised full dominion and control over the same as absolute owners until the transfer to your defendant, and immediately thereafter your defendant took actual possession of said timber, and has since then exercised full, complete, and perfect dominion and control over same, and has caused said timber to be regularly assessed with its other property, and paid the taxes thereon, and fully accepted the transfer by its purchase from J. M. & V. M. Davis, who fully accepted said purchase by executing the deed, and paying the portion of the purchase price stipulated therein, and that said J. M. & V. M. Davis and your defendant were and are fully bound by all of the terms, conditions and stipulations contained in the above-alleged timber deed; and, in addition to having accepted same as above alleged, your defendant did on the — day of —, 1907, execute a full and perfect acceptance of all of the lands and timber owned by it, including the above-described timber, and fully bound and obligated itself to carry out all the terms, stipulations, and conditions set forth in the various purchases by itself and its authors as is more fully shown by notarial act passed before Charles J. Halen, notary public of the parish of Jackson, state of Louisiana, on said date, and which is duly recorded in the conveyance records of your said parish of Lincoln, and which document was executed and recorded long prior to the institution of this suit.

Defendants, further answering, specially denied that they or either of them practiced any fraud on the plaintiff, or that the plaintiff is ignorant and incapable of attending to his own affairs. Defendants, therefore, prayed that the demands of the plaintiff be rejected at his costs, and, in the alternative, for judgment against said plaintiff for the full sum of \$202, the amount of alleged tender. Defendants prayed for all other needful orders and decrees, and for general relief.

The district court rendered judgment in favor of the plaintiff and against the defendants, annulling and setting aside the agreement made and entered into between said Z. T. Kent and said J. M. Davis as to all the pine timber of 10 inches and greater in diameter at the stump, growing, standing, and being on the N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, E. $\frac{1}{2}$ of S. W. $\frac{1}{4}$, S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$, section 13, and

N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, section 24, township 17 N., range 5 W., La. Mer., situated in Lincoln and Bienville parishes, La., dated November 11, 1899, and recorded in Book Q of Conveyances in and for Lincoln parish, La., on page 281, and that same be canceled on said record, and that plaintiff, Z. T. Kent, be decreed to be the owner of the above-described timber.

It further decreed that there be judgment in favor of the Davis Bros. Lumber Company, Limited, against the said Z. T. Kent for the sum of \$101, with 5 per cent. interest thereon from date hereof. All costs of this suit to be paid by defendants.

The defendants have appealed.

Opinion.

Plaintiff's counsel in their brief state that:

"The prescription of four years pleaded against this action, in so far as it seeks to annul the agreement for lesion for moiety, was not contested by him, and was either sustained by the court or that he himself took a voluntary nonsuit to that part of the petition; that, at any rate, the question of lesion beyond moiety was eliminated from the suit, and is not now contested."

The agreement referred to in plaintiff's petition reads as follows:

"This contract and agreement made and entered into this the 11th day of November, 1899, by and between Z. T. Kent, party of the first part, and J. M. and V. M. Davis, party of the second part, witnesseth: That the party of the first part being the owner in fee simple of the following land situated in the parish of Lincoln, and state of Louisiana, to wit:

"N. E. of N. W. $\frac{1}{4}$ and N. W. of S. E. Sec. 13 T. 17. R. 5; S. W. S. W. Sec. 13; S. E. of S. W. sec. 13, T. 17. R. 5; N. W. N. W. Sec. 24 T. 17. R. 5—Bienville parish, has this day, for and in consideration of the sum of one dollar paid to the party of the first part by the party of the second part, the receipt of which is hereby acknowledged, granted, bargained, sold and conveyed, and by these presents does hereby grant, bargain, sell and convey unto the party of the second part and unto its successors, heirs and assigns all the pine timber of ten inches and greater in the diameter at the stump growing, standing and being on said land, for the price of fifty cents per thousand feet, board measure, payable monthly at the end of each month as same shall be cut and removed. That, for the purpose of felling, cutting and removing said timber from said lands, the party of the second part, their heirs and assigns, are to have possession of said land, and the right to cut out and construct roads and tramways over and through the same (field clearing and other improvements now on said land not to be interfered with or encroached upon, however except by special agreement) and the right to use the same for the removal of timber which they may purchase on land adjoining and beyond that described herein, and to have free ingress and egress for their employes, teams and vehicles, into, upon and off the same, for the period of — years from this date, at the end of which time this contract is to be void as to future operations thereunder.

"Be it further agreed, that if the said J. M. and V. M. Davis, party of the second part, pay unto Z. T. Kent, party of the first part, the sum of \$100 within sixty days, or less from the above date, this contract shall be in full force and

effect; otherwise, it shall be void. Said \$100 if paid to apply as payment on timber when cut.

"Z. T. Kent.
"J. M. Davis.
"V. M. Davis.

"Witness:
"Wm. Pusca."

Plaintiff's counsel in their brief say:

"It will be seen that 50 cents per 1,000 payable monthly at the end of each month as the same shall be cut and removed is only an incident in the contract for which the \$1 is the consideration, and is not the consideration of the contract. Defendants do not bind themselves to cut and remove the timber; on the contrary, they carefully provide that, after a lapse of blank years, the contract is to be void as to future operations thereunder. In other words, if for any cause they should in the future cut and remove the timber, they could say to Kent: 'We do not desire to cut and remove the timber, so the contract is at an end, and you can do what you please with it.' But there is no time fixed within which Kent can put an end to the contract. It is perfectly clear that the only agreement or contract made by J. M. & V. M. Davis is to pay for the timber monthly as it is cut and removed (if they cut it at all), and that that is the only obligation they assume. If they had thought they had made a contract to cut and remove the timber at 50 cents per 1,000, they would have known that was a sufficient consideration for the contract and would not have put in the consideration of \$1. The last clause of the contract is certainly peculiar, and reads like an effort to deceive Kent into believing that they had obligated themselves to cut and remove the timber.

"What contract is it which the clause says shall have full force and effect? Manifestly the contract to pay 50 cents per 1,000 monthly at the end of each month as the timber is cut and removed, but there is no contract to cut and remove the timber, and no such contract was intended by the Davises. The \$100 was evidently paid for the purpose of trying to bind Kent to the contract by making this insignificant payment. The district judge very properly said that \$100 was no consideration for holding about \$2,000 worth of timber for eight years or for an indefinite time. The instrument is null either as a contract or as a sale for want of legal consideration. It is also null for want of mutuality of obligation. It is null for want of mutuality of obligation, for it contains a potestative condition entirely dependent on the will of J. M. & V. M. Davis. It is left optional with them whether or not they ever cut and remove the timber. It is clear from the language of the act that the timber standing on the land at the time of the instrument is not sold and delivered to J. M. & V. M. Davis, so as to force them to pay for all the timber standing on the land at the date of the instrument, but that they will only pay for so much timber as they cut and remove. If the timber should be destroyed by storm, forest fires, or by insects as is frequently the case, they would not cut and remove the timber, and no certain thing would be sold, and it might be that a third or a half of the timber might thus be destroyed, and the thing sold would be uncertain. *Clark v. Comford*, 45 La. Ann. 511, 12 South. 763.

"There was no consent. It is clear from the language of the instrument that plaintiff was desiring and intending to sell all of the pine trees standing on the land 10 inches and greater for price of 50 cents per 1,000, while it is equally clear that the vendees only intended to pay for such timber as they might cut and remove, and, if they never cut any by reason of the timbers being destroyed, nor saw fit to cut any, they would not buy the timber and pay for it. They did not bind themselves to do so, and plaintiff

could not force them to do so under the terms of this artfully worded agreement. Plaintiff had one object and defendants quite another.

"There was no certain or serious price. The \$1 consideration was no serious price and the price of 50 cents per 1,000 feet when cut was not certain, because it was impossible to know what amount of timber might be cut and removed, if any, and if none of it was cut and removed, or if it was destroyed, there would be nothing sold and consequently no price, or, if different portions of it would be destroyed, there would be different quantities of timber cut, and therefore a different price. There was no certain thing, and therefore no certain price. The price must be serious, and, if it is out of all proportion, it invalidates the same. *D'Orgenoy v. Droz*, 13 La. 382; *Prude v. Morris*, 38 La. Ann. 767; *Lamotte v. Lamotte*, 43 La. Ann. 572, 19 South. 570.

"The instrument cannot be considered as evidencing a sale, for the reason that the timber has never been put at the risk of the pretended purchaser.

"As soon as the contract of sale is completed, the thing sold is at the risk of the buyer. *Civ. Code*, art. 2467.

"It is the very essence of a sale that it divest the ownership of the seller in the thing sold and transfer it in full ownership to the buyer. *Herold v. Stockwell*, 32 La. Ann. 952; *Allen, Nugent & Co. v. Buisson*, 35 La. Ann. 109; *Gumbel & Co. v. Beer*, 36 La. Ann. 493, 494. It is not pretended by any one that this timber was or is at the risk of the purchaser; the contract being carefully worded so that the timber pretending to be transferred to them could not be considered at their risk. The language of the act is, 'Granted, bargained, sold and conveyed unto the party of the second part,' etc., but the word 'deliver' is carefully omitted. Then follow the words:

"'For the price of fifty cents per thousand feet board measure payable monthly as the same shall be cut and removed.'

"It cannot be disputed that the ownership of the timber remains in Kent, and, if it shall be destroyed, it would be his loss, and, if this be the case, no sale of the timber has ever been perfected or completed, and, after waiting eight years, he is certainly justified in demanding that such an iniquitous contract be declared a nullity, and in demanding that the registry of the same be erased from the records of Lincoln parish. Such contracts are terminable at the will of any of the parties thereto. *Landache v. Sarpy*, 37 La. Ann. 837."

Plaintiff refers the court to *Civ. Code*, art. 2084; *Martel v. Jennings-Heywood Oil Syndicate*, 114 La. 351, 38 South. 253; *Murray et al. v. Barnhart*, 117 La. 1023, 42 South. 489; *Jennings-Heywood Oil Syndicate v. Housiere-Latreille Oil Co.*, 119 La. 836 et seq., 44 South. 481; *Blackshear v. Hood*, 120 La. 966, 45 South. 957; *Union Sawmill Co. et al. v. Lake Lumber Co.*, 120 La. 106, 44 South. 1000; *Thompson v. Union Sawmill*, 121 La. 318, 46 South. 341; *Campbell v. Lambert & Co.*, 36 La. Ann. 37, 51 Am. Rep. 1; and *Landache v. Sarpy*, 37 La. Ann. 837.

Defendant's counsel in their brief say that:

"There is no pretense that at the date of the contract 50 cents per 1,000 feet or the consideration stated in the contract was not full value for the timber conveyed, and the evidence nowhere intimates that there was any fraud or deception practiced. They declare that they attached no importance to the consideration of \$1

expressed in the contract for the payment of \$100 additional thereto perfected the contract, and then and there became a perfectly legal and subsisting contract just as in the Shepard Case, 121 La. 1011, 46 South. 999.

"They say the sum of \$101 was paid for the right to cut and remove timber from the lands described, with an obligation to pay any sum in excess of the amount that the timber actually cut would amount to at 50 cents per 1,000 feet, and 19 Am. & Eng. Ency. of Law, p. 524, declares that the sale of standing timber is usually made at a given price per 1,000 feet exactly as this sale was made, except that there has been a portion of the price paid in cash.

"They urge that the present is identical with the Shepard Case, and should be governed and controlled by it. They maintain that the case of Thompson v. Union Sawmill was passed on upon a different state of facts and upon different questions of law.

"They refer the court to *Globe Lumber Co. v. Lockett*, 106 La. 414, 30 South. 902; *Jennings-Heywood Company Case*, 119 La. 793, 44 South. 481; *St. Louis Cypress Co. v. Thibodeaux*, 120 La. 834, 45 South. 742; *Shepherd v. Davis Bros. Co., Ltd.*, 121 La. 1011, 46 South. 999; and *Civ. Code*, art. 2043."

The plaintiff (Kent), the party of the first part, and the defendants J. M. & V. M. Davis (the party of the second part), having both attached those signatures to the instrument of the 11th November, it evidenced an agreement of some kind between the parties. Whether the act so signed evidenced a valid and binding contract between them is a different question. *Civ. Code*, art. 1762.

It evidently did not *ipso facto* bring about a present sale of any kind, for the writing expressly declared that:

"If J. M. and V. M. Davis pay to Z. T. Kent the sum of \$100 within 60 days or less from date then this contract shall be in full force and effect, otherwise it shall be void, said \$100 if paid to apply as payment on timber when cut."

Until this payment of \$100 was made, the instrument remained an offer by the plaintiff to sell the timber thereon referred to on the terms therein declared; the offer being left open to the Davises for acceptance for 60 days, and their acceptance of the offer to be evidenced by the payment by them of \$100 to Kent. *Civ. Code*, art. 1811. The \$1 consideration was obviously inserted in the act by the Davises under the belief that a present fixed consideration of some kind was necessary in order to bind Kent to his obligation of holding his offer open for 60 days.

The parties of the second part paid the \$100, which payment by the terms of the agreement was made the condition upon the happening of which the offer previously made should ripen into a contract. The purpose of this consideration having been accomplished, and the "offer" having merged into a contract, there is no issue before the court as to whether any consideration at all was needed as between Kent and the Davises to hold the former to his open offer, and none as to whether (if one was needed) the

amount agreed upon by the parties was sufficient for that purpose. We have, therefore, to direct our attention to ascertaining whether or not there be in the contract everything needed to give it validity and binding force, for it is upon that instrument that the rights and obligations of the parties have to be determined.

Eliminating for the present from the instrument everything having reference to the \$1 consideration and the later payment of the \$100, the agreement reads that Kent "thereby bargained, sold, and conveyed unto the party of the second part, and unto its successors, heirs, and assigns, all the pine timber of 18 inches and greater in the diameter at the stump, growing, standing, and being on said land (the land having been described) for the price of 50 cents per 1,000 feet board measure, payable monthly at the end of each month.

It will be noticed in this particular agreement that, as written, the time at which the Davises are to commence cutting and removing the timber is not given nor is the time within which it is to be cut and removed, neither is the quantity of timber to be cut any one month fixed. Plaintiff's contention is: That he is unable to compel the defendants either to "specifically perform" any obligation which has been assumed by them nor can he "recover damages" for noncompliance with any obligation on their part. That, as matters stand, the court would be unable to grant him relief of any kind inasmuch as, in order to do so, it would have in reality to make a contract between the parties instead of enforcing one already made. That, while perhaps the court might compel defendants to commence cutting, there would be no authority on its part to fix the quantity of timber they should cut each month, nor to fix the date at which the cutting and removing it should end. That defendants could reply to any attempt made to coerce them that the amount of the timber to be cut in any month being left open, subject to his own will, the court would act arbitrarily should it undertake to order them to cut any particular quantity a month. Plaintiff's contention is that it was not his purpose and intention to enter in a mere executory contract whereby the objects covered by the contract were to remain at his risk and at defendants' will for an indefinite time in the future, but to bring into existence a contract which should at once, on acceptance of its terms and through mere consent operate *ipso facto*, a transfer of the ownership of the things covered by it, and place them immediately at the risk of the other party.

That if the court should adopt defendant's construction of the contract, and hold all the pine trees on the land of the size mentioned in the contract, to be at his risk until cut for an indefinite period, then the consideration of 50 cents per thousand feet for timber to

be cut and as cut would not be a serious consideration, but a vile price. That article 1803 of the Civil Code declares that:

"When one party proposes and the other assents, then the obligation is complete and by virtue of the right, each has impliedly given to the other, either of them may call for the aid of the law to enforce it."

That his inability to successfully call for the enforcement of this agreement, either through specific performance or through damages, establishes the fact that there is no valid contract between the parties, and that it is unconscionable and inequitable. That an agreement whose terms are so indefinite and uncertain as to place the obligee at the mercy and will of the obligor is no contract at all, though it may have the form of one. Plaintiff urges that, although eight years have passed since this agreement was signed, the Davises have not moved a step towards cutting any trees, and have no intention of doing so in the future, unless they think proper, and he is without a remedy to force them to do so. That under article 1762 of the Civil Code a contract must not be confounded with the instrument in writing by which it is evidenced. The contract may subsist, though the written act may for some defect be declared void, and the written act may be good and authentic, although the contract it witnesses be illegal. The contract itself is only void for some cause or defect determined by law.

The Davises undoubtedly gave their consent to an agreement of some kind. Did a valid contract result from that consent? We do not think there was any uncertainty as plaintiff claims there was in the things sold. Article 1886 declares that an obligation must have for its object something determinate at least as to its species. The quantity of a thing may be uncertain, provided it be capable of being ascertained. The things covered by the agreement are all (not a part) the pine trees on the land of the size mentioned. There was no difficulty in ascertaining immediately after the agreement was entered into how many trees of that kind and size there were on the land. The fact that payment of the price was to be made from time to time as trees should be cut would not stand in the way of an examination of the trees on the place with the view of fixing the number. Should there be error in fixing the number, it could be corrected when the trees came to be cut. Such a possible error would not give rise to a ground for claiming the nullity of the agreement for uncertainty. It could not be said in advance that an error would be committed.

It cannot be said that the price is uncertain because of the fact that it might so happen that an estimate made immediately after the agreement as to the number of trees might be erroneous, and therefore from that fact there might arise uncertainty as to the full price which would be ultimately received.

The price was fixed and not uncertain—50 cents per 1,000 feet for all the trees on the land of the size mentioned. Should there be error in the estimate made of the trees, then the price fixed would simply be reduced to conform to the actual facts.

It cannot be said in advance and on the face of the instrument that there was any uncertainty in the quantity sold or the price of the trees, because as a possibility at some future time some of the trees which were on the land of the size mentioned should be thereafter destroyed by fire or storms or insects.

Article 1898 of the Civil Code states that where the consideration of the contract really exists at the time of the contract, but afterwards fails, it will not affect the contract, if all that was intended by the parties be carried into effect at the time. The destruction of property sold after the sale is perfected without the fault of the seller is a case governed by this rule; but (article 1899 declares) if the contract consists of successive obligations to be performed at different times, and the equivalent is not given in advance for the whole, but is either expressly or impliedly promised to be given at some future period, then, if the cause on the contract corresponding to either of the successive obligations should fail, the obligation depending on it will fail also. Thus in leases for 10 years the obligation to pay the yearly rent ceases if the property which is leased should be destroyed.

The contract in this case is one which under the classification of the Civil Code is designated as a "contract to give." If is a contract of that character the obligation to deliver is an object which is particularly specified, it is perfect by the mere consent of the parties. It renders the creditor the owner if it be not delivered, puts the thing at his risk from the date of the obligation, if the contract is one of those which purports a transfer. If, however, the debtor is in default for not having made the delivery, it is at his risk from the time of the default. Article 2458 declares that when goods, produce, or other objects are not sold in lump, but by weight, by bale, or by measure, the sale is not perfect, inasmuch as the things so sold are at the risk of the seller until they be weighed, counted, or measured, but the buyer may require either the delivery of them or damages if there be any in case of non-execution of the contract. If, on the contrary, the goods, produce, or other objects have been sold in a lump, the sale is perfect, although these objects may not have been weighed, counted, or measured.

The contract in this case covered all the pine trees of a certain description standing or being on a designated tract of land. Plaintiff consented to sell not prospectively, but presently, all of those particular trees, and the defendant also consented to buy, not

prospectively, but presently, all of those particular trees.

Not only were the trees covered by the contract so described as to fix their identity, but their identity was further fixed by a description of the place where they were selected. There was no mingling or mixture of those trees with others of a like description. In the brief filed on behalf of the plaintiff it was assumed that under the agreement the trees on the land remained at his risk; that the sale of the trees was held in check by a suspensive condition as the price stipulated is to be paid when and as the trees are cut.

We do not understand these words as containing a "suspensive condition" to a sale and as postponing the creation of a contract of sale until the trees are cut. These words refer not to the creation of a contract, but to the payments to be made under an agreement already agreed to. They do not reach back to the contract itself, but are what is known as "accidental stipulations" in a contract.

What effect this "accidental stipulation" as to payment may have in the future on the obligation of parties we are not called upon to say, as the facts of the case have not taken such shape as to make a decision necessary. It is not presented in this case under such circumstances as to authorize us to declare the contract on the face of the instrument a nullity. If the plaintiff has suffered any injury, so far it has been the result of his own inaction not of the terms of the contract.

This action as brought is one seeking to have a particular contract declared "to be a nullity." We have to deal with it as such, and not as an action for "rescission of a contract."

Before a contract can be "rescinded," the obligor must be placed in default. Plaintiff has not placed defendants in this case in default. The contract involved in this case can be made more definite, but it is not a nullity.

For reasons herein assigned, it is hereby ordered, adjudged, and decreed that the judgment appealed from be, and the same is, annulled, avoided, and reversed. Plaintiff's demand is hereby dismissed without prejudice.

(122 La. 1064)

No. 17,032.

STATE v. RICHARDSON.

(Supreme Court of Louisiana. Nov. 30, 1908.
Rehearing Denied Feb. 15, 1909.)

1. ATTORNEY AND CLIENT (§ 44*)—CONTRACTS WITH CLIENT—VALIDITY—MISCONDUCT OF ATTORNEY—SUSPENSION.

There was a want of sufficient consideration in a transaction, which resulted in the transfer of property.

[Ed. Note.—For other cases, see Attorney and Client, Dec. Dig. § 44.*]

2. DIVORCE (§ 56*)—EVIDENCE—COLLUSION.

The evidence produced assisted in establishing facts of a date preceding the suit, and facilitated the wife in obtaining her divorce.

Client and counsel should decline to accept the offer of the opposite party to the suit of evidence to prove his or her matrimonial offense.

The witnesses to prove the offense were procured by the plaintiff's husband.

As relates to material points in course of proceedings for divorce, each of the parties to the suit should decline to enter into an agreement facilitating the proof of the offense. The main issues should be left to be made out by the respective parties.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 56.*]

Provosty, J., dissenting.

(Syllabus by the Court.)

Suit by the State for the disbarment of Francis R. Richardson. Judgment of suspension.

Walter Gulon, Atty. Gen. (Joseph Wheadon Carroll, of counsel), for the State. Donelson Caffery, Rufus Edward Foster, Francis Liddell Richardson, Weeks & Weeks, and Frank Soule (Robert Persifer Hunter and David Blackshear Hamilton Chaffe, of counsel), for defendant. Philip Henry Mentz, amicus curiæ. Armand Romain, Edwin Howard McCaleb, Jr., Henry W. Robinson, Woodville & Woodville, Philip Henry Mentz, Edwin Howard McCaleb, Sr., John Taylor Whitaker, William Winans Wall, Fergus Kernan, William Charles McLeod, William Grant, William Bullitt Grant, Edward Rightor, Benjamin Ory, Lloyd Posey, Chandler Clement Luzenberg, E. A. O'Sullivan, Robert Hardin Marr, Frank Edward Rainold, William F. Brewer, John Beauregard Fisher, Arthur John Peters, James Wilkinson, Hubert Marion Ansley, Harry Darley Smith, Albert Campbell Allen, James Rundlett Parkerson, Joseph Francis Walton, S. R. Montgomery, William Weeks Westerfield, and Emile Joseph Mèral, amici curiæ on application for rehearing.

BREAUX, C. J. Relator brought this suit against the respondent to obtain his disbarment as an attorney at law.

The petition of relator contains a number of specific allegations regarding his conduct as an attorney at law while acting as counsel of a Mrs. Winling, a seamstress of slight education and little or no business experience.

She employed him in the year 1901 to obtain a divorce on the ground of adultery of her husband, about the same time she employed him to protect her rights to property she owned.

Mr. Charles J. Théard was her attorney. She became impatient, as she was nervously anxious to obtain a divorce. He was disinclined to sue for a divorce. There was a child, issue of the marriage. He was disinclined on that account to institute suit.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

She changed attorney, and employed respondent.

This incident has no immediate significance; it is referred to as part of the narrative of the case.

Relator avers that he charged her an excessive fee, and that he availed himself of the opportunity he had as an attorney at law and of his influence to buy her property for an amount less than it was worth and to sell to her two lots of ground; that he resorted to separate suits to obtain her rights when he might by one suit have obtained them; that he advised his client to abandon her claim for alimony in the divorce proceedings.

As relates to the divorce: Relator alleges that respondent advised with and came to an understanding with the attorney of the defendant to obtain witnesses to prove the charges brought by his client; that the proceedings resulted in an imposition upon the court by whom judgment was rendered.

At the time that the respondent was employed he demanded and received \$50 from his client as a retainer and to pay costs.

About the time that he was employed he learned from her, properly enough, that she had five lots of ground, acquired by her during her marriage with paraphernal funds. The title was in her name, but the deed did not recite that it was acquired by her with paraphernal funds.

He also about the same time was informed by her that she owned 25 shares of gas stock, for which she held certificates in her name. This stock also was bought with her separate funds. This stock had been bought by her in her name.

He was informed that the husband of his client laid claim to this property as being community. This information was given in course of the employment.

There is an averment that he knew from conversations he had with her attorney, Mr. Théard, who had formerly attended to her business, that the lots and the gas stock had been acquired with her paraphernal funds.

Of this there is no serious question.

Before the client came to respondent's office and employed him, when she was about to sell a lot of ground, she was annoyed by her husband, who employed counsel and demanded of her some \$700 in satisfaction of some asserted right.

This amount the husband reduced to some \$300 for some improvements he claimed to have made on the property, which was in the name of the wife. As she was anxious to sell the property, she finally concluded to let him have the amount, although she was well informed by her attorney at the time, Mr. Théard, that he had no right to it.

From this, and possibly other incidents, the respondent says he conceived the idea, after he had been employed by Mrs. Winling, that the husband was not so much concerned

about his wife as he was about her little property; that he would subserve the interest of his client by having the ownership fixed as being paraphernal; that the husband would then be less anxious to defend the suit for divorce, which had not yet been brought.

The respondent went to work to have it decreed that it was paraphernal property. He advised his client to make a sale to an ostensible buyer; that before passing the sale he would bring suit averring that the signature of the husband was necessary, and thereby obtain the authorization of the husband or of the court.

The client found a convenient purchaser, who doubtless did not feel apprehensive, for the price was nominal.

The suit was brought to have it decreed that the property was paraphernal; the husband answered and made a defense, which the relator characterizes as weak.

Judgment was rendered against the husband recognizing the right of the wife.

After this judgment had been obtained, the property was transferred to a vendee by the name of Chapon.

A day or two after the property was sold by Chapon to a relative of the respondent, or really to the respondent.

There was no price paid at either sale.

Time passed; no suit was brought for a divorce.

Now as to the gas stock in the name of Melanie Winling, owned by her:

In accordance with the respondent's advice, the client consented to its sale. Respondent placed it in the hands of a broker, and directed him to sell it in his name.

After it had been sold, the gas company refused to recognize the sale, on the ground that Mrs. Winling needed the authorization of her husband. The result was that that sale was never completed. It became necessary for the broker to furnish the buyer from him as broker with other stock in place, and, as the stock had increased slightly in value, it cost a broker's commission a small amount additional, \$28.13, paid by the respondent, which the respondent charged to his client.

After this attempted sale, or, rather, sale which was never completed, the respondent returned the certificate of stock to his client; it was placed in an envelope and handed to her.

She, the same day or a short time thereafter, lost it—misplaced it in some way. The loss was advertised, and a bond had to be furnished. It was required by the gas company before giving a duplicate. This bond was signed by the attorney, respondent, who charged for his services as surety the sum of \$100.

It seems that some comment was made by the client in matter of returning the certificate.

We may as well state here that that

amounts to nothing; relator attaches no importance to it, and it forms no part of the case. We merely refer to it in passing to say that it amounts to nothing. She must have lost it, and no blame can be laid at respondent's door on that score.

After a new certificate of stock had been obtained from the gas company, respondent claimed that in April, 1902, Mrs. Winling sold him the stock for its market value, to wit, \$116 per share.

No suit for a divorce had been brought.

The relator further charges that in June, 1902, while the relation and influence of attorney and client still existed, the attorney induced his client to buy from him two lots of ground, one for \$900, and the other for \$1,400; and at the same time he bought the five lots from his client before mentioned.

She about the same time sold her gas stock to respondent.

The respondent testified that a verbal agreement was entered into in April, 1902, in which she consented to buy his two lots at the price before mentioned, and sell him the gas stock before mentioned.

In June following, he wrote to her and inclosed a statement.

As it is of some importance, it is inserted here:

"New Orleans, La., June 3rd, 1902.

"Mrs. M. J. Winling, City.

"Dear Madame: I beg to furnish you statement of the several matters I have had in hand for you as follows:

By purchase price of lots.....	\$ 500 00
By purchase price of stock.....	2,900 00
	<hr/> \$3,400 00

This amount has been expended as follows:

Purchase price of No. 762 Peters ave.	\$1,400 00
Purchase price of 1126 Arabella street	900 00
Cash handed you.....	100 00
My fee in re lots.....	100 00
My fee in re stock sale, authorization and obtaining new certificate of stock	800 00
My charge for bond required.....	100 00
Paid H. L. Huntington, due by you	28 00
Taxes on lots	12 00
Costs of sale to Chapon and certificates	20 00
Estimated costs in divorce proceedings	40 00
My fee in divorce proceedings.....	400 00
	<hr/> \$3,400 00

"I have itemized these charges, but my agreement with you was to let you have the above named property, pay these charges and myself for the transfer of the stock and lots to me. This I have carried out and I trust it all meets with your approval."

[Signed by the respondent.]

The Proceedings for a Divorce.

The suit for a divorce was afterward brought.

The question of alimony claimed by plaintiff against her husband came up between counsel. The counsel for the husband said

to respondent that if that demand were abandoned there would be no defense made in the divorce proceedings. Respondent then spoke to his client and advised her to abandon the claim, which she did.

The default was confirmed and judgment of divorce rendered on December 22, 1902.

The record discloses that respondent was informed that the witnesses to prove the charge of adultery would be on hand; that there was no question about the facts being provable, and that the testimony would be forthcoming.

To quote from the testimony: Respondent states as a witness that he met Mr. Coats whom he knew, and that he introduced him to the witnesses who could prove up what was wanting in the Winling case. He obtained the facts from them, asked these witnesses what they would testify to, asked if they knew Winling, and the fact of the adultery, and the facts necessary.

We state the facts in the order of dates:

Mrs. Winling wished to sell one of the properties she bought from the respondent by the sale to her. Although it contained the declaration that the property was bought with her paraphernal funds, she was again met with the objection from the one who thought of buying that the signature of the husband was necessary. This was one of the lots sold by respondent to his client. It was about in the same situation, as to title, as the property of the client was when she was advised by respondent to place it in the name of another.

She called on another lawyer than respondent, and the latter, through counsel for Winling, obtained the desired signature.

Some time thereafter the differences between counsel and his former client, two of his friends—one a well-known and highly reputable attorney, and another a well and favorably known notary—took the matter in hand, and finally obtained the consent, reluctantly, of respondent to an adjustment.

The fee was reduced to \$350, and the parties were placed in the position they were before the property was transferred as before mentioned. Mrs. Winling became again the owner of the property which had been hers, and respondent went into possession of his.

Before concluding this statement of facts, we insert the following excerpt from the testimony of respondent:

"There was a bill due to Mr. Huntington for \$28 and some cents, costs of court, taxes on her lots, certificate of sale, and the cost of the transfer of Chapon.

"You will find it all itemized here.

"I told her that I would stand all of these charges as a part consideration of the deal we were making."

It is charged that the defendant netted for his services \$1,102, nearly one-third of the total property of the client.

There are a number of other details. We will close our summary and statements of the facts as these suffice for the decision.

Alimony.

To the abandonment of the alimony in itself, for which Mrs. Winling had sued, we attach no great importance. The purpose was, as stated, to facilitate the obtaining of the judgment of divorce and the custody of her child.

We will state it would have been best in the proceedings for a divorce not to dispose of whatever right she may have had to alimony.

Attorney and Client.

The attorney may expect too much of his client, and, on the other hand, the client may in some instances surrender too many rights, owing to the implicit confidence in the attorney.

In their transactions in the pending case it does look as if the attorney, as sometimes happens, overlooked the fact that he was dealing with a person whose will power was very much influenced by his own; that his profession naturally inspired confidence.

She consented to sell property; afterward to buy property; signed receipts, and gave clear acquittance to the attorney, accompanied by words of approval and even thanks. But after all this, on recalling her acts, she was seized with regret and doubtless indulged in complaints, and met with the sympathy that complaining clients almost always meet with when they state that they have signed away rights under the advice of their attorney which they should not have signed.

Even the merest color of truth in a case of this kind leaves the attorney with scant ability to do away with the impressions created on the client and the ever-ready advisers and friends.

In order as much as possible to guard against the error into which attorneys have been known to fall in acquiring property of their clients, adversely to their clients' interest, it has in some jurisdictions been laid down as a rule that, if an attorney goes too far and acquires property of his client adversely to the latter's interest which he should not have acquired, he can be made at law to return it.

There is no question here of an attorney having acquired property of his client which he can be made to return; he acquired it with her consent, given, it must be said, when she was nervously anxious to obtain a divorce, and to be permitted by the court to retain the custody of her child of tender years.

She testified that she was willing to part with all she had for the divorce and the custody of her child.

If, owing to the nervous anxiety of the client, she parted with the property, there is already a hardship.

It is advisable to decline to make sales to clients or buy their property, particularly if there is an unsettled fee, the amount of which has not been fixed, and, again, if the services are not rendered but to be rendered.

The objectionable feature here is that the attorney, without informing his client of the amount of the fee, bought her property, and after he had bought he informed his client of the amount of his fee.

The standard of professional conduct is before us for consideration.

In view of this standard, we must hold that the attorney must not deal with his client and become the owner of her property under the facts and circumstances developed here.

We will not deny for an instant to the attorney the right to secure his fee if that was the purpose, but to the end of securing his fee he should not go to the extent of becoming the owner of all her property, even though there is willingness on the part of the client in face of the fact that her property had been transferred.

We are of opinion that there was no necessity for the attorney to become the owner of the stock which was transferred to him at the time that it was transferred.

There was a verbal agreement, April, 1902, preceding the transaction, of which no written note was made and in regard to which we do not understand that attorney and client agree. There was no one present other than these two.

Respondent's contention is that another agreement, that of June, 1902, shows the distribution of the proceeds of the property disposed of under the agreement of April, 1902:

"Under which agreement I agreed to sell to her or have transferred to her the city property No. 762 Peters avenue and 1126 Arabella street."

In all these transactions, in matter of consideration, it does seem that the client was in a disadvantageous position; she had parted with everything, and the statement furnished her, showing excessive charges, was, doubtless, imposing.

She is a weak, uneducated woman, a seamstress, not familiar with the ways of business. The complaint would appear in a different light if it were from one having mental energy enough to fully protect her rights. She was entitled to full protection from her attorney.

Something related of Pothier may serve to illustrate, although not directly pertinent.

It is related by Prof. Duverger, of the Paris Law School, in a book of recent date, a copy of which we have in our possession.

Pothier had committed an error, and had thereby wronged a servant. Discovering it, it was a source of annoyance. The servant had left, and was at some distance when the

error was discovered. It is related that Pothier made it his duty to find the humble man and in person convey his regret to the servant, all confused by the expressions of regret of a great man.

This may have the appearance of altruism. It only manifested the desire not to impose on the weak and ignorant.

We are not inclined to go much further with this thought. It only shows the desire to correct the wrong—the desire to be strictly just. This feeling is not confined to any place nor to the people of any country.

Of course, there should be no great discrimination among clients. It remains that the lawyer owes special protection to the weak client.

By the by, in the pending case, the wrong committed was corrected, as far as it was possible to correct it as between respondent and his client through the interposition of the friends as before stated.

A few words in regard to the delay in instituting suit for a divorce:

There was delay in instituting suit for divorce. We are not inclined to scrutinize too closely the causes. During this delay, the property of the client passed to the attorney, and he sold property to her. Afterward the suit for divorce was brought.

The respondent's reason for the delay was because he deemed it best in the interest of his client to temporize.

Be all this as it may, the delay does not seem to have placed the client in a better position.

It is said that by placing the property in the name of a third person it would leave the husband without hope of recovering anything from the wife as belonging to the community; it would enable the client better to get rid of him, and facilitate the obtaining of a divorce, as the husband would no longer have the same interest in opposing that demand.

The explanation is not convincing, particularly in view of the fact that the respondent sold the two lots before mentioned to his client, one for \$1,400, and the other for \$900, during the delay he deemed advisable.

Although it was recited in the deed from the respondent to his client that it was paraphernal property of the wife, it none the less remained subject to the husband's claim, as much as the other property of the wife transferred by her to the respondent had been subject to that asserted right.

As to the contingent fee, not admitted by the client:

Conceding for a moment that the client was advised about this fee, it remains there was little necessity for such a fee. He had the property. There was no necessity for the client to give up a part in order to realize the remainder.

As to the services to be rendered for the divorce, they scarcely justified a contingent fee. The services to be rendered and which

were afterward rendered were ordinary services which did not call for a large deduction from the amount in hand under the circumstances to which we have already referred.

The Divorce.

We come to another delicate subject—the complaint that the attorney for the husband produced evidence to assist in proving existing facts and facilitated the divorce.

We have heretofore given the facts as we found them in the record. From them we deduce that the parties, plaintiff and defendant, did not keep at arm's length in matter of the divorce. The acts stated by relator go no further than as shown by the evidence. It is true that the record does not disclose there was suppression of facts, nor were facts manufactured or distorted.

But the witnesses were at court on the day that the default was confirmed on motion of respondent. They were present with the husband's consent, and at his instance, we understand. They were interviewed by respondent, who must have known that they came from the adversary of his client.

Under our law, there must be no consent in matter of divorce. It is against its policy. Rev. Civ. Code, art. 140.

There should be no way made easy by agreement to a divorce. Even though the steps as just before stated were very limited, there was a wrong; the husband cannot give such information and contribute in obtaining the divorce by assisting in proving his own violation of his marriage ties. That which might be done by the husband if sanctioned in this respect might be done by the wife. She, also, in case of suit against her for divorce, might facilitate the husband in proving her matrimonial offense. That, indeed, would be a sad state. The mind on reflection recalls from the thought, and the possibility to which such an understanding might lead. That which was done, let us conceive, was done thoughtlessly. Yet it must be disapproved. Such conduct on the part of either of the spouses is wrong. One cannot benefit by his own wrong in a court of justice, is the maxim. Attorneys have it in their power to curb wrongs. They should not countenance them in any way in proceedings for a divorce in any matter so material to the issue.

The Adjustment Between Attorney and Client.

This adjustment relates, let it be said, only to the financial part of the case. This adjustment is creditable to the friends of the respondent as well as to the respondent. They could not, unfortunately, obliterate the past—make that not to be which had been.

It remained as a fact, we will state as relates to the financial branch of the case, the client had not received full consideration for the property the title to which she had parted with, and she would never have received

full consideration except for the interposition of the friends of respondent, as before stated.

We are impressed by the fact that the friends of the respondent, to whom we have above referred, would never have consented to the adjustment as made if they had for an instant thought that the fee was reasonable and proper.

The amount agreed upon by them, upon which the adjustment was arrived at, as the fee due by the client, shows that the client had not received full consideration in the transactions which have engaged our attention.

Attorneys are not inclined to avoid the courts when they think they are in the right. The theory for the adjustment does not fully explain.

The Constitution of 1898 brings within the original jurisdiction of this court in such matters as now before us such questions as presented in the present case. From this it inevitably follows that a higher standard must be maintained. It is the inevitable effect of proper organization. If it is to be maintained (as it certainly should be), the questionable conduct of the members of the bar will be subjected to scrutiny that heretofore passed unnoticed.

The profession of law has many temptations—"pitfalls and mantraps," says Judge Sharwood in his popular Essay on Professional Ethics. To avoid them, prudence and self-denial are required. The desire to succeed, to obtain clients, and of securing their rights, may lead, if not held under some restraint, into dangerous paths.

We have at last performed our task in this case; with reluctance we reach our conclusion. From our premises it is in our opinion inevitable, and the only conclusion they will admit. Each fact and each proposition has been carefully considered and weighed.

In addition to the foregoing, the traditions of the American bar impel us to our conclusion. If there are those who can see a proper standard in an opposite view, it is our misfortune, perhaps, that we cannot agree with them.

The law and the evidence being in favor of relator and against the respondent, it is ordered, adjudged, and decreed that judgment be, and the same is hereby, rendered suspending the respondent from practicing at the bar for the term of 12 months.

It is further ordered, adjudged, and decreed that during that number of months he is suspended from practicing as an attorney at law and from appearing before the courts of this state.

It is further ordered, adjudged, and decreed that he is to pay costs.

PROVOSTY, J. (dissenting). This case is fully stated in the petition of the state and

in the answer of the defendant, both of which I give in full:

Petition.

"To the Honorable the Chief Justice and Associate Justices of the Supreme Court of Louisiana.

"The petition of the State of Louisiana, on the relation of Walter Guion, the Attorney General thereof, respectfully represents:

"That Francis Rivers Richardson is an attorney at law practicing his profession in the city of New Orleans, in this state. That he was duly licensed as an attorney at law more than 15 years ago, and has been since continuously practicing his profession in said city, and was so practicing said profession during the time of the events hereinafter set forth.

"That on or about July 24, 1901, Mrs. Melanie Winling, then wife of Arthur J. Winling, who then resided and still resides in this city, consulted said Richardson in his professional capacity in regard to obtaining divorce from her then husband.

"That said Mrs. Winling was at that time living apart from her said husband, was a seamstress working for her own support and for the support of her mother, with whom she lived, and was possessed of little or no business experience and of but slight education.

"That on or about said July 24, 1901, said Mrs. Winling disclosed to said Richardson the grounds upon which she hoped to obtain her divorce, to wit, the adultery of her husband upon his verbal confession to her, and was then and there advised by said Richardson that she had not sufficient proof in law to obtain a divorce, and that she could not obtain a separation from bed and board from her said husband on the ground of abandonment, for the reason that she had deserted him rather than that he had deserted her; nevertheless on said day said Richardson demanded from said Mrs. Winling, and said Mrs. Winling paid to said Richardson, the sum of \$50 in cash for account of attorney's fees and costs of suit for the proposed divorce suit.

"That on said day, or shortly thereafter, said Richardson interrogated said Mrs. Winling as to the amount and character of property owned by her, and learned from her that she was the owner of five lots of ground in this city in the square bounded by Solomon, David, Toulouse, and St. Peter streets, which had been acquired by her during her marriage with said Winling and with her own separate and paraphernal funds, though her title to said lots did not so recite, and also that she was the owner of 25 shares of the capital stock of the New Orleans Gas Light Company, embraced in one certificate standing in the name of 'Melanie Winling,' which had also been acquired with her separate and paraphernal funds.

"That after learning these facts said Richardson advised said Mrs. Winling that proceedings should be taken to establish the separate and paraphernal character of said lots of ground, and to that end advised that a nominal or simulated purchaser for said lots be found who should propose to buy the same and that thereupon a suit should be filed by said Mrs. Winling against her said husband praying to be authorized by the proper court of this parish to sell said property to said purchaser.

"That, in pursuance of said advice, a nominal or simulated purchaser was found, either by said Richardson or said Mrs. Winling at his suggestion and on his advice, in the person of one Francis Chapon, who offered said Mrs. Winling in writing to purchase said five lots of ground for the sum of \$500 in cash. That thereupon, and in pursuance of said advice, a suit was instituted on July 25, 1901, by said Richardson as attorney at law of said Mrs. Winling, under

the title 'In re Authorization of Mrs. Melanie Winling,' bearing the No. 65,522 of the docket of the civil district court of this parish, setting forth that said Mrs. Winling was the owner of said property, that the same was purchased with her separate and paraphernal funds, that she had received an offer to purchase said property, that she desired to sell the same, and that her husband refused to authorize her, and praying that he be cited and that she be authorized in due course.

"That said Winling was cited to answer said suit, and appeared therein by filing first exceptions, which were overruled in due course, and thereafter, on October 5, 1901, an answer in which he claimed the said property was purchased with community funds and opposed the authorization prayed for. That thereafter said suit came on for trial on January 21, 1902, and the testimony of two witnesses was taken on behalf of said plaintiff, Mrs. Winling, and no testimony was offered on behalf of the defendant husband. That on January 21, 1902, judgment was rendered authorizing said Mrs. Winling to sell said lots of ground, which judgment was duly signed on January 27, 1902.

"That on said July 24, 1901, or shortly thereafter, said Richardson advised said Mrs. Winling to sell said 25 shares of stock in the New Orleans Gas Light Company, the market value of which was then about \$118 per share. That in pursuance of said advice, which was accepted by said Mrs. Winling, and while said relation of attorney and client existed between them, said Richardson on behalf of said Mrs. Winling, but in his own name, instructed one H. L. Huntington, a broker in this city, to sell said 25 shares of stock, said order having been given on or about August 20, 1901. That, acting under said instruction, said Huntington on said day or the succeeding day sold 25 shares of stock for the account of said Richardson, who was acting for said Mrs. Winling as aforesaid. That said sale was made at the price of \$2,890.62 for said 25 shares. That after said sale had been made said Huntington called upon said Richardson for said shares of stock for delivery to the purchaser thereof, and said Richardson delivered to said Huntington the certificate of said Mrs. Winling issued in the name of 'Melanie Winling' for said 25 shares, which he had caused her to indorse for transfer in blank. That upon presentation of said certificate to said New Orleans Gas Light Company or to the United States Savings Bank & Safe Deposit Company, its stock transfer agent, a transfer of said certificate was refused for want of the authorization of Mrs. Winling's husband, and said certificate of stock was returned by said Huntington to said Richardson.

"That said certificate of stock was shortly thereafter lost or misplaced under the following circumstances:

"Shortly after said sale had failed on account of the inability to transfer said certificate of stock, said Mrs. Winling called upon said Richardson at his office, and, after being informed of the failure of said sale to be made, was handed by said Richardson an envelope which was said by him to contain said certificate of stock. That after leaving said office, and a short while thereafter during the same day, she discovered that said envelope was empty, and immediately so reported to said Richardson, who at once advised her to notify said United States Savings Bank & Safe Deposit Company that said certificate was lost, in order that an unauthorized transfer thereof might not be made.

"That said certificate was never found by Mrs. Winling, and that it became necessary to obtain a new certificate for said 25 shares of stock, which was accomplished by advertising the loss of said certificate, by application to said transfer agent for a new certificate, and by the giving of a bond to secure said transfer agent

or said gas light company against loss on account of said certificate, which bond was made by said Richardson as surety, and was for the sum of ——— dollars, and was to run for the term of 10 years from its date; that thereupon, and in May, 1902, a duplicate certificate for 25 shares was issued in the name of 'Melanie Winling.'

"That from and after July 24, 1901, and during the time covered by the pendency of said suit No. 65,522, civil district court, and the attempted sale of the gas light company stock, and until April, 1902, nothing was done regarding the desired divorce.

"Relator further shows: That during the month of June, 1902, while said relation of attorney and client still existed, and while said Mrs. Winling was still under the influence of said Richardson as her attorney, said Richardson induced or allowed said Mrs. Winling to buy from him two certain lots of ground in this city, one, bearing the municipal number 1126 Arabella street, for the sum of \$900, and the other, bearing the municipal number 762 Peters avenue, for the sum of \$1,400. That said two lots of ground were at that time being advertised by said Richardson for sale by him at the respective prices of \$900 and \$1,500, said prices being set forth on a printed list of real estate owned or controlled by said Richardson and by him offered for sale. That at or about the same time he induced or allowed said Mrs. Winling to sell to him her said five lots of ground on Solomon street for the sum of \$500, which sum said lots were fully worth, and in the month of May, 1902, allowed or induced her to sell through him her 25 shares of gas light stock.

"That shortly after said new certificate of stock for said 25 shares of stock was obtained and in May, 1902, said Richardson caused the same to be sold by H. L. Huntington as broker. That said Huntington sold said stock for the sum of \$3,037.50, and, after deducting his commission of \$12.50 for said sale and the sum of \$28.13 for the loss which he had sustained by having to acquire other stock to meet the sale which he had first made which he was unable to carry through on account of the failure to cause a transfer to be made, remitted the net proceeds of sale of said stock, to wit, the sum of \$2,996.87, to said Richardson, who received and retained the same.

"That on or about June 3, 1902, said Richardson sent or delivered to said Mrs. Winling a letter or communication in the words and figures following, to wit:

" 'New Orleans, La., June 3rd, 1902.

" 'Mrs. M. J. Winling, City.

" 'Dear Madame: I beg to furnish you statement the several matters have had in hand for you as follows:

By purchase price of lots.....	\$ 500 00	
By purchase price of stock.....	2,900 00	\$3,400 00

This amount has been expended, as follows:

Purchase price of No. 762 Peters avenue	\$1,400 00	
Purchase price of No. 1126 Arabella	900 00	
Cash handed you.....	100 00	
My fee in re lots.....	100 00	
My fee in re stock authorization and obtaining new certificates of stock	300 00	
My charge for bond required.....	100 00	
Paid H. L. Huntington, due by you	28 00	
Taxes on lots.....	12 00	
Costs of sale to Chapon and certificates	20 00	
Estimated cost in divorce proceedings	40 00	
My fee in divorce proceedings....	400 00	\$3,400 00

"I have itemized these charges, but my agreement with you was to let you have the above named property, pay these charges and myself for the transfer of the stock and lots to me. This I have carried out and I trust it all meets your approval.

"Very truly yours,

"[Signed] F. Rivers Richardson, Atty."

—and that said communication was received by said Mrs. Winling on or about June 4, 1902.

"That the statement of account contained in said letter understated the amount that said Richardson had received from the sale of the 25 shares of gas stock, and charged his client with an item of \$28 as due the broker Huntington, when no such sum was due, the same having been retained by the said Huntington before remitting the proceeds to the said Richardson, and was so shown and stated on the account sales furnished the said Richardson.

"That the said Mrs. Winling was dissatisfied with and protested against the charges contained in said statement of account, but that by force of the influence and the ascendancy which the said Richardson had acquired over his client he induced her to sign a letter prepared by him, dated June 14, 1902, approving of everything he had done for her, and in like manner to sign a letter prepared by him and dated January 15, 1903, again approving and ratifying all that had been done by him.

"That on or about June 14, 1902, said Richardson transferred to said Mrs. Winling for the recited consideration of \$800 said Peters avenue property and the Globe Realty Company, Limited, a corporation owned or controlled by said Richardson, transferred to said Mrs. Winling said Arabella street property for a recited consideration of \$500; and about said time said Richardson paid to said Mrs. Winling the sum of \$100 in cash.

"That thereafter, on or about June 26, 1902, said Mrs. Winling and said Chapon, to whom her said lots of ground had been transferred under his pretended offer hereinabove set forth, transferred to one Miss Newman said five lots of ground on Solomon street for a recited consideration of \$500. That, though said transfer was made to said Miss Newman, the same was in fact made to her for the account and benefit of said Richardson, and that said Miss Newman was merely an interposed party between said Mrs. Winling and said Richardson in said transaction.

"Relator further shows: That on May 23, 1902, said Arthur J. Winling filed suit against his said wife, Mrs. Melanie Winling, for separation from bed and board upon the ground of abandonment, in the proceedings entitled 'Arthur J. Winling, Husband, v. Melanie Pourret Winling, Wife,' No. 67,816 of the docket of the civil district court of this city, and that said Richardson was the attorney at law of said Mrs. Winling in regard to said suit, as well as in regard to the other matters and things herein set forth.

"That nothing was done in said suit for separation from bed and board further than the first and second summons required by law were issued and served on said Mrs. Winling on June 18, 1902, and October 17, 1902, respectively. That shortly after the filing of said suit for a separation from bed and board said Mrs. Winling, through said Richardson as her attorney at law, filed suit against her said husband for a divorce on the ground of adultery, and in the alternative for a separation from bed and board upon the ground of cruelty and defamation in the proceedings entitled 'Mrs. Melanie Pourret, Wife, v. Arthur J. Winling, Husband,' No. 67,994 of the docket of the civil district court of this parish, which suit was filed in June 17, 1902.

"That, after the filing of said suit No. 67,994 by said Mrs. Winling, said Richardson met and consulted with the attorney at law of said Winling (but not his attorney of record in said

suit), and an agreement was made between said two attorneys to the effect that if said Mrs. Winling would abandon all claims for alimony for herself and her child, the only issue of said marriage, then aged about seven years, said attorney for said Winling would produce in court witnesses who would establish the adultery of said Winling, and as part and parcel of said agreement it was agreed that a supplemental petition alleging time, place, and circumstance of the adultery charge should be filed. That said Richardson in his said suit for said Mrs. Winling had averred that said Winling was earning \$90 per month, and that he was capable of paying and should be made to pay the sum of \$30 per month as alimony to his said wife, and that he was capable of so doing.

"That, after said proposal regarding said suit, said Richardson consulted said Mrs. Winling in regard to foregoing her claim for alimony, and, as said Mrs. Winling has declared, and as your relator avers upon information and belief pursuant thereto, caused and urged her to forego her claim for alimony upon the ground that otherwise and in the event of failing to make said agreement, she would lose the custody and control of her said child. That acting upon the advice of said Richardson, and seized by the fear that she would lose the custody and control of her child, said Mrs. Winling consented to forego all claims for alimony against her said husband.

"That thereafter her consent to said agreement was communicated to the attorney of said Winling, and that said attorney for Winling thereupon, or shortly thereafter, himself drafted a supplemental petition in the name of said Mrs. Winling, alleging the time, place, and circumstance of the adultery of her husband, and praying for an absolute divorce because thereof. That said supplemental petition so prepared by Winling's attorney was signed by said Richardson as attorney for said Mrs. Winling, and the same was offered to the court, and the trial was held thereon, but that it was never filed in said suit No. 67,994: that said case was on or about December 23, 1902, taken up for trial by agreement between the attorney of said Winling and by said Richardson as attorney for said Mrs. Winling. That pursuant to said agreement said Winling's attorney had there present in court two witnesses, who were placed upon the stand by said Richardson on behalf of said Mrs. Winling without previous consultation with the said witnesses, and without knowing what testimony they would give, except as communicated to him by the attorney of said Winling. That said witnesses testified in court to the adultery of said Winling, or to facts from which the same was deduced by the court, and that upon said testimony, and without counter testimony by said Winling, a judgment confirming the default previously taken, and decreeing a divorce, was rendered by the court on December 23, 1902, which was thereafter duly signed on January 7, 1903.

"Relator further shows that the net result of said transaction or series of transactions between said Richardson and said Mrs. Winling, while the relation of attorney and client existed between them, was as follows:

"Richardson received from Mrs. Winling the net proceeds of 25 shares of gas company stock which was sold for and was worth the sum of \$3,037.50, from which was deducted the cost of selling (\$12.50) and the loss on the first sale (\$28.13), leaving therefrom the cash sum of \$2,996.87 in his hands, and also the five lots of ground on Solomon street, then worth not less than \$500, and also the sum of \$50 paid him by her on July 24, 1901, making a total of \$3,546.87 in value received by him; and said Richardson transferred or caused to be transferred to said Mrs. Winling the two properties No. 762 Peters avenue and No. 1126 Arabella street, worth not more than \$1,400 and \$900, respectively, and gave her \$100 in cash, or a total of

\$2,400 in value. That the difference between said sums, to wit, \$1,146.87, represented the amount charged by said Richardson for the services rendered to said Mrs. Winling, and the costs incurred in the two suits for authorization and divorce respectively.

"That the suit for authorization involved but little professional skill and labor, and that of no high order, and had relation to property of small value, in which Mrs. Winling had, under any circumstances, her community rights. That said suit was practically of no benefit to said Mrs. Winling, for the double reason that it was necessary to said Richardson to enable him to obtain title to said lots of ground through the purchaser interposed by him and for his account, and because the title to the lots of ground transferred to said Mrs. Winling by said Richardson and the Globe Realty Company, Limited, at his instance, were subjected to the self-same presumption of being community purchases, with the difference that two properties were placed in this position of attack where only one had been so before. That, in any event, a reasonable professional fee for such suit would not exceed the sum of \$50.

"That the costs of said suit paid by said Richardson for said Mrs. Winling amounted to less than \$90, and could by reasonable diligence have been made out of the defendant therein, said Arthur J. Winling.

"That the service of signing the bond signed by said Richardson was, at his own valuation, worth \$100.

"That the only other effective service rendered by said Richardson to said Mrs. Winling was in procuring for her a divorce in the manner and under the circumstances hereinabove set forth; that, in substance, the whole of the amount received by said Richardson in excess of the value of property transferred to said Mrs. Winling, said excess being the sum of \$1,146.87, was for costs and for his services in signing bond and procuring said divorce.

"Relator further shows that said Richardson claims and avers, and that he believes that said Richardson will claim and aver in answer hereto, that said payment to him of the proceeds of sale of the gas company stock and the transfer of said five lots of ground to the interposed party for his account, and said transfer to said Mrs. Winling, were the consummation of a verbal contract and agreement made between him and said Mrs. Winling on or about April 20, 1902, whereby said Mrs. Winling agreed to transfer to him said 25 shares of gas company stock at \$3,000 and said five lots of ground at \$500, and in return to receive said property No. 1126 Arabella street at \$900, and said property No. 762 Peters avenue at \$1,400, and the professional services of said Richardson in said authorization and divorce suits, and in his service in signing said bond and all costs of said suits, together with \$100 in cash; that as part and parcel of said agreement said Richardson guaranteed said divorce to said Mrs. Winling but that nothing was said as to the respective rights of the parties in the event that a divorce could not be procured.

"Relator further shows: That said Mrs. Winling complained to said Richardson of the charges made for his services; that in the summer of 1903 she made said complaint through W. S. Parkerson, Esq., as her attorney, but that said Richardson at that time refused to accord her any relief therefrom. That she subsequently complained to said Richardson in regard thereto, through Bertrand I. Cahn, Esq., as her attorney, in April, 1905, but that said Richardson refused at that time to accord her any relief.

"That charges of professional misconduct were filed in April, 1905, by said Mrs. Winling and said Cahn before the commission of attorneys at New Orleans appointed by this honorable court pursuant to section 11 of rule 14 of the rules of this court (23 South. xvi) and article 85 of the Constitution of the state of Louisiana

of 1898. That, after said charges had been so filed, said Richardson, on or about —, 1906, made a settlement with said Mrs. Winling by which he restored to her, and to her satisfaction, a large part of the amount of which he had become possessed in the manner herein set forth, by restoring to her the five lots of ground on Solomon street and a sum in cash to represent the value of said 25 shares of gas company stock, less the rents collected by said Mrs. Winling on said properties, No. 762 Peters avenue and 1126 Arabella street, and received from her a retransfer of said properties, No. 762 Peters avenue and 1126 Arabella street. That at the same time said parties agreed upon the amount to be retained by said Richardson as his fees as attorney of said Mrs. Winling and a charge for signing said bond, which amounts with the amount of costs paid by said Richardson in said suits, was retained by him out of said sum.

"That said settlement was not made until the said charges had been filed as aforesaid, and that said Richardson made said settlement for the purpose and with the intent of influencing the said Mrs. Winling and said Cahn to withdraw or fail to prosecute said charges, and not from any laudable or meritorious desire to right a wrong done or error committed.

"Relator further shows that the transaction or series of transactions hereinabove set forth constituted gross professional misconduct on the part of the said Richardson, whether the same were in pursuance of the alleged verbal contract or otherwise; and in further specification of this charge relator avers:

"(1) The deal or bargain which the said Richardson devised and carried out as herein set forth was an unconscionable one; it involved the retention by him of over \$500 of his client's money in consideration of transferring to her at his own price two pieces of property, valued by him at \$2,300, which he had for sale, and receiving from her in exchange the full value thereof, viz., \$500 in real estate and \$1,800 in cash.

"(2) Making a bargain or deal with an ignorant and unexperienced woman, who was his client and under his influence and entitled to his protection, causing her afterwards to sign letters prepared by him and designed to serve as admissions and estop her from complaining of anything that had been done by him, and refusal to accord her any relief until coerced thereto by fear of disbarment proceedings, show such a want of proper appreciation of the trust relations which exist between lawyer and client and of the duties which those relations impose upon the lawyer as to warrant the charge that the said Richardson is unfit to assume such relations and to be intrusted with such duties.

"(3) The statement of account contained in the letter of June 3, 1902, hereinabove set forth, was misleading and intended to deceive, and was a gross violation of the uberrima fides which the said Richardson owed to his client.

"(4) The conduct of the said Richardson in procuring said divorce under the circumstances above set forth was grossly unprofessional, and amounted to and was professional misconduct. In a statement to the commission of lawyers appointed by this court to investigate the charges against him, he declared that on or about April 20, 1902, he guaranteed the said Mrs. Winling an absolute divorce as part of the consideration for the transfer to him of her said five lots of ground and her said 25 shares of gas stock. This divorce, which he had thus traded to his client, he subsequently procured by collusion with the said Winling and his attorney, and in so doing he perpetrated a fraud upon the court before which said suit was pending, and perverted the course of law and justice.

"Relator further shows that the matters and things herein set forth have been investigated by said commission of attorneys; that said com-

mission are of the opinion that a probable cause of disbarment exists against said Richardson, and have certified the facts to relator as herein set forth.

"Wherefore, the premises considered, relator prays that said Francis Rivers Richardson be cited to answer this petition, and that, after due proceedings, there be judgment herein in favor of the state of Louisiana and against said Richardson, adjudging and decreeing that the said Richardson be disbarred from practicing the profession of law in this state, or that such judgment be rendered as the nature of the case may require and to this honorable court may seem fit and proper; and relator further prays for costs and general relief in the premises."

Answer.

"And now into this honorable court comes F. Rivers Richardson, defendant herein, and, for answer to the relator's demand, he says:

"That he denies all and singular the allegations of the petition, except such as may be admitted, directly or indirectly, in the following recital of the facts in the transactions referred to in said petition.

"Further answering, he says:

"That, on or about July 22, 1901, Mrs. Melanie Winling, wife of A. J. Winling, came to petitioner's office to consult him about obtaining a divorce from her husband, and also for the settlement of her paraphernal property rights.

"That then and there said Mrs. Winling made a statement to respondent of the grounds on which she hoped to obtain her divorce, and of the status of her paraphernal property.

"That respondent, during the interview, found that Charles J. Théard, Esq., had been the attorney of Mrs. Winling, and respondent sent her away until he could see Mr. Théard and learn whether she was still his client. That it is untrue, as alleged in the petition herein, that he received a retainer from Mrs. Winling at that interview.

"That respondent ascertained from Mr. Théard that Mrs. Winling was no longer his client, and he thereupon accepted from her a retainer. That it is untrue, as stated in the petition, that he accepted such retainer for her divorce proceedings when he was of opinion that Mrs. Winling had no grounds for a divorce.

"That Mrs. Winling asserted to him that she was entitled to her divorce on the ground of her husband's adultery. That she recited facts which made such adultery more than probable. That respondent advised her that her proof was weak, but, from the probability of there having been adultery, he concluded that the fact itself would become provable after investigation.

"That Mrs. Winling disclosed to him that her paraphernal property stood in her own name, without any recital as to its paraphernality in the deed, and that, upon its being made known to Mrs. Winling that her husband had it in his power to dispose of this property, she asked respondent to take steps to prevent it.

"That respondent did, at that time, actually prepare a petition for a divorce, and, alternately, for a separation a mensa et thoro, but that he did not file same until later, for the reason that he judged that the husband would make less opposition to the divorce after the wife's property was judicially declared not to belong to the community of acquets and gains, and hence, with the consent of his client, his first steps were to have the paraphernality of the property established, said property consisting of said real estate and of shares of stock in the New Orleans Gas Company.

"That he took the divorce case and the paraphernality case upon contingent fees (the sum of \$50 having been partially paid him as a retainer, and partially to cover costs), and that he considered it would be fair, and in accordance with custom, for him to charge a larger fee, if payable only in the event of success, than he could have asked if his fee had been stipulated

in advance and payable independent of success.

"That it was important to first established the paraphernality of said property, because of the weakness of Mrs. Winling's proof in the divorce case, and because of the danger of her husband's interference therewith as head and master of the community.

"That Mrs. Winling had no written proof of the paraphernality of said property; that he was for a time in doubt whether the title to real estate could be affected by parol to show that the purchase was a paraphernal one. That he investigated the authorities and found that parol was admissible.

"That he advised Mrs. Winling how the issue of the paraphernality could be made, to establish that the property was not community, to which she consented, and that he brought the suit, No. 65,522 of the docket of the civil district court of the parish of Orleans, entitled 'In re Authorization of Mrs. Melanie Winling,' in pursuance of said plan. That A. J. Winling, the husband, first filed exceptions, through Cage, Baldwin & Crabites, attorneys, which were tried, argued, and overruled. That an answer was filed by the husband, claiming that the property belonged to the community; that the suit was as vigorously defended as was possible on the part of the husband. That the case was duly tried and judgment rendered therein in favor of his client in January, 1902, some six months after the matter had been placed in respondent's hands.

"That respondent is wronged by the allegation belittling his services to Mrs. Winling in the authorization suit; that it is untrue that said suit was of no benefit to her, or that the title he gave Mrs. Winling to the property he sold her, hereinafter mentioned, was subject to the same attack by the husband as her original property, for the deeds he delivered her set forth that the purchase was with her paraphernal funds.

"That he found that the gas stock stood in the name of Melanie Winling, with nothing to indicate that she was married. That he attempted to have same sold without the necessity of any expense or legal proceedings, but he informed Mrs. Winling that if an unauthorized sale were attempted and did not go through it might cost her something. That she told respondent to try such a sale, and gave him the certificate of stock for that purpose, and he receipted to her for the certificate. That he instructed H. L. Huntington, a broker, to sell said stock for the account of his said client, which he did, on August 20, 1901, and he delivered to said broker the certificate of stock. That the trust officer of the gas company refused to recognize the transfer of the stock on the ground that Mrs. Winling needed the authorization of her husband. The sale fell through, the broker filed his order by purchase on the market, and sent his bill for \$28.13, the difference in price and his commission; that respondent wrote on the same day to Mrs. Winling that the sale had failed, causing a slight loss to her, and that her certificate would be returned to her if she called. That she did call a day or two afterwards, and he gave her the certificate, which she then herself placed in an envelope, and left. That perhaps an hour later she came rushing back to his office, stating that she had lost the certificate while shopping. That he told her to notify the gas company of the loss at once, and also to advertise the loss, which she did, an official of the gas company being notified by her of the loss, and an advertisement thereof being inserted by her in the Picayune. That he advised her that she could not be damaged by the loss of the certificate, as it was not indorsed in accordance with the ruling of the gas company's officials. That the gas company, considering showing of the loss necessary as a preliminary to the issuance of a duplicate certificate, required that the loss be shown by an affidavit, and this affidavit, averring that she

had lost the certificate, was signed by her some time afterwards.

"That respondent had not, up to that time, had any agreement with Mrs. Winling fixing his fee, and it was not until long after the loss of said certificate that a definite agreement was entered into for the prosecution of her affairs in the future. That she never intimated to any one, until these disbarment proceedings were instituted, her belief that respondent had imposed an empty envelope upon her and willfully made away with her certificate of stock, and that her new-found suspicion that respondent had perpetrated upon her such a petty, unscrupulous, and purposeless trick is contradicted by the facts stated above and the record created by her.

"That the real estate of Mrs. Winling consisted of five vacant lots on the outskirts of the city, which produced no revenue and represented to her nothing but a bill for taxes every year. That these lots had cost her \$500, and at that time there was no prospect of an increase in value, she having repeatedly offered them for sale at what they had cost. She also had 25 shares of the New Orleans Gas Company stock, of a par value of \$2,500, and then worth 112, from which her revenue was \$150 per annum, or less than 6 per cent. upon the value thereof. That Mrs. Winling had frequently said to respondent that she was not satisfied with her investments, and it was her desire to sell her gas stock and her vacant lots for the purpose of buying a home, so that she might stop paying house rent, and the balance of her funds she wished to invest in something that would give her a better return than the gas stock did; that she knew that respondent owned a number of houses, and she asked him if he would sell her some that would rent well; that respondent gave her a printed list of the property that he had for sale. That she looked at and selected two of the places, No. 1126 Arabella street, listed at \$900 and renting for \$8 (subsequently \$10) per month, and No. 762 Peters avenue, listed at \$1,500 and rented for \$12, and she decided to buy them when she sold her gas stock. That she asked for a reduction in price, and finally respondent agreed to let her have them both for \$2,300.

"That the petition herein does him a grievous injustice in stating that for the fee stated he guaranteed a divorce to Mrs. Winling. That the use of the word 'guarantee' by him, in his testimony before the committee of examiners, was entirely misunderstood and applied by them. That, in testifying, he did use the word 'guarantee,' but the nature of the guarantee was the permissible one of guaranteeing that she should get her money back from him if she did not get the divorce, and not the improper one of guaranteeing the divorce, be the facts what they might. That said obligation further included all expenses in obtaining evidence, either in a divorce or separation suit, or both, and its plain meaning was that, for such an expenditure, she would finally receive a divorce, else the money should be refunded.

"That the fee agreement was, in substance, that respondent should take over Mrs. Winling's gas stock at its then market price of 116 (bid 115), and her vacant lots at her own price, \$500; that he should turn over to her No. 1126 Arabella street and No. 762 Peters avenue. That he should get her husband to authorize a sale of the stock, or compel him, in court, to do so, if necessary. That he should cause the issuance of a new certificate for the stock in her own right, and go surety for her on any indemnity bond that might be required in obtaining such certificate. That he should defeat any community claim which her husband might assert to the gas stock. That he should get her an absolute divorce from her husband, either in a direct suit or through separation proceedings, or both, he to bear all expenses thereof, and that he should obtain for her the custody of her child. That he should pay the sundry obligations of hers mentioned in his letter of June 3,

1902, together with \$100 cash to her, and that his service already rendered, in the suit to authorize the sale of the lots, should be considered paid.

"That he and Mrs. Winling having thus agreed on the fee and exchange of property, she took possession of No. 1126 Arabella street and No. 762 Peters avenue. He paid her the \$100, and the gas stock became his property from the time said agreement was entered into, and that, when the gas stock was subsequently sold, it was for his account, and not for Mrs. Winling's, and he specifically denies, as another of the serious wrongs done him in the petition, that he sold his client's property at one figure and accounted to her at another, and likewise denies as a wrong the allegation that he instituted the authorization proceedings for the purpose of having Mrs. Winling's property transferred to him, when, in truth and in fact, no such transaction was contemplated until long after the authorization proceedings No. 65,522, mentioned above, were closed; and he likewise denies as a wrong the allegation that he entered up against his client the false charge of \$28 as due the broker, Huntington, since, in truth and in fact, his client did owe said \$28 out of the proceeds of the sale of said stock sold to him at 116, and when the broker, Huntington, charged said \$28, it was on respondent's account personally, and not as agent for Mrs. Winling, so that Mrs. Winling was not charged with said \$28 twice, as alleged by relator.

"That he correctly advised Mrs. Winling on the law concerning alimony and the custody of her child; that, her husband being a carpenter, not regularly employed, and she owning considerable property, respondent did not think permanent alimony would be awarded Mrs. Winling in the divorce suit because of these facts. That he informed her that she was not surrendering a right of any value in giving up said alimony. That he gave her said advice because he believed it to be the law, and not with any ulterior design of influencing Mrs. Winling to her disadvantage. That his advice as to the custody of the child was given her when her husband had filed his suit against her. That the custody of the child was not discussed seriously at the time the question of abandonment of alimony was considered.

"That both husband and wife had entered separation proceedings, the wife's being also for an absolute divorce. That respondent, in pressing his client's cause, found that, if the husband was relieved of the alimony claim, he would make no attempt to conceal the facts as to his adultery, charged in the petition, but that there was no collusion or fraud between himself and any one in the obtaining of said divorce. That there was nothing improper, unprofessional, or uncourtly in the preparation and trial of said case, and that it is not true that respondent placed the witnesses in said case on the stand without first having consultation with them or knowledge of the testimony they would give.

"That he did obtain from Mrs. Winling receipts and letters as her business progressed, but that all the recitals thereof are accurate and truthful, and were fully understood by Mrs. Winling at the time she signed same. That it is respondent's habit to be exact in such matters, and to put in writing as much as can be done, preferring to rely on contemporaneous memoranda than on the uncertainties of memory, and that there is no justification whatever for the charge in the petition that he deliberately prepared such writings to entrap, mislead, or estop his client.

"That his said client continued thereafter to call upon him to attend to her business, and made no complaint, until, at a later date, she requested him to assist her in obtaining a loan upon a mortgage upon her said real estate, bought from him, which he advised her not to do so, and she thereafter ceased to consult him.

"That the said Mrs. Winling remained satisfied until about the month of October, 1903, when she employed W. S. Parkerson, Esq., who called upon him in her behalf. That, after some discussion of the management of her affairs, it was finally agreed between them that a quitclaim deed should be obtained from A. J. Winling, in favor of his divorced wife, to the real estate which she owned, whereupon Mr. Parkerson stated that she would be satisfied if this was done, and respondent avers that it was so done, at some expense to himself, in January, 1904. That, while he did not think such a quitclaim deed was necessary, yet at the request of her attorney he procured it.

"That he did not hear from the said Mrs. Winling again for more than a year after this, when Mr. B. I. Cahn appeared as her second attorney and made peremptory demands upon respondent for a settlement of her claims. That he offered to show Mr. Cahn his books and records and explain the matter to him, showing full settlement with his client, but said offer was declined, whereupon printed charges were presented to the bar committee, without any recourse to the courts to correct any asserted injury, same having been filed almost immediately after the peremptory demand upon respondent, and before he had any time or opportunity to consult any of his friends as to his course in the emergency.

"That it is true that he subsequently consented to rescind the arrangements and exchanges made between himself and Mrs. Winling, and to settle with her for his fees in the litigation hereinabove referred to upon a different basis; but respondent shows that he did this by the advice of certain friends and against his own wish and judgment, for respondent did not then believe, and does not now believe, that the said Mrs. Winling was entitled to demand the rescission of the arrangements into which she had entered voluntarily; but respondent shows that, subsequently to the making of these arrangements, the lots which Mrs. Winling had transferred to respondent had increased rapidly and greatly in value, and respondent's friends, W. Morgan Gurley and D. B. H. Chaffe, were of opinion that, as Mrs. Winling was a woman of small means, the existence of such charges, by such a woman client, before the bar association would so seriously affect respondent's professional standing that he ought to settle same at any cost, and regardless of the injustice or inequity of the woman's claim, and that it would be becoming in respondent to return the lots and rescind the transaction.

"Respondent shows that his said friends advised him to reduce his charges for fees by the amount of \$500, which respondent consented to do, not because he thought his former charges had been excessive or extortionate, but merely because his friends so advised.

"Respondent shows that Mrs. Winling fully understood all that was done, and was a woman of intelligence and prudence, and respondent was never actuated by any desire to get any advantage over the said Mrs. Winling, or to make any charge or arrangement to her disadvantage. Respondent shows that the fees that he charged were agreed to by her after she had ample time for considering them.

"Respondent shows that he performed faithfully and in good faith all his obligations and undertakings to the said Mrs. Winling under the agreement hereinabove set forth, and that the petition herein does him a grave injustice in undervaluing his services in these various matters. That he believes the fees charged by him, especially as they were contingent, to be perfectly fair and reasonable. That, if he erred in this, it was an honest mistake in judgment, and that, if he erred in the appraisal of his services, it is not professional misconduct.

"Respondent shows that said proceedings never would have been instituted but for the fact that the vacant lots received by him from Mrs.

Winling became, shortly thereafter, many times more valuable than before by the construction of a new railroad in that vicinity; and respondent finally did, as stated above, satisfy her by returning to her the said lots, *inter alia*.

"Respondent now avers that his course of dealings with his client shows, throughout, faithful and honorable treatment, and he asks this court to exonerate him from the many unjust aspersions herein.

"Wherefore, he prays that relator's demand be rejected and his suit dismissed, at his cost; and for general and equitable relief."

The charge, or allegation, in the state's petition, to the effect that Mr. Richardson handed to Mrs. Winling in his office an envelope said to contain her certificate of the gas company stock, but which on the same day, a short time after she had left the office, was discovered by her to be empty, has admittedly gone out of the case, as having been founded entirely on mistake. It was not that the envelope was discovered to be empty, but that Mrs. Winling, as she herself says, lost the envelope—with the certificate in it, for all she knows.

The charge of collusion, and perversion of the course of justice, and fraud upon the court, in the matter of the divorce, is unfounded. There was no collusion, no perversion of the course of justice; and, as for fraud upon the court, it is a misuse of terms to qualify in that manner the act of Mr. Richardson.

Collusion is defined to be:

"A conspiracy of the husband and wife to obtain a decree of divorce by false or manufactured testimony."

A more comprehensive definition is the following:

"Collusion in the law of divorce is a corrupt agreement between the husband and wife whereby one of them, for the purpose of enabling the other to obtain the divorce, commits a matrimonial offense, or whereby, for the same purpose, evidence is fabricated of an offense not actually committed, or evidence of a valid defense is suppressed."

Now, no one pretends to say that the testimony upon which the divorce in question in this case was granted was "false or manufactured," or that the causes upon which the divorce was asked were trumped up for the occasion. There was therefore no collusion.

There was no perversion of the course of justice, because if ever a poor woman was in justice and in law entitled to a divorce it was Mrs. Winling. Far from having been perverted, the course of justice never ran truer.

Now, as to whether a fraud was committed upon the court. In any particular case, the question of whether a fraud has been committed upon the court is a question of fact. And, of course, questions of fact must be determined from their particular facts. On any question involving but facts, it will not do to argue by generalities or from abstract principles. The facts in this particular case are that, when Mrs. Winling applied for her

divorce, she had been living at her mother's for nearly two years separate from her husband, and with the firm intention of never returning to him, having abandoned him because of ill treatment, abuse and defamation of her, and attempt to kill her, and because of his having admitted to her and to her mother that he had committed adultery with a certain other woman whose name he gave, and, finally, because of his having contracted a venereal disease. She had sufficient legal evidence of the ill treatment, etc., but perhaps not of the adultery. Under these circumstances, there was nothing either legally or morally wrong in the husband's facilitating his wife in obtaining the divorce to which she was so richly entitled; and if it was Richardson who proposed that he should do so, and offered to waive the alimony in order to induce him to do so, I cannot see wherein he did anything either legally or morally wrong.

Indeed, looking at the matter even in the abstract, I, for my part, cannot see the wrong of an agreement by which truth, law, and justice are to be made to prevail, even in a divorce case. The argument that to permit such agreements to be made would be dangerous, as it might open the door to fraudulent practices, proves absolutely nothing. A thing in itself good does not become bad from the fact that the perverse may put it to an ill use.

It is said in the brief of the state that if the district judge who granted the divorce had known that the two main witnesses to the adultery had been furnished by the husband, or by the lawyer of the husband, he would not have granted the divorce; no, not if under the peculiar circumstances of the case, he doubted that the testimony of the witnesses was true. But here again is an argument which proves absolutely nothing, since a judge will not in any case predicate his judgment upon testimony of the truth of which he is in doubt. The fact that the witnesses had been furnished by the husband would have justified the judge in being extra cautious in accepting their testimony as true. Whether he so accepted it or not would depend a good deal upon who the witnesses were. But if he believed that they had testified truly, he could no more refuse to render judgment upon their testimony than if they had not been furnished by the husband. There is no suggestion in this case that the witnesses in question were not entirely worthy of belief, or that they did not testify to the truth. Before going into court with them, Mr. Richardson questioned them, and satisfied himself that they had personal knowledge of the adultery.

The idea that a court could refuse to hear witnesses in a divorce case because their names had been furnished by the opposite party is, in my humble opinion, not to be entertained a single minute. The litigant would say to the court:

"I present to you witnesses of unquestionable veracity, who will testify positively to the facts entitling me to a divorce."

And the court would have to answer:

"No, I cannot hear them: because their names were furnished you by the defendant."

Perhaps it would have been better if Mr. Richardson had informed the court that the witnesses had been furnished by the husband—in order that the judge might have been more careful in weighing their testimony—but the failure so to inform the court was not a fraud. A lawyer is not bound, under pain of disloyalty to the court, to warn the court of every circumstance connected with a witness which may make it necessary to be more careful in accepting his testimony.

Were it to be conceded, however, that Mr. Richardson took an erroneous view of the matter—as I myself am possibly, or probably, doing—still he cannot be censured in the premises; for no statute had pronounced against the making of such an agreement, nor had this court done so; and, under general jurisprudence, the question is, at least, an open one. In Bishop on Marriage and Divorce (6th Ed.) vol. 2, § 28, we find the following:

"An agreement between parties, not involving an imposition upon the court or a suppression of facts, to facilitate the divorce and smooth the asperities of the litigation, is, though liable to be looked into by the court, not collusion or otherwise objectionable; it may be meritorious."

In the brief filed in behalf of the defendant, decisions are cited in the same sense. I think, in this particular case, the agreement was a meritorious one. But, even if it were otherwise, surely an attorney is not censurable for adopting a line of action which contravenes no statutory law, which has never been pronounced against by the court of his own state, and which has the sanction of such high authority as Mr. Bishop.

As to the manner in which Mr. Richardson conducted the litigation, I can find nothing to censure. Having to deal with an unscrupulous husband, who cared more for the property of his wife than for the wife herself, his plan of first putting the property beyond his reach, and thus causing him to lose interest in the litigation, appears to me to have been shrewd and wise. And, even if it was not, the matter was one for his good judgment, and an error of judgment is not professional misconduct.

The remaining charges, of having taken unfair advantage of his client in a business transaction, and of having exacted excessive fees, depend largely, if not entirely, upon appreciation of the testimony.

Mr. Richardson testifies that his client was desirous of investing her money in houses, in one of which she might live, and thereby save rent, and the others of which she might rent, and thereby get a larger revenue than she had been deriving theretofore from her unimproved lots and her gas stock; that one of

his houses was across the street from where she lived; that he proposed to her an arrangement by which he should transfer this house and a certain other house of his to her and pay her \$100, and hold her free from all liability for expenses or costs in her litigation, and account to her for \$400 additional in case he failed to obtain a divorce for her, this \$400 being the amount of his fee for obtaining the divorce, and she on her part should transfer to him her five lots and her gas stock, and that Mrs. Winling consented to this agreement; and that this agreement was duly carried out, to the perfect satisfaction of Mrs. Winling, who remained perfectly satisfied with it until long afterwards, when she complained that the fee charged her for the divorce was excessive, saying that it should have been only \$50, and still later, more than a year later, began to complain on the score of the five lots—the latter complaint coming only after the five lots had risen enormously in value, as the result of the advent of a railroad, the coming of which railroad had not been foreseen by anybody.

Mrs. Winling says that she consented to this agreement only because Mr. Richardson threatened her with the loss of her child if she did not. I simply do not believe Mrs. Winling when she says this. The thing is palpably improbable. Testimony more prejudiced, self-contradictory, and reckless than hers has never come under my observation. Indeed, the judgment of my colleagues, as I understand, and even the theory of the prosecution, is not founded so much upon this testimony as upon the case as a whole—even accepting the statement of Mr. Richardson as true. The testimony of Mr. Richardson, on the other hand, is consistent with itself throughout, and with every one of the very numerous memoranda, receipts, accounts, letters, and documents in the case.

There is no denying that the agreement was carried out, and that Mrs. Winling in her letters declared herself perfectly satisfied with it. And there is no denying that more than a year after the close of her business relations with Mr. Richardson, when she had occasion to employ Mr. Parkerson, she still had no complaint to make, except on the score of the fee for obtaining the divorce, which she said should not have been more than \$50 as she had been informed that that was the regulation fee for obtaining a divorce. And there is no denying that had she felt aggrieved at that time on account of these lots she would have complained about it to Mr. Parkerson just as she did about the \$400 fee. And, finally, there is no denying that her first complaint on account of the lots came more than two years after the close of her business relation with Mr. Richardson, and only when, as the effect of the unanticipated advent of a railroad in the neighborhood, the value of the lots had risen from \$500 to \$5,500.

A lawyer is not prohibited from having

business dealings with his client. Of course, when the fairness of such dealings is brought in question, the burden of showing that they were fair is upon him. In this case, apart from the \$400 fee matter, to which I shall come later on, I think the fairness is established. Richardson transferred his properties at \$100 less than he had been asking for them, and took her five lots at the full price at which she had been trying in vain to sell them to others, and took the gas stock at market price. Until her bargain with him was set aside by the arrangement to which I may have occasion to refer later on, she lived in one of the houses, and derived from the other a revenue larger than her gas stock and five unimproved lots had been producing. The subsequent increase in the value of the lots was simply Mr. Richardson's good fortune. That he did not anticipate this early rise in value is conclusively shown by the fact that after he had acquired these 5 lots he sold 16 lots in the same neighborhood, better situated if anything, at the price at which he took these 5; that is to say, at the price prevailing before any knowledge of the probable construction of the railroad had reached the public.

With regard to the excessiveness of the fee charged, while the fees in the authorization suit and the gas certificate matter were large, \$100 each, I do not think they were so excessive as that the exaction of them constituted professional misconduct. In the settlement which the attorneys of Mrs. Winling subsequently made with Mr. Richardson there was allowed \$300 for going security, this being the amount which a security company would have charged. This would leave \$200 for the services in connection with the authorization suit and obtaining the new certificate and obtaining the consent of the husband for disposing of it. Four hundred dollars, however, on top of this \$200, was large, and Mrs. Winling would have been perfectly justified in objecting to it, as she says she and her mother did; and, no doubt, Mr. Richardson should have reduced it. But does his having refused to do so, if he did so refuse, amount to professional misconduct? He furnished his client with a statement which showed in black and white that he was charging this fee. I refer to the statement copied in the state's petition. The client says she objected that the fee was too large. At that time the suit for divorce had not yet been filed; the lots had not yet been transferred; the two properties had not yet been transferred. The situation was intact, except that Richardson had rendered certain services for which he would have the right to claim a fair remuneration. Mrs. Winling testifies that both she and her mother told Richardson that this fee was excessive. She knew, then, that the fee was excessive, and when she consented to pay it she knew what she was doing. I repeat, I do not believe her story of Richardson's

having forced her to consent by threatening her with the loss of her child if she did not.

In connection with the matter of the excessiveness of the fees charged, the following excerpt from the brief filed in behalf of the state is apposite:

"We may say at the outset that, if this case is to be regarded merely as involving the question of the amount of fee which was obtained, then the state has, in our opinion, no case against defendant. The amount of compensation which a client may agree to pay, and may actually pay, his attorney for a given service is a matter of contract between them, when made at a time when, and in a manner in which, the parties are dealing at arm's length with each other. Under such circumstances, the parties are left by the law to fix the consideration for themselves, as they are left in other contracts. It may, and often does, happen that fees are paid by clients to attorneys largely in excess of what would be considered reasonable compensation by the bar or by the courts. The desire of a person to have a particular lawyer attend to his affairs, whether matter of litigation or otherwise, is as much a part of the lawyer's capital as transcendent ability or the reputation of it, which are much the same so far as the public are concerned.

"We say, therefore, that the alleged excessive amount of compensation obtained by defendant is not the gravamen of the state's complaint, but that the manner in which such more than reasonable compensation was obtained is the foundation of the complaint upon that branch of the case."

I think that, to use the language of the foregoing excerpt, it was "the desire of Mrs. Winling to have a particular lawyer attend to her affairs" which induced her to consent to pay this fee. She did so with her eyes open. What she desired above all things was to secure the custody of her child and obtain a divorce, and she had found that Mr. Théard would not consent to act for her in that connection, and she had to come to Mr. Richardson as to a lawyer who would. She preferred to pay this large fee rather than give him up as her lawyer.

In the brief of the state, it is said that inasmuch as the divorce had not yet been obtained, and the community of acquets and gains still existed, when Mrs. Winling acquired the two improved properties from Richardson, these properties were in no better predicament than those which he induced her to sell to him had been, so far as the control of them by the husband was concerned. But this is not true, since the acts of sale which he executed in her favor contained the recital that the property was acquired by her for her separate benefit and with her separate funds, whereas the act by which she had acquired the other property did not contain this essential recital. The husband might at any time have complicated matters very much by selling or mortgaging this other property thus acquired during marriage and presumably belonging to the community of which he was the head, whereas he could not possibly have done this in

the case of the property acquired from Richardson.

Mr. Richardson's subsequent settlement with Mrs. Winling, at the instance of his friends, cannot be construed into a confession of guilt. He himself was at first unwilling to make the settlement, and finally did so in deference to the advice of his friends.

The learned counsel for the state argue that if Richardson's fee for obtaining the divorce was contingent, as he says it was, he, by consenting to waive the claim for alimony, was acting in his own interest. This argument, in my opinion, is of little force; since his having bargained for a contingent fee did not preclude him from doing those things which were manifestly for the benefit of his client, even though redounding at the same time to his own. A lawyer who has taken a damage suit on a contingent fee is not cut off from making a compromise advantageous to his client.

Realizing how desirable it is that the decision of the court should be unanimous in a case of this kind, I would have yielded my judgment to that of my colleagues, who, I cannot but recognize, are at least as competent as I am to form a correct judgment in the matter, if I had found it possible to do so. And it is because of this doubt as to whether possibly I ought not to have done so, that I have thus given my reasons—in justice, as it were, to myself.

(158 Ala. 502)

SOUTHERN RY. CO. v. GULLATT.

(Supreme Court of Alabama. Jan. 18, 1909.)

1. RAILROADS (§ 395*)—INJURIES TO PERSONS ON TRACK—PLEADING AND PROOF.

Where intestate's injury was alleged to have been caused by the negligence of defendant's trainmen in failing to stop the train after seeing intestate on the track, proof of the knowledge of his peril was essential.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 395.*]

2. RAILROADS (§ 400*)—INJURIES ON TRACK—ACTIONS—JURY QUESTION—DISCOVERED PERIL.

In an action for intestate's death by being struck by a train, whether the company's employees saw intestate's peril on the track in time to stop *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 400.*]

3. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—PREJUDICIAL EFFECT.

In an action for intestate's death by being struck by defendant's train, testimony as to intestate's residence before his death, as well as how long the witness had resided at his place of residence, was not prejudicial to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1050.*]

4. APPEAL AND ERROR (§ 232*)—OBJECTIONS BELOW—SCOPE—OPINION EVIDENCE.

Objections to a hypothetical question on the ground of illegality and immateriality would not raise the question on appeal whether the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

hypothetical question included facts not in evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1430, 1431; Dec. Dig. § 232.*]

5. EVIDENCE (§ 539½*)—OPINION EVIDENCE—COMPETENCY OF EXPERT—OPERATION OF RAILROAD.

One who had 20 years' experience in railroading, and had served 2 years as fireman and 3 years as freight engineer, and, though he had never run a passenger train, had often observed them being stopped, was competent to state as an expert within what distance the passenger train could be stopped; the passenger engine being similar to the usual type of freight engines, even though the cars composing the passenger train were different from those composing a freight train.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2351; Dec. Dig. § 539½.*]

6. RAILROADS (§ 397*)—INJURY ON TRACK—ADMISSION OF EVIDENCE—COMPOSITION OF TRAIN.

In an action for intestate's death by being struck by a passenger train while he was on the track, evidence of the number of coaches in the daily train of the same number and schedule as that which struck intestate was not admissible to prove the number of coaches in that train; it having no tendency to prove that fact, and evidence thereof being otherwise obtainable.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 397.*]

7. EVIDENCE (§ 595*)—WEIGHT AND SUFFICIENCY—INFERENCES BY JURY.

The jury may draw such inferences from the facts proven to their reasonable satisfaction as they believe to be fair and reasonable, and consistent with the other evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2444, 2445; Dec. Dig. § 595.*]

8. RAILROADS (§ 376*)—INJURIES TO PERSONS ON TRACK—DISCOVERED PERIL—COMPANY'S LIABILITY.

If decedent was lying on the railroad track in a position of peril, and defendant's trainmen saw his peril in time to stop, and failed to use due care to do so, and thereafter negligently ran over him, causing his death, the company would be liable.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1275-1279; Dec. Dig. § 376.*]

9. TRIAL (§ 252*)—INSTRUCTIONS—REQUESTS—APPLICABILITY TO EVIDENCE—ABSTRACT INSTRUCTIONS.

Where plaintiff requested no instructions as to the effect of the failure of defendant's engineer to testify, and no reference was made in argument as to any presumption arising from his failure to testify, a requested charge that no inference prejudicial to defendant could be drawn from his failure to testify was properly refused as being abstract.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 252.*]

10. TRIAL (§ 240*)—INSTRUCTIONS—REQUESTS—ARGUMENTATIVE INSTRUCTIONS.

Argumentative instructions are properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 561; Dec. Dig. § 240.*]

Appeal from Circuit Court, Jackson County; W. W. Haralson, Judge.

Action by Samuel Gullatt, as administrator, against the Southern Railway Company. From a judgment for plaintiff, defendant appealed. Reversed and remanded.

The following charges were refused to the defendant: (1) and (2) Affirmative charges as to the second count. "(3) No inference can be drawn prejudicial to the defense in this case by reason of the fact that the engineer was not introduced and examined as a witness in the cause by the defendant. (4) The jury would not be authorized to infer, from all the testimony in this case, that the engineer, when he blew the whistle, as is shown by the testimony of one of the witnesses, that he had then discovered the deceased upon the track and had perceived his peril."

The following charges were given at the instance of the plaintiff: "(1) The jury has the right to draw such inference from the facts in the case proven to their reasonable satisfaction as they believe to be fair and reasonable and consistent with the evidence in the case. (2) If the jury are reasonably satisfied from the evidence that deceased, E. E. Kirby, at or about the time and place named in the complaint, was lying down on the track of the railroad, and was then and there in a position of peril from defendant's approaching train on said railroad, and that the agent and servants of defendant then and there in control and management of said train saw the peril of said Kirby, and after the discovery of said peril, the said agents and servants of defendant negligently ran such train of cars on said Kirby and killed him, and that said negligence of defendant's agents and servants was proximately the cause of the death of plaintiff's intestate, then the jury must find for the plaintiff."

Humes & Speake, for appellant. Billbro & Moody, for appellee.

McCLELLAN, J. The report of this case on former appeal may be found in 150 Ala. 318, 48 South. 577. The second count of the complaint, upon which the trial was had, ascribes the negligence to liability to the operatives of the train by which Kirby was killed, in that, after discovery of his peril, proper care and diligence was not exercised to avert the injury to him. The particular averment is "that the agents and servants of the defendant then and there in the control and management of said train saw the peril of the plaintiff's intestate, and after the discovery of said peril" the train was negligently run upon intestate, killing him.

The predicate to the duty alleged in the count to have been breached, to the proximately consequent injury of intestate, is knowledge of the peril of intestate by those in control of the defendant's train. Of course, to make out the case under the count, the averred fact of knowledge of the peril stated was absolutely essential. It is insisted that, on the trial after reversal, this testimony so far sustained the important averment and condition to the duty declared

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

as to carry the prima facie case and to require the submission of the question to the determination of the jury, namely, that one Kennemar was sitting in a room of his house, near the railway; that he heard three or four short, shrill whistles, one right after the other; that he had lived near a railroad all his life, and knew the blasts that are made for cattle and things on the track; that he had often observed that kind of blowing for things on the track; that he at once ran from the room and across the porch, a distance of about 18 feet, to the edge of the porch, looked in the direction from which the train was coming, saw it emerge from a skirt of woods about 89 yards from where blood from the intestate appeared on the track, and then looked along the track in front of the train, but could not see anything; and that, had a man been standing upon the track, he could have seen him.

We have considered with great care the question indicated, and are not prepared to say that the trial court erred in the submission of the matter to the jury. The inference that the engineer saw intestate on the track, before an oncoming train, running 25 or 30 miles an hour, may be reasonably deduced from the fact, testified to by Kennemar, that the signal heard by him he had often heard used for cattle and things on the track, and from the further uncontroverted fact that intestate was on the track when the train struck and killed him. Whether this inference should be drawn is, of course, another question, which must be left to the sound discretion of the jury. It is unquestionably an argument against the adoption of such an inference, under the circumstances, that the blows of the whistle may have been given for a different purpose or suggested by a different object on the track. But this is an argument only in opposition to the adoption of the inference reasonably deducible from the facts testified to. Likewise, it is an argument only that, though the blows were sounded with reference to intestate, and his proximity to, or attitude about, the track ahead of the train, the peril of intestate may not have then existed and have been known to the engineman; because, if the jury credited the testimony of Kennemar, the whistles blown were, as he often heard, used when cattle and things were on the track, and, if so, intestate was on the track, in a down posture, before an oncoming train, and, if so, he was in a position of extreme peril, unless the train was stopped. We have said enough to indicate the ground for our conclusion that the general affirmative charge for the defendant was properly refused on this phase of the case.

On the former appeal there was no testimony tending to show that the train could, by the exercise of proper care and diligence, have been stopped short of the point of contact with intestate. On this trial there was

testimony tending to show that the train could have been so stopped by the exercise of such care and diligence. If the jury, as they might, from the testimony, have done, found that the discovery of intestate's peril was made at the time the whistle was sounded, then the duty to resort to the means suggested by due care and diligence arose, and, if some tendencies of the evidence were credited by the jury, these means would have averted the injury.

The testimony, to which defendant objected, showing where intestate resided before his death, and also that showing where and for how long the witness had resided at his place of residence, could not have worked injury to the defendant.

The question to the witness Osborne, as an expert, in reference to the distance in which a passenger train of five or six cars, of certain equipment, running 25 or 30 miles an hour, could be stopped, was objected to upon the grounds of illegality, immateriality, and because the witness was not qualified as an expert. The two first grounds did not take the point, argued in brief, that elements were included in the hypothetical question not shown by the evidence. The broad grounds of illegality and immateriality were not definite enough to direct the court's attention to the point indicated and now argued. We think Osborne qualified as an expert in the operation of engines. He had served, about 20 years ago, 2 years as a fireman and 3 years as a freight train engineer, though he never ran a passenger train, and had "for a long time noticed passenger trains being stopped." The general similarity between locomotives used for passenger and freight service is sufficient to justify, in respect of their operation, the opinion of a person familiar with the other and without experience with the first. However that may be, there is nothing in the record tending to show that the engine drawing the train in question was not of the same type as that usually used to draw freight trains. Nor do we think the mere dissimilarity between the cars composing a freight train and those composing a passenger train necessarily renders valueless a person's opinion whose experience has been limited to the handling of the other class of trains. The relative distance in which either may be the more quickly stopped is, as appears, subject to many conditions of track, weather, and appliances; and that some conditions are present and some are absent cannot disqualify one shown to have had several years of experience in operating locomotives. The weight to be given the opinion of the expert is, in this as in all cases, a very different matter. The court properly overruled the objections to the question to Osborne.

The plaintiff was permitted, over objection, to prove how many coaches or cars the daily train of the defendant corresponding in schedule and number to that inflicting the injury

usually carried. We think this was error. It had no sort of tendency to prove the composition of the train in question, and was, therefore, wholly immaterial. *T. C. I. & R. Co. v. Hansford*, 125 Ala. 349, 365, 28 South. 45, 82 Am. St. Rep. 241. Evidence of the composition of this train could have been easily secured by propounding interrogatories under the statute, if, indeed, not otherwise.

Charges 1 and 2, given at the instance of plaintiff, are not subject to appellant's criticisms of them, and were properly given.

From the bill it appears that the engineer who had control of the train in question was present in the courtroom upon the trial and was not examined. The defendant offered no evidence of any character. So far as the bill shows there was no reference in the argument of counsel to any presumption to be indulged on account of the failure to examine the engineer, nor any special instructions requested by plaintiff in that connection. In this state of the case those special charges expressing a denial of any such presumption from the failure to examine the engineer were patently abstract, and no errors attend their refusal.

We have carefully examined the other charges requested by, and refused to, defendant. They are each either abstract, argumentative, or affirmatively bad, and were well refused. As stated before, the issues were for the jury under all the facts and circumstances shown by the evidence; and hence the affirmative charge asked for the defendant was correctly refused by the court.

The judgment, for the error stated, is reversed, and the cause is remanded.

Reversed and remanded.

HARALSON, DOWDELL, and ANDERSON, JJ., concur.

(158 Ala. 169)

UNION CENT. LIFE INS. CO. v. WASHBURN.

(Supreme Court of Alabama. Jan. 13, 1909.)

1. PLEADING (§ 399*)—PLEADING AND PROOF.

Though the replications plead in different ways a waiver of the forfeiture of the policy sued on, it is enough if any one of the replications is established.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1339-1342; Dec. Dig. § 399.*]

2. EVIDENCE (§ 378*)—WRITINGS—AUTHENTICATION.

Papers found among those of insured at his death, purporting to have emanated from the general agent for the state of the insurer, with no indicia or marks other than of genuineness, though bearing his signature affixed only with a rubber stamp, are admissible, with evidence of his custom to so affix his signature, to show waiver of forfeiture of the policy.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1648-1655; Dec. Dig. § 378.*]

3. INSURANCE (§ 371*)—WAIVER OF FORFEITURE.

A waiver of forfeiture of a policy, once made, is irrevocable.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 944; Dec. Dig. § 371.*]

4. APPEAL AND ERROR (§ 1054*)—TRIAL BY COURT—ERROR IN ADMITTING EVIDENCE.

The court, in a case tried without a jury, having been justified on the legal evidence, in which there was no conflict, in finding that there had been a waiver of forfeiture of the policy sued on, any error in admitting irrelevant and illegal evidence was harmless.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4185; Dec. Dig. § 1054.*]

5. EXECUTORS AND ADMINISTRATORS (§ 224*)—CLAIMS TO BE PRESENTED.

Defendant, in an action on a life policy, is entitled, under the plea of set-off, to a credit of the amount of the unpaid premium note, as provided in the policy; the claim therefore not being required to be presented to insured's administrator to save it from the bar of the statute of nonclaims as a credit on the policy.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 224.*]

Appeal from City Court of Gadsden; John H. Disque, Judge.

Action by T. S. Washburn, as administrator, against the Union Central Life Insurance Company. Judgment for plaintiff. Defendant appeals. Corrected and affirmed.

Burnett, Hood & Murphree, for appellant. Oull & Martin, for appellee.

DENSON, J. The principles of law controlling the pleadings in this case were determined on former appeal. *Washburn v. Union Central Life Insurance Co.*, 143 Ala. 485, 38 South. 1011. Since the remandment of the cause two additional pleas, 4 and 5, have been filed by the defendant. The fourth plea, like the second and third, sets up the defense of forfeiture of the policy sued on. Replications 17 to 24, inclusive, which had been filed to pleas 2 and 3, were also filed to plea 4. In principle, no new question is raised by this last plea, different from those considered when the case was here before. The fifth plea is one of set-off. The real issue in the case is that of waiver vel non of the forfeiture pleaded, which is raised by the replication to the pleas setting up this defense. In the several replications the waiver of the forfeiture is pleaded in different ways; but this does not impose upon the plaintiff the duty of supporting by the evidence all of the replications in order to a recovery. It is a sufficient answer to the pleas of forfeiture, if any one of the replications setting up waiver is established.

It is needless to repeat here what was said on former appeal as to the law in respect of forfeiture and the waiver thereof in such cases, and we content ourselves in referring to that case for what was then said.

The present case was tried by the court below without a jury, and on the facts in evidence a judgment rendered in favor of the

plaintiff. Upon the introduction of evidence on the trial many objections were made and exceptions reserved to the rulings of the court. These exceptions are not discussed in detail by counsel in their briefs, nor do we find it necessary to so treat them in this opinion. Under the issues made by the replications, the evidence of any fact or circumstance which tended, though slightly, to show a waiver of the alleged forfeiture by the defendant, was competent and legal. Along this line the documents designated in the record as "B," "C," "E," "H," "I," and "J" were admissible in evidence. It was shown that they, together with the policy sued on, were found among the papers of the insured at the time of his death. They purported to have emanated from E. H. Andrews, the general agent of the defendant company at Birmingham, Ala., and with no other indicia or marks than that of genuineness. The evidence, attending the introduction of these papers, of the custom of General Agent Andrews to use a rubber stamp in affixing his signature, was permissible, going to show the authenticity of these documents, which bore his signature affixed in this manner. The evidence without dispute showed that E. H. Andrews was the general agent of the defendant company, and as such had the general management and control of all of the business of the defendant in the state of Alabama. In a sense he was the alter ego of the defendant in this state. As a question of law there can be no doubt of his authority to bind the defendant by a waiver of the forfeiture, and this either expressly or by his acts and conduct. The letters designated "I" and "J," which were written and sent to the insured after the date of default in the payment of the premium note, the said default being the time of the alleged forfeiture, we think, clearly indicated a purpose to waive and not to claim a forfeiture; and the law is the waiver is irrevocable when once made.

On the legal evidence in the case, and in which there was no conflict, the trial court, who heard the cause without a jury, was justified in the conclusion that there had been a waiver by the defendant of the alleged forfeiture, and in rendering judgment for the plaintiff. This being true, it may be conceded that the court committed errors in the admission of other evidence that was irrelevant and illegal, without affecting the conclusion reached, since under the settled law of this court, in such a case, where the trial court acts as both court and jury, the error is *absque injuria*. The rule is thus stated in *First National Bank v. Chaffin*, 118 Ala. 259, 24 South. 84: "If illegal evidence has been admitted, the judgment must be reversed, unless the remaining evidence is without conflict and supports the judgment." Such is the case before us. Eliminating all

illegal evidence, the remaining evidence without conflict supports the judgment.

The judgment, however, must be corrected. Under the plea of set-off the defendant was entitled to a credit of the amount of the unpaid premium note. This was provided for in the contract on which the plaintiff sues, and it was not required to be presented to the plaintiff, as administrator of the insured, to save it from the bar of the statute of non-claim as a credit on the policy. With this correction, the judgment will be affirmed.

Corrected and affirmed.

HARALSON, SIMPSON, and McCLELLAN, JJ., concur.

(153 Ala. 31)

HERRING et al. v. STATE.

(Supreme Court of Alabama. Dec. 17, 1908.

On Rehearing, Jan. 14, 1909.)

1. INTOXICATING LIQUORS (§ 198*)—ILLEGAL SALE—PROSECUTION—AFFIDAVIT—SUFFICIENCY.

Code 1907, § 7359, provides that, where a person disposes of intoxicating liquors in violation of section 7357, a justice of the peace or judge of the county court shall on complaint issue a warrant for the person's arrest. *Held*, that an affidavit made before a judge of a city court and warrant issued by him are void.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 198.*]

2. INTOXICATING LIQUORS (§ 198*)—SECURITY TO KEEP THE PEACE—APPLICATION TO PROSECUTIONS UNDER LIQUOR LAW—"MAGISTRATES."

Code 1907, § 7519, providing that judges of city courts, etc., are "magistrates," within the meaning of the chapter ("Proceedings to Preserve the Peace"), and authorized to require persons to give security to keep the peace, etc., refers only to affidavits and warrants under that chapter, and not in prosecutions for illegal liquor selling.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 198.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4271-4273.]

On Rehearing.

3. INTOXICATING LIQUORS (§ 198*)—ILLEGAL SALE—PROSECUTION—JURISDICTION—CITY COURT OF BESSEMER.

The act creating the city court of Bessemer confers on the court and judge thereof the same jurisdiction and powers as are possessed by the criminal court of Jefferson county and the judge thereof. The act creating the criminal court of Jefferson county confers on it the jurisdiction in criminal cases and proceedings connected with the administration of criminal law which is or may be conferred on the circuit courts. Section 2, as amended by Act Dec. 7, 1900 (Laws 1900-01, p. 214, § 1), gives the judges all the jurisdiction of circuit judges. Section 6 confers jurisdiction of all offenses against the state concurrently with other courts. Section 12 gives the court jurisdiction, concurrently with other courts already having it, of prosecutions for misdemeanors committed in the county. *Held*, that the act does not confer on the judge of the criminal court of Jefferson county, and hence not upon the judge of the city court of Bessemer, the authority conferred by

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Code 1907, § 7359, on justices of the peace and county court judges to issue warrants for arrest upon complaint before them alleging an unlawful disposal of intoxicating liquors by a person concealed in a house, etc., so that he is unknown, in violation of section 7357.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 198.*]

Appeal from City Court of Bessemer; William Jackson, Judge.

G. W. Herring and others were convicted of unlawful sale of intoxicating liquors, and appeal. Reversed and rendered.

T. T. Huey and Allen & Bell, for appellants. Alexander M. Garber, Atty. Gen., and Thomas W. Martin, Asst. Atty. Gen., for the State.

SIMPSON, J. The appellants were tried and convicted of the offense of selling spirituous, vinous, or malt liquors in violation of section 7357 of the Code of 1907.

The affidavit upon which the defendants were arrested was made before Hon. William Jackson, judge of the city court of Bessemer, and the warrant was issued by him. Motion was made to quash the affidavit and warrant on the ground that said judge of said city court was not authorized to administer said affidavit or to issue said warrant.

The statute (section 7359, Code of 1907) specifically provides that the affidavit shall be made before a justice of the peace, or judge of the county court, and the warrant issued by the same. The court erred in overruling said motion. Section 7519 refers only to affidavits and warrants under that chapter of the Code—which is the chapter in regard to proceedings to keep the peace.

The affidavit and warrant being void, the entire proceeding is without authority of law. The judgment of the court is reversed, and a judgment will be here rendered discharging the defendants.

Reversed and rendered.

DOWDELL, DENSON, and McCLELLAN, JJ., concur.

On Rehearing.

SIMPSON, J. The act creating the city court of Bessemer confers upon the court and upon the judge the same jurisdiction and powers as are conferred upon the criminal court of Jefferson county and the judge thereof. The act creating the criminal court of Jefferson county (Loc. Laws 1886-87, p. 835) confers upon said court the "jurisdiction and powers, in the trial of criminal cases, and in proceedings connected with the administration of criminal law, which now are or may be, by law, conferred on the several circuit courts of this state, together with such other jurisdiction and powers as may be conferred on said criminal court by the provisions of this act"; and the second section of said act, as amended by the act of De-

cember 7, 1900 (Laws 1900-01, p. 214, § 1), provides that "said judges shall have and exercise jointly or separately all the jurisdiction and powers which are now, or may be hereafter lawfully exercised by the judges of the circuit court." The sixth section confers jurisdiction of all offenses against the state concurrently with other courts; and section 12 provides that said court "shall have and exercise jurisdiction concurrently with other courts now having the same, of all prosecutions for misdemeanors committed in said county, which may be instituted or commenced in said court by complaint and warrant of arrest, and prosecutions for misdemeanors may be commenced by any person complaining under the form now prescribed by law for the commencement of prosecutions in the county courts," etc., and "it shall be no objection to the complaint and warrant of arrest, when issued by a justice of the peace, that they are irregular," etc. The act also provides for grand and petit juries in said court. See Local Laws of Jefferson County (Compiled by Weakley) p. 599 et seq.

We do not see in this act anything conferring on the judge of said court the authority of justices of the peace and of county court judges, mentioned in section 7359 of the Code of 1907. Vann & Waugh v. Adams, Throne & Co., 71 Ala. 475. On the contrary, another court has been created in said county to exercise the jurisdiction and powers of justices of the peace.

TYSON, C. J., and ANDERSON, DENSON, and McCLELLAN, JJ., concur.

(158 Ala. 343)

GULF COMPRESS CO. v. HARRIS, CORTNER & CO.

(Supreme Court of Alabama. June 30, 1908. Rehearing Denied Feb. 5, 1909.)

1. **WAREHOUSEMEN (§ 3*) — PUBLIC WAREHOUSES—STATUTES.**

A domestic business corporation, organized for private gain, with power to engage in the general storage and compress business, which takes out a warehouseman's license required by Gen. Laws 1907, p. 371 (Code 1907, § 6123 et seq.), declaring that warehouses for the storage of cotton, etc., shall be public warehouses, and requiring a license permitting one to transact business as a public warehouseman, does not thereby become a public service corporation, but at most its warehouse business is affected with a public interest.

[Ed. Note.—For other cases, see Warehousemen, Cent. Dig. § 4; Dec. Dig. § 3.*]

2. **EQUITY (§ 43*)—JURISDICTION—ADEQUACY OF LEGAL REMEDY.**

A court of equity is without jurisdiction of a cause where a plain and adequate remedy at law exists, unless jurisdiction is conferred by statute.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 121; Dec. Dig. § 43.*]

3. **EQUITY (§ 46*)—JURISDICTION—ADEQUACY OF LEGAL REMEDY.**

Where a wrong can be compensated by money, a court of equity will not assume juris-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

diction because an adequate remedy at law exists, and where the question is one of damage to individual or property rights, to warrant a court of equity to assume jurisdiction, the damage must be in its nature irreparable or incapable of measurement in money, unless coupled with some other independent matter of equitable cognizance.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 151, 152; Dec. Dig. § 46.*]

4. EQUITY (§ 46*)—JURISDICTION—ADEQUACY OF LEGAL REMEDY.

An action for money had and received against a public warehouseman exacting overcharges for the storage gives a complete and adequate remedy, and a court of equity is without jurisdiction to grant relief.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 152; Dec. Dig. § 46.*]

5. INJUNCTION (§ 14*)—GROUNDS OF RELIEF—IRREPARABLE INJURY.

Where a public warehouseman exacted overcharges for the storage of cotton, which one engaged in the business of buying, selling, and shipping cotton had to pay, but the overcharges were too inconsiderable to warrant the conclusion that the dealer's business would be ruined thereby, the dealer could not invoke equity to restrain the collection of overcharges on the theory that he would suffer irreparable injury.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 14; Dec. Dig. § 14.*]

6. EQUITY (§ 51*)—JURISDICTION—GROUNDS—MULTIPLICITY OF SUITS.

Since one engaged in the business of buying, selling, and shipping cotton, who must pay overcharges for the storage of the cotton in a public warehouse, may recover in one action all the overcharges paid for a cotton season, or may maintain numerous actions at law therefor, equity is without jurisdiction to grant relief to prevent a multiplicity of suits.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 168; Dec. Dig. § 51.*]

7. CONTRACTS (§ 187*)—RIGHTS OF THIRD PERSONS.

An owner of a cotton compress and warehouse leased the same for a term of years to a corporation authorized to engage in the general storage and compress business, the plant to be conducted as a public warehouse and compress for hire. The lease fixed a schedule of maximum charges. *Held*, that one engaged in the business of buying, selling, and shipping cotton had no such interest in the lease as entitled him to enforce the provisions fixing the maximum charges, and he could not sue in equity to compel the corporation to comply with such provisions on the ground that the contract was made for his benefit.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 798; Dec. Dig. § 187.*]

8. CONSTITUTIONAL LAW (§ 70*)—LEGISLATIVE POWER.

The prescribing of rates for a public service corporation, or one affected with a public interest, is a legislative, and not a judicial, function.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 129; Dec. Dig. § 70.*]

9. EQUITY (§ 15*)—JURISDICTION.

A court of equity has no jurisdiction to fix a schedule of prices to be charged by a public warehouseman for receiving, storing, and handling goods, and in the absence of equitable ground of relief it will not assume jurisdiction on the question merely of the reasonableness of rates.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 27; Dec. Dig. § 15.*]

McClellan, J., dissenting.

Appeal from Chancery Court, Morgan County; W. H. Simpson, Chancellor.

Suit by Harris, Cortner & Co. against the Gulf Compress Company. From a decree overruling a motion to dismiss the bill for want of equity, a demurrer to the bill, and a motion to dissolve a preliminary injunction, defendant appeals. Reversed and rendered.

Brown & Kyle, Fittshugh, Biggs & Fittshugh, and Cabaniss & Bowie, for appellant. E. W. Godbey and Callahan & Harris, for appellees.

DOWDELL, J. The appeal in this case is prosecuted from an interlocutory decree of the chancellor overruling the respondent's motion to dismiss the bill for want of equity, demurrer to the bill, and motion to dissolve the preliminary injunction for want of equity in the bill, and on the denials in the sworn answer of the material allegations of the bill.

The averments of the bill, in substance, are that the complainants, appellees here, are engaged in the business of buying, selling, and shipping cotton, and have been so engaged for more than a year, with their headquarters at Decatur, Ala., handling in their said business from 20,000 to 25,000 bales of cotton per annum, and will probably handle and deal in as many as 25,000 bales the current season; that they have a number of employes engaged in their service in the conduct of their business at a large expense to complainants; that the defendant, the Gulf Compress Company, is an Alabama corporation, with charter powers authorizing it to engage in the general storage and compress business; that the Gulf Compress Company in 1904 leased the plant of the Decatur Compress Company, an Alabama corporation of like powers, for a term of five years, at an annual cost to it of \$10,000 to be paid as rent; that said plant has been conducted prior to said lease by the Decatur Compress Company, and since by the Gulf Compress Company under said lease, as a public warehouse and compress for hire and compensation, inviting dealers such as complainants, and the public, to store their cotton; that said cotton compress and warehouse is located in the city of Decatur and on lines of railway which furnish shipping facilities in the handling of cotton, and the complainants are dependent upon the defendant's warehouse and compress and facilities "for the proper conduct of their [complainants'] business"; that in the lease contract under which the Gulf Compress Company operates said plant, a schedule of maximum charges was fixed by the contracting parties during the terms of the lease, and that until recently the Gulf Company has been conforming to the schedule so fixed, but since the close of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

the cotton season of 1906-7, the respondents, the Gulf Company and the Decatur Company, have annulled said lease, at least in so far as it relates to the schedule of maximum charges, and that under the new arrangement there is no limitation upon the respondent the Gulf Company in fixing the amount it will charge for services in the conduct of its business; that a new schedule of rates was made by the Gulf Company for the cotton season of 1907-8, which in certain particulars specified increased the charges incident to its business as warehouseman, and that such increased charges are unreasonable; that the Gulf Company has refused to receive complainants' cotton and render the services which has been its custom to render under the old schedule, unless complainants will submit to and pay the charges fixed in the new schedule, which it is alleged will be "practically ruinous" to the complainants. It is averred that the plant operated and conducted by the Gulf Company is the only one of its kind maintained in the city of Decatur, or in the county, and that the Gulf Company has taken out a license as required of warehousemen by an act of the Legislature approved March 7, 1907 (see Gen. Laws passed at first session 1907, page 371, and which is incorporated in the Code of 1907, as section 6123 et seq.), and that by reason of being the only warehouse of its kind in said city or county it was a virtual monopoly. The lease contract between the Gulf Company and the Decatur Company, and under which the plant is being operated by the former company, is set out as Exhibit A to the bill. The old and new schedules of rates and charges are set out as Exhibits B and C to the bill. It is averred that the old rates had been maintained for three years, and that, in reliance upon a continuation of the old rates, the complainants during the summer months of 1907, and prior to the beginning of the cotton season of 1907-8, in making preparations for the conduct of their business in the handling of their cotton for said cotton season of 1907-8, incurred heavy liability in the employment of hands, etc., and this without any notice or knowledge of the proposed change in the schedule of rates and charges.

It will be observed from the foregoing statement that the alleged wrong complained of is based upon the increase in rates and charges prescribed in the new schedule over those in the old, and as being excessive and unreasonable. The bill is directed against the Gulf Compress Company as warehouseman, no complaint being made as to the compress feature of respondent's business. The relief sought is injunctive. There is no charge of discrimination against the complainants in favor of any other customer of the respondent, but all are put upon the same basis and with like treatment.

The bill, according to its averments and

prayer for relief, is predicated upon the theory that the business of the respondent is "affected with a public interest" either by virtue of the act of March 7, 1907, declaring all warehouses in incorporated cities and towns for the storage of cotton or other articles of value for compensation to be public warehouses, or by reason of its being a monopoly in fact. However this may be, whether "affected with a public interest" or not, we need not decide that being unnecessary to a conclusion of the case under our view of the law applicable to the facts as shown by the bill, and therefore for the sake of argument it may be admitted that the business is one "affected with a public interest." But it is proper to here state that the respondent Gulf Compress Company is not in any sense a "public service" corporation, nor does the business carried on by it characterize it as such. It possesses no element of governmental power conferred upon it by law as in the case of a railroad company, serving the public as a common carrier of passengers and freight. It is strictly a private business corporation, organized for private gain and not for public service—a private business enterprise like that of an incorporated concern to carry on a merchandise business or a manufacturing business. And the fact that the statute declares that part of the plant conducted as a warehouse for the storage of cotton for compensation to be "a public warehouse" does not change the private nature and character of the corporation, or convert it into a "public service" concern, in the sense in which those terms are used and understood. The most that can be said of the effect of the statute is to say that it impresses upon the warehouse business the character of its being "affected with a public interest." It is well to observe in this connection that the act of March 7, 1907, does not prescribe any rates or charges for storage, or undertake in any manner to regulate the business conducted or carried on in such "public warehouses." There are privileges and powers possessed by "public service" corporations and exercised by them, governmental in character, which may not be conferred upon a private business corporation, as, for instance, the right of eminent domain, although the business carried on by the latter may become "affected with a public interest." This distinction has been taken in many of the adjudged cases. We have made the above observations in respect to the difference between a "public service concern" and one only "affected with a public interest," because equitable remedies might be sought and applied in the former, when they would not be in the latter.

Conceding, then, for the sake of argument, that the respondent the Gulf Compress Company, in the warehouse branch of its business is conducting and carrying on a business "affected with a public interest," the first ques

tion with which we are confronted at the very threshold is, Does the bill on the facts stated present a case for equity jurisdiction? It is an elementary principle that a court of equity is without jurisdiction to hear and determine a cause wherein a plain and adequate remedy may be had in a court of law, unless it be that jurisdiction is conferred by statute. And it was in this doctrine of the failure of a court of law to furnish such plain and adequate remedy for the enforcement of rights and redress of wrongs in certain cases that the court of chancery had its origin.

As a rule, where the wrong complained of can be redressed and fully compensated in damages by a money standard, a court of chancery will not assume jurisdiction for the reason that an adequate remedy exists at law. Where, then, the question is one of damage to individual or property rights, to warrant a court of equity in the assumption of jurisdiction, the damage must be in its nature irreparable, or incapable of measurement in dollars and cents, or unless coupled with some other independent matter of equitable cognizance. These are elementary principles.

Applying these principles to the case before us, let us inquire what, if any, fact is alleged that will give a court of equity jurisdiction. In its first analysis, the case presented by the bill is that the respondent is now, and has been since 1904, carrying on a warehouse business in the city of Decatur for the storage of cotton for compensation; that such warehouse is by the statute declared to be a "public warehouse," and therefore such business is "affected with a public interest"; that the complainants are engaged in the business of buying, handling, and shipping cotton, and in the conduct of complainants' business it becomes necessary for them to patronize the respondent, its warehouse being the only one of the kind in the city of Decatur; that the respondent is demanding tolls for the storage and handling of cotton in its said warehouse business under a new schedule of rates and charges, which is in excess of the old schedule, and that said increase in rates and charges is unreasonable; and that the respondent refuses to receive, store, and handle complainants' cotton unless complainants consent to pay the increased tolls. It is manifest from the foregoing statement that the wrong complained of consists in the exaction of overcharges. For this there is a complete and adequate remedy at law in an action for money had and received for the overcharges paid. *Mobile & Montgomery R. R. Co. v. Steiner, McGhee & Co.*, 61 Ala. 559. Moreover, it may be asked, if the defendant corporation be under a legal duty to receive and handle the complainants' cotton in accordance with the rates prescribed in the old schedule, as is alleged in the bill, why

may it not be compelled to the performance of this duty by mandamus?

It is true it is alleged in the bill that if complainants submit to and pay the increased charges under the new schedule of rates it will be practically ruinous to the complainants. This, however, in the light of other facts contained in the bill, can but be regarded as a conclusion of the pleader, and not as the statement of a fact. The difference in amount produced by the alleged overcharges as shown by the bill is too inconsiderable to warrant the conclusion that ruinous results would follow to a business of the kind and character as that engaged in by the complainants, when it is to be remembered that the overcharges so paid are not a permanent loss, and may be immediately recovered back in an action at law. We are unable to see how or in what way the complainants would suffer irreparable injury and damage from the alleged course of conduct of the respondent.

It is urged that the complainants would be put to numerous suits at law, and hence the bill has equity upon the doctrine of the prevention of a multiplicity of suits. It cannot be denied but that the complainants might in one action at law sue to recover all of the overcharges paid for the entire cotton season. One suit or a multiplicity of suits therefore would be a matter of complainants' own election. There being no necessity for a multiplicity of suits the reason for the interference of a court of equity on the principle mentioned fails.

It is urged as another ground of equity in the bill that the schedule of maximum rates named in the lease contract entered into between the Gulf Company and the Decatur Company was made and intended for the benefit of the complainants and others engaged in like business, and that having been made for their benefit, although not so expressly declared, the contracting parties have no right to annul the same, and the complainants, as such beneficiaries, have a right to have the same enforced in equity. There is no provision, statement, or expression in the contract by which such intention on the part of the contracting parties is shown. The fact that one not a party or privy to a contract is incidentally benefited under it is no reason for declaring that the contract was made and intended for his benefit. We are clearly of the opinion that the complainants had no such interest in the lease contract made between the Gulf Company and the Decatur Company in 1904, and which the contracting parties had rescinded, as entitled them to enforce any of the provisions of said contract, even if the same had not been annulled. 9 Cyc. 380, and authorities there cited; *Vrooman v. Turner*, 69 N. Y. 280, 25 Am. Rep. 195; *Gilbert v. Sanderson*, 56 Iowa, 349, 9 N. W. 293, 41 Am. Rep. 103; *Davis v. Calloway*, 30 Ind. 112, 95 Am. Dec.

671; Durnherr v. Rau, 135 N. Y. 219, 32 N. E. 49; National Bank v. Grand Lodge, 98 U. S. 128, 25 L. Ed. 75; Lovejoy v. Bessemer, etc., 146 Ala. 379, 41 South. 76, 6 L. R. A. (N. S.) 429.

The law, we think, is too well settled to admit of doubt that the prescribing of rates for a "public service" corporation or one "affected with a public interest" is a legislative, and not a judicial, function. To this effect are the adjudications both state and federal. To us it is equally clear in the case at bar that a court of chancery has no jurisdiction or power to fix a schedule of prices to be charged by the respondent for receiving, storing, and handling complainants' cotton. *City of Madison v. Madison Gas & Electric Co.*, 129 Wis. 249, 108 N. W. 65, 8 L. R. A. (N. S.) 529; *W. U. Tel. Co. v. Myatt (O. C.)* 98 Fed. 342; *Neb. Tel. Co. v. State*, 55 Neb. 627, 76 N. W. 171, 45 L. R. A. 113; *So. Pacific Co. v. Colo. Fuel & Iron Co.*, 101 Fed. 779, 42 C. C. A. 12; *Inter-State Com. Com. v. R. R. Co.*, 167 U. S. 479, 17 Sup. Ct. 896, 42 L. Ed. 243; *Reagan v. Farmers' Loan & T. Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *A., T. & S. F. R. R. Co. v. Denver & N. O. R. R. Co.*, 110 U. S. 682, 4 Sup. Ct. 185, 28 L. Ed. 291; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; *R. R. Co. v. Stockyards, etc.*, 45 N. J. Eq. 50, 17 Atl. 146, 6 L. R. A. 855. From the foregoing authorities the principle is likewise deducible that a court of chancery, in the absence of other equitable ground of relief, will not assume jurisdiction in any case upon the question merely of the reasonableness or unreasonableness of rates and charges.

But we need not pursue this line of discussion, since, in our opinion, the case is determinable upon the proposition that the complainants have an adequate remedy at law for a redress of the wrongs complained of. Our attention has been called to the recent case of *Ex parte Young*, 209 U. S. 166, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, cited in supplemental brief of counsel for appellee as an authority for equity jurisdiction in the case before us. The facts in that case are materially different from the facts in the case at bar. The complicated facts in the case cited, which the court say render it difficult, if not impossible, for a court of law to determine the issues do not obtain in the present case. The case of *R. R. Co. v. Stockyards, etc.*, supra, is more analogous in fact and principle to the one under consideration. That was a case in chancery, and the bill was dismissed on the ground of an adequate remedy at law.

Our conclusion is that the bill is without equity, and the chancellor erred in not dismissing the same and dissolving the injunction on the respondent's motion.

Reversed and rendered.

TYSON, C. J., and SIMPSON, ANDERSON, and DENSON, JJ., concur. McCLELLAN, J., dissents.

GULF COMPRESS CO. v. SYKES, TWEEDY & CO.

(Supreme Court of Alabama. June 30, 1908.
Rehearing Denied Feb. 5, 1909.)

Appeal from Chancery Court, Morgan County; W. H. Simpson, Chancellor.

Suit by Sykes, Tweedy & Co. against the Gulf Compress Company. From a decree for complainant, defendant appeals. Reversed and rendered.

Fittshugh, Biggs & Fittshugh and Cabaniss & Bowie, for appellant. Callahan & Harris and E. W. Godbey, for appellee.

McCLELLAN, J. This decree appealed from will be reversed and one here rendered in accordance with and upon the authority of *Gulf Compress Company v. Harris, Cortner & Co.*, 48 South. 477.

Reversed and rendered.

TYSON, C. J., and HARALSON, DOWDELL, SIMPSON, ANDERSON, and DENSON, JJ., concurring. McCLELLAN, J., dissenting.

GULF COMPRESS CO. v. JONES COTTON CO.

(Supreme Court of Alabama. July 15, 1908.
Rehearing Denied Feb. 5, 1909.)

Appeal from Chancery Court, Morgan County; W. H. Simpson, Chancellor.

Suit by the Jones Cotton Company against the Gulf Compress Company. From a decree for complainant, defendant appeals. Reversed and rendered.

Brown & Kyle, Fittshugh, Biggs & Fittshugh, and Cabaniss & Bowie, for appellant. Callahan & Harris and E. W. Godbey, for appellee.

ANDERSON, J. Reversed and rendered on the authority of *Gulf Compress Company v. Harris, Cortner & Co.*, 48 South. 477.

(158 Ala. 306)

TRIBBLE v. SINGLETON.

(Supreme Court of Alabama. Nov. 23, 1908.
Rehearing Denied Feb. 5, 1909.)

MORTGAGES (§ 38*)—ABSOLUTE DEED AS MORTGAGE—EVIDENCE.

In order to declare a deed absolute on its face to be a mortgage, the evidence must be clear and conclusive that it was so intended.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 109; Dec. Dig. § 38.*]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Suit by B. F. Singleton against George Tribble. From a judgment for plaintiff, defendant appealed. Reversed, and bill dismissed.

Robert E. Smith, for appellant. Ward & Ward and Mamie Riddle, for appellee.

SIMPSON, J. The bill in this case was filed by the appellee to have an absolute deed declared a mortgage.

There is no controversy about the facts that the complainant executed the absolute deed, conveying the property to the defendant, and also signed the lease contract, by which he was to pay so much monthly as rent for the premises, with the agreement therein expressed that, if he made the monthly payments promptly, a conveyance of the property was to be made to him, but, if not, he was to have no right of purchase; also, that he has not made such payments according to said instrument; also, that complainant can read and write, that he read the lease contract a short time after the copy was delivered to him, and continued to make payments thereunder without making any protest as to its terms.

The testimony of the complainant is in conflict with the testimony of the defendant, but that of the notary who took the acknowledgment tends to support the contention of the defendant.

The testimony is not of that clear and conclusive character which would justify the court in setting aside the plain language of the written instruments, and declaring the deed a mortgage.

The decree of the court is reversed; and a decree will be here rendered dismissing the bill.

Reversed and rendered.

TYSON, C. J., and DOWDELL and DENSON, JJ., concur.

(158 Ala. 173)

OLLINGER & BRUCE DRY DOCK CO. v. TUNSTALL.

(Supreme Court of Alabama. Dec. 17, 1908. Rehearing Denied Jan. 14, 1909.)

1. SALES (§ 64*)—CONSTRUCTION OF CONTRACT—OPTION.

Defendant paid plaintiff money under an agreement that on payment of a further sum within a specified time plaintiff would sell him a vessel, and that if defendant failed to exercise the option the cash payment should be retained as rent for the vessel, etc., and defendant should owe plaintiff nothing more. *Held*, that plaintiff's retention of the money paid released defendant from any further obligation for breach of any conditions of the agreement.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 156; Dec. Dig. § 64.*]

2. SALES (§ 64*)—OPTION CONTRACT—ACTION FOR BREACH.

Defendant paid plaintiff money under an agreement that on payment of a further sum within a specified time plaintiff would sell him a vessel, and that if defendant failed to exercise the option the cash payment should be retained as rent, etc., and defendant should owe plaintiff nothing more. Defendant did not elect to buy within the time specified, and plaintiff sued for defendant's failure to order necessary repairs on the vessel, to pay over its earnings, etc., alleging that notwithstanding breaches of the agreement the parties agreed it should re-

main in force, and that defendant waived the provision that the contract should cease on his failure to perform his obligations thereunder. *Held*, that such allegations do not show a change in the provision of the original agreement that, on defendant's breach, he should not be held beyond the sums theretofore paid.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 156; Dec. Dig. § 64.*]

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

Action by the Ollinger & Bruce Dry Dock Company against Peyton R. Tunstall. From a judgment for defendant, plaintiff appeals. Affirmed.

Gregory L. & H. T. Smith, for appellant. Pillans, Hanaw & Pillans and McAlpine & Robinson, for appellee.

McCLELLAN, J. The appellant, plaintiff below, was the owner of a vessel named "City of Camden"; and with reference to which it and appellee contracted, in writing, in substance as follows: Appellee paid appellant the sum of \$5,000, and the consideration inducing such cash payment is stated, in the contract, to have been (1) that appellant, upon the request of appellee, at any time within 12 months from the date of execution of the agreement, would sell and convey to appellee the vessel named for the sum of \$4,440, with interest thereon at the rate of 6 per cent. to be paid in cash at the time of making said request, and that, upon the payment of said sum to it, appellant would make a good and sufficient bill of sale of the vessel to appellee; (2) that in the event appellee desired an extension of time for another 12 months he had the option to do so; (3) "In the event that the said Peyton R. Tunstall, Jr., shall fail to pay to the Ollinger & Bruce Dry Dock Company the said sum of four thousand four hundred and forty dollars (\$4,440.00) as provided by this agreement, with interest, or shall fail to keep and perform any other obligation in this instrument agreed by him, then this agreement shall cease and determine, and the said Ollinger & Bruce Dry Dock Company shall have the right to retain the said sum of five thousand dollars (\$5,000.00), and any part of the said sum of four thousand four hundred and forty dollars (\$4,440.00) that shall have been paid as compensation for being deprived of the right to otherwise sell and dispose of said steamboat during said period, and as rent for said steamboat during said period, and said Peyton R. Tunstall, Jr., shall owe the said corporation nothing more" (italics supplied); (4) that appellee had the right to operate said vessel without charge for its use, but, if he did not so desire, there should be no wharfage charges for the use of appellant's wharf for the vessel, "and during the time said steamboat is not being operated the said Peyton R. Tunstall, Jr., is to keep a watchman on her day and night at

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

his expense"; (5) that appellee should pay 6 per cent. interest on said deferred payment so long as said payment was unsettled, and appellant should receive each month, during the time, or extension thereof, of the agreement, the net earnings of the vessel from whatever source the same was derived until the said deferred payment, with interest, was paid; (6) that in the event it became necessary to make repairs on the vessel, during the life of the contract, such repairs should only be made on an order from appellee to appellant instructing it to have the repairs made, and appellee should pay the expense thereof. There were a few other provisions in the contract not now necessary to be considered. It does not appear that appellee elected, during the period specified, to buy the vessel.

The several counts of the original complaint are predicated upon alleged breaches accruing by the failure of appellee (1) to pay the interest stipulated, (2) to order the necessary repairs, (3) to maintain the watch specified, (4) to pay the earnings of the vessel to appellant.

The demurrers take the point that, by the letter of the contract, the retention by appellant of the sums mentioned in the contract should entirely exonerate the appellee from any further or other obligation to the appellant for a breach of any or all of the conditions of the agreement. It is hardly necessary to say that such is the express and plain provision of the original agreement made by the parties. We have quoted and italicized the instrument in this special particular. There is no room for construction or interpretation; the original agreement being, in this respect, entirely unequivocal.

After the demurrers were well sustained to the original counts, they were amended. The first four (numbered) amendments allege, in substance, that notwithstanding breaches of the agreement the parties did not rescind the contract, but, on the contrary, appellee insisted upon its performance by the appellant. The last two (numbered) amendments, 5 and 6, allege, respectively, in substance: (1) That subsequent to the execution of the contract the parties agreed that the instrument should be construed and understood to the effect that the contract should remain in force, and that each party should be bound to the other to do and perform those things which were stipulated therein to be done by both, respectively, notwithstanding appellee had breached the contract; (2) that appellee waived the provision of the contract that it should cease and determine on account of the failure of the appellee to perform his obligations thereunder, and this, notwithstanding appellee had breached the contract as complained.

It is too evident for doubt that, in order

for the appellee to avoid effect, plainly expressed, of the exonerating of appellee from further liability provision of the original contract, the parties must have done something more than merely fail to rescind it for the breaches asserted, or more than waive its rescinding, or more than insist upon its performance after breach, or more than agreed that, notwithstanding the breaches, they should each be bound to do those things provided, in the original instrument, each should do. Every one of the conditions, acts, or agreements set forth in the amendments is perfectly consistent with the continued efficacy, unimpaired in any degree, of the exonerating provision of the original agreement. In other words, there is averred in the amendments no subsequent agreement or act or waiver that operated, directly or indirectly, to strike from the original agreement the exonerating provision. There is nothing so averred that denuded the appellant of the right to retain, upon the conditions stated, the funds specified in the original agreement, nor, on the other hand, that denuded the appellee of the right to stand exempt, from the consequences of any breach committed by him, from further liability than the retention by appellant of those specified funds or sums. It might well be that the parties agreed to a continuance of the contract's binding qualities, notwithstanding its breach, and still the consequences of the breaches, viz., exemption from liability therefor, would not be altered. Indeed, the very act or agreement for a continuance of the contract, whatever the necessity for, or inducement to, the subsequent agreement operated, unless otherwise stipulated by the parties, to clothe each other with the rights each had under the original, yet breached, contract.

It results that, so far as the exonerating provision is concerned, the acts, waivers or agreements stated in the amendments had no effect—were not so intended by the parties—to change that provision of the contract.

The demurrers to the amended counts were correctly sustained, and the judgment is affirmed.

Affirmed.

TYSON, C. J., and DOWDELL and ANDERSON, JJ., concur.

BARNARD v. STATE.

(Supreme Court of Alabama. Jan. 13, 1909.)

1. INTOXICATING LIQUORS (§ 103*)—SALE—NATURE OF LICENSE.

A license to retail intoxicating liquors, being merely a personal permit, and not a contract, is not assignable in the absence of statutory authority, nor subject to demands of creditors, and cannot protect another than the li-

(158 Ala. 35)

censee or his representative in the conduct of a retailing business.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 108; Dec. Dig. § 103.*]

2. INTOXICATING LIQUORS (§ 106*)—SALE—LICENSE—EFFECT OF BANKRUPTCY OF LICENSEE.

Bankruptcy of a liquor licensee does not cancel his privilege to sell under the license subsequent to the adjudication of bankruptcy.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 106.*]

3. INTOXICATING LIQUORS (§ 236*)—SALES—PROSECUTION—EVIDENCE.

Evidence held to show that accused who purchased a stock of liquors belonging to a bankrupt liquor licensee, and sold them back to him, taking a mortgage thereon, and retaining possession of the goods in himself to secure the purchase price, the parties agreeing that accused should conduct the business as manager for his security until the purchase price was paid and as an employé of the licensee should receive a stated salary, was an employé of the licensee, and within the protection of his license, and was not conducting the business himself.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 236.*]

Appeal from City Court of Montgomery; W. H. Thomas, Judge.

Dave Barnard was convicted of selling intoxicating liquors without a license, and he appeals. Reversed and rendered.

John W. A. Sandford, Jr., for appellant. Alexander M. Garber, Atty. Gen., for the State.

McCLELLAN, J. The defendant's conviction was upon an indictment charging him with retailing without a license. The trial was upon an agreed statement of facts, which were, in substance, as follows: Lenzer had a license to engage during the year 1907, and was engaged, in retailing intoxicating liquors. In May, 1907, he was adjudged a bankrupt, and at a sale, under the direction of the bankruptcy court, the defendant Barnard became the purchaser of the stock of liquors of the bankrupt. Upon such purchase defendant and Lenzer entered into written agreements wherefrom it appears that defendant sold the stock so purchased by him to Lenzer for \$650. Lenzer gave his note for that sum and a mortgage on the stock to secure the payment of the indebtedness. An instrument was also executed by the parties, wherein it was agreed that Barnard should be "manager of said business and shall conduct the same for his own security until all of the named purchase price thereof shall have been paid in the manner specified in the mortgage, and, being also in the employ of said George Lenzer (Barnard) shall receive as a salary eighty dollars per month for his services." The mortgage referred to in the instrument, and mentioned above herein, provided that possession of the stock should be with Barnard, the defendant.

It is settled in this state that a license to retail liquors is a personal permit merely—

not a contract in any sense. *Powell's Case*, 69 Ala. 10. Hence it is not assignable in the absence of statutory authority, and is not an asset subject to the demands of creditors, and cannot afford protection to another than the licensee or his representative in the conduct of a retailing business. 23 Cyc. 154; *Wharton v. King*, 69 Ala. 365. And it follows, we think, from the premise stated, that bankruptcy had no effect to cancel the privilege or permit held by the licensee, Lenzer, to carry on the retailing business under his license subsequent to the adjudication of his bankruptcy. So the question here is: Was the retailing conducted by Barnard that of himself, and hence unprotected by the license of Lenzer, or was it that of Lenzer and authorized under his license? There is nothing in the record to indicate an unlawful purpose in the arrangement effected by the parties. It does not therefrom appear that the consideration for the sale of the stock by the purchaser, Barnard, to Lenzer, was simulative, feigned, in any sense, or that the stock was materially different in value to the sum agreed to be paid therefor by Lenzer. In short, there is nothing in the record to indicate a pretense to avoid the necessity for Barnard to secure a license, and for him to operate illegally under the license to Lenzer. We cannot assume such to have been the case.

From the whole arrangement between the parties, read from their writings, Barnard was an employé of the licensee to conduct the business until the agreed purchase price was paid, and was to be paid a monthly salary for his services. The provision for Barnard's engagement as manager of the business was induced by an idea of securing Barnard in the payment of the purchase price, due from Lenzer, for the stock, and was entirely consistent with the protection the parties desired and agreed to afford Barnard in the premises. That consideration or inducement did not render the business any the less Lenzer's business of retailing the stock. And the provision in the mortgage that possession should be with Barnard until the purchase price was paid obviously from sales to be effected from the stock was, for like reason, an element not only of security to Barnard, the seller to Lenzer, but was also, consistent with the ample authority conferred by Lenzer on Barnard as general manager of the business. Had the stock been burned, without Barnard's misconduct, manifestly the loss would have been Lenzer's. It was his property, subject to the liability fastened upon it by his purchase from Barnard. For purposes of taxation it was Lenzer's property, not Barnard's, and might have been the subject of levy and sale under execution for legal liabilities not canceled by the adjudication of Lenzer's bankruptcy. Under the circumstances here present, we think Barnard's rela-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion to the business of retailing, conducted as shown in the record, was that of an employé of the licensee, and within the protection of the license to Lenzner to retail liquors.

The judgment is accordingly reversed, and, since no other result can be attained on another trial, the appellant will be discharged.

Reversed and rendered.

DOWDELL, SIMPSON, and ANDERSON, JJ., concur.

(158 Ala. 396)

WILLIAMS v. ALABAMA GREAT SOUTHERN R. CO.

(Supreme Court of Alabama. Dec. 17, 1908. Rehearing Denied Feb. 5, 1909.)

1. DEATH (§ 10*)—ACTION—NATURE OF REMEDY.

Code 1907, § 3910, makes an employer liable in damages to a servant receiving a personal injury in the employer's business in certain cases. Section 3912 provides that, if the injury results in death, the personal representative may sue therefor, and the damages shall be distributed according to the statute of distributions. *Held*, that the statute continued the cause of action which the injured servant had, for the benefit of the legal distributees of his estate, and did not create an entirely new right of action.

[Ed. Note.—For other cases, see Death, Dec. Dig. § 10.*]

2. LIMITATION OF ACTIONS (§ 55*)—COMPUTATION OF PERIOD—PERSONAL INJURIES.

An injured servant's cause of action having accrued at the time of injury, an action for the injury, commenced by his personal representative under section 3912 more than a year after it was received, was barred by section 4840, subd. 6, barring causes of action for personal injuries after one year.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 302; Dec. Dig. § 55.*]

Appeal from Circuit Court, Jefferson County; A. A. Coleman, Judge.

Death action by Carter Williams, administrator of Jack Williams, against the Alabama Great Southern Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Frank S. White & Sons and S. C. M. Amason, for appellant. A. G. & E. D. Smith, for appellee.

DENSON, J. This is an original action, by the plaintiff, as administrator of the estate of Jack Williams, deceased, to recover damages of the defendant for negligently inflicting a personal injury upon the intestate, which, it is alleged, resulted in his death. Said injury is alleged to have been received by plaintiff's intestate while he was in the employment of the defendant as flagman of one of defendant's trains, and while engaged in the performance of his duties as such flagman. The action is based upon the employer's liability statutes. Sections 1749-1751 of the Code of 1896; sections 3910-3912 of the Code of 1907. Defendant interposed,

amongst other defenses, the plea of the statute of limitations of one year, in bar of the plaintiff's cause of action. The undisputed proof showed: That the injury occurred on the 15th day of July, 1901; that the intestate died on the 1st day of September, 1903; that original letters of administration were granted to plaintiff on the estate of the intestate on the 21st day of June, 1904; and that this action was commenced on the 4th day of October, 1904. On this state of the proof, the court, at the request of the defendant in writing, charged the jury as follows: "If the jury believe all the evidence in this case, they must find a verdict for the defendant." As is clearly shown by the record, as well as by the contentions of counsel on both sides, the charge was requested and given on the motion that plaintiff's cause of action was, at the commencement of the suit, barred by the statute of limitations pleaded.

For the purposes of this discussion it may be, as we understand it is in fact, conceded that, while the plaintiff's intestate might, under the facts alleged in the complaint, have maintained his action under section 1749 of the Code of 1896, on account of the injury suffered, yet, unless his action had been commenced within one year from the day on which he received the injury, the action would have been barred by the limitations of one year, as prescribed by section 2801 of the Code of 1896 (section 4840 of the present Code). Therefore, before the intestate died—upon the facts of this case—the statute had completed the bar, in so far as his right of action was concerned. Section 1751 of the Code of 1896 (section 3912 of the Code of 1907) reads as follows: "If such injury results in the death of the servant or employé, his personal representative is entitled to maintain an action therefor, and the damages recovered are not subject to the payment of debts or liabilities, but shall be distributed according to the statute of distributions." It is in virtue of this statute that the plaintiff seeks to maintain this action, and, recognizing the applicability generally of the same statute of limitations to the right of administrators to maintain such actions, it is insisted by the plaintiff that the administrator's cause of action accrued, not when the injury occurred, but at the time the intestate's death occurred, or at the time letters of administration were granted; therefore that the statute did not begin to run, in this case, until the letters of administration were granted (Code 1896, § 2815), and, in this view, that, plaintiff's action having been commenced while the statute was current, the defendant's plea was not sustained. So the question for our determination is: When did the plaintiff's cause of action accrue? When did the statute begin to run?

The object of the statute (section 1751, Code 1896), as we understand it, was to con-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tinue the cause of action which the person injured had—and which he had not enforced, but might have enforced had not death intervened—for the benefit of the legal distributees of his estate; and to enable the distributees to obtain their damages, resulting from the same primary cause, and not to create an entirely new and additional right of action, although the mode of estimating the damages might be entirely different from that employed had the action been brought by the employé. "In the view we take of the statute, the right to be enforced is not an original one, springing into existence from the death of the intestate, but is one having a previous existence, with the incident of survivorship, derived from the statute itself." The insistence of the appellant is contrary to this view, and is founded on the idea that the cause of suit by the administrator is the death of his intestate, and not the negligence of the defendant in causing the injury which finally resulted in the death of the intestate. This theory would manifestly lead to anomalous, if not incongruous, consequences. The injured person might live quite a number of years, and his right of action would be barred during his lifetime; and yet, after his death, should his administrator bring suit (as was here actually done), he could recover, provided actionable negligence be shown, and proof be made that the death resulted from the injury. We think the very language of the statute repels the theory of the plaintiff: "If such injury results in the death of the servant or employé, his personal representative is entitled to maintain an action therefor." Thus it seems clear that no new cause of action is contemplated, but that the statute simply devolves upon the personal representative the right to prosecute the same cause of action the servant or intestate had. It may be true that the action is, in a sense, a new one, in the interest of the distributees of the estate of the intestate. It is the creature of the statute. At the common law no such action could be maintained (*actio personalis moritur cum persona*), and in that respect it is new. It originated for the benefit of the distributees of the intestate, at his death, and is for damages that for him did not exist.

"But the measure of the administrator's right to have the employer declared responsible toward him is to be ascertained by the rights the deceased himself had against the employer." And it seems to us the correct construction of the statute to say that there is attached to the administrator's right of action the implied statutory condition that, at the time of the employé's death, he had a right of action that could be enforced. If his right was then gone, or if his right was barred, the administrator has no claim. "The statute extends the remedy to the administrator, but does not revive the defendant's liability if it had been extinguished. It simply gives him the right to avail himself of the right to the action the deceased had at

his death," and it is given for the same wrongful act or neglect. That is the essential foundation of the action in either case. The wrong to be redressed is the same in both cases. The foregoing views are fully supported by the reasoning of the Supreme Court of Canada, in the case of *Canadian Pacific R. Co. v. Robinson*, 54 Am. & Eng. R. R. Cas. 49; but it is said by counsel for the appellant that the decision of the Supreme Court was reversed, on appeal to the House of Lords (L. R. [1892] 481). It is true the judgment of the Supreme Court was reversed as stated, but a critical examination of the opinion of Lord Watson will show that the reversal depended upon the failure of the Supreme Court to regard the peculiar features of the statute then under consideration; and that, as applied to our statute, the reasoning employed in the opinion of the judges of the Supreme Court is entirely appropriate. The Canadian statute was in this language: "In all cases where the person injured by the commission of an offense or a quasi offense dies in consequence, without having obtained indemnity or satisfaction, his consort and his ascendant and descendant relations have a right, but only within a year after his death, to recover from the person who committed the offense or quasi offense, or his representatives, all damages occasioned by such death." The deceased lived more than a year after the injury was inflicted that caused his death, and the action was commenced within a year from his death.

Another statute of Canada (section 2262 [2] of the Code) provided that actions "for bodily injuries" were prescribed by one year, saving the special provisions contained in section 1056, and cases regulated by special laws. It was held by the House of Lords: That the conditions affecting the right of action competent to the deceased, being prescribed or specified in the statute, were so delineated "for the purpose of making it clear that no conditions affecting the personal claim of the deceased, other than those specified, are to stand in the way of the statutory right conferred upon his widow and relatives"; that notwithstanding the deceased's right of action was barred at the time of his death, yet the statute provided one year from the death as the time within which the widow might bring suit; and that therefore to hold that, because the deceased's right of action was barred at his death, the widow's right of action was cut off, would be to add to the language of the statute words not to be found there, such as "and without his claim having been otherwise extinguished," or, in other words, would involve the insertion of a new condition which the Legislature had excluded. So the decision of the House of Lords is based (as must be all decisions construing statutes) upon the particular statute then submitted for construction.

In *Fowlkes v. N. & D. Ry. Co.*, 5 Bart.

(Tenn.) 663, we have a case almost on all fours with the one in judgment. A statute of Tennessee provided that: "The right of action which a person who dies from injuries received from another, or where death is caused by the wrongful act or omission of another, would have had against a wrongdoer, in case death had not ensued, would not abate or be extinguished by his death, but was to pass to his personal representative for the benefit of his widow and next of kin." There was no statute of limitation expressly applicable to that class of cases, but by another section it was provided that actions for personal injuries should be commenced within one year after the cause of action accrued. The court held that, under this last section, the cause of survivors' action accrued when the injury was received, or at the time of the wrongful act or omission, and that consequently, as to their action, the statutory limitation of one year began to run from that time, as it would have begun to run, for the decedent's action itself, had he survived his injuries. Thus it is substantially held that the survivors' action was brought for the same cause that the injured party would have proceeded upon had he, himself, been the plaintiff; that it is not the death of the injured party that is the cause of the survivors' action. *Read v. Great Eastern R. Co.*, 9 B. & S. 714; *Haigh v. Royal Mail Steam Packet Co.*, 52 L. J. Q. B. 640; *Dibble v. New York, etc., Co.*, 25 Barb. (N. Y.) 183; *Littlewood v. Mayor, etc.*, 89 N. Y. 24, 42 Am. Rep. 271.

From the foregoing considerations, it remains to us only to announce our conclusion: That the statute of limitations of one year commenced to run from the time the intestate received the injury; and, therefore, on the undisputed evidence, the affirmative charge was properly given for the defendant. Affirmed.

TYSON, C. J., and HARALSON and SIMPSON, JJ., concur.

(158 Ala. 218)

EXCHANGE NAT. BANK OF MONTGOMERY et al. v. STEWART.

(Supreme Court of Alabama. Jan. 21, 1909.)

1. FRAUDULENT CONVEYANCES (§ 239*)—REMEDY AT LAW.

The fact that a creditor may be entitled to an action at law for money received is no objection to his bill to set aside an alleged fraudulent transfer of property by an insolvent debtor.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 681-683; Dec. Dig. § 239.*]

2. BANKRUPTCY (§ 279*)—FRAUDULENT TRANSFER—AVOIDANCE BY TRUSTEE IN BANKRUPTCY.

A bill to set aside an alleged fraudulent transfer of property by an insolvent debtor may

be maintained in the name of a trustee in bankruptcy.

[Ed. Note.—For other cases, see *Bankruptcy*, Dec. Dig. § 279.*]

3. EXECUTION (§ 46*)—"PROPERTY" SUBJECT—MONEY.

Money is "property" subject to levy by execution.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 57; Dec. Dig. § 46.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5717, 5718; vol. 8, pp. 7768-7770.)

4. FRAUDULENT CONVEYANCES (§ 237*)—PROPERTY WHICH MAY BE SUBJECT.

Money being leviable property, when fraudulently disposed of by an insolvent corporation, may be reached by a creditors' suit.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Dec. Dig. § 237.*]

5. FRAUDULENT CONVEYANCES (§ 237*)—PROPERTY WHICH MAY BE SUBJECT—PROCEEDS OF CHECKS.

The proceeds of checks paid from the assets of an insolvent debtor may be recovered by a creditors' suit as property fraudulently transferred.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Dec. Dig. § 237.*]

6. FRAUDULENT CONVEYANCES (§ 263*)—PLEADING—SUFFICIENCY—COMPLAINT.

The averments in a creditor's bill that the payments sought to be set aside were made "with intent to hinder, delay, and defraud creditors" and "without consideration," are sufficient as to want of consideration for the payments alleged to have been fraudulently made.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 771-781; Dec. Dig. § 263.*]

**7. EQUITY (§ 150*)—PLEADING—MULTIFARI-
OUSNESS.**

A creditor's bill to set aside fraudulent transfers of property is not open to the objection of multifariousness or misjoinder of defendants, in that it joins two or more defendants alleged to be fraudulent grantees in different transactions.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 342, 371-379; Dec. Dig. § 150.*]

Appeal from City Court of Montgomery; A. D. Sayre, Judge.

Action by Mose W. Stewart, trustee in bankruptcy, against the Exchange National Bank of Montgomery and the Union Bank & Trust Company. From a judgment overruling demurrers to the bill, defendants appeal. Affirmed.

The bill alleges: That the Conecuh Pine Lumber & Manufacturing Company was a corporation under the laws of Alabama, and on the 4th of June, 1907, it was adjudged to be a bankrupt, and the complainant was appointed the trustee on the 24th day of June, 1907, and qualified as such on June 25th; that the Exchange National Bank of Montgomery is a corporation organized under the national banking laws, and is engaged in the business of banking in the city of Montgomery, and the Union Bank & Trust Company is a corporation organized under the laws of Alabama, and has been engaged in business in Montgomery, Ala.; that on and prior to June 30, 1906, and on March 1,

1907, respectively, the Conecuh Pine Lumber & Manufacturing Company was engaged in business in the city of Montgomery, and on the dates last above mentioned was indebted to the Fourth National Bank of Montgomery in a large sum, to wit, \$10,000 or more, which indebtedness had been continuously in existence since and prior to June 30, 1906; that the Conecuh Pine Lumber & Manufacturing Company was also indebted to numerous and divers other persons on said dates; and that a large portion of said indebtedness is still due and unpaid. It is further shown on information and belief that on June 30, 1906, Thomas W. Tebb and R. N. Chestnutt executed and delivered to said Union Bank & Trust Company a note for \$7,000, dated June 30, 1906, and payable December 30, 1906, which note is attached as an exhibit to the bill. It is further averred on information and belief that the note is secured by 330 shares of the capital stock of the Conecuh Pine Lumber & Manufacturing Company, of the par value of \$25, and issued to Thomas W. Tebb and placed by him with said Union Bank & Trust Company as collateral security for said note, and that said note, with the collateral security, was transferred to the Exchange National Bank for a consideration unknown to orator. It is further averred on information and belief that said Conecuh Pine Lumber & Manufacturing Company had an account with the Union Bank & Trust Company, and that they delivered to the Union Bank & Trust Company a check for \$280 (check is made exhibit to the bill), and that the amount of said check was appropriated by said Union Bank & Trust Company under some arrangement, express or implied, between said Union Bank & Trust Company and the Conecuh Pine Lumber & Manufacturing Company, or its officer or officers, agent or agents, and was applied in payment of the interest for a period of six months on the \$7,000 note signed by Tebb and Chestnutt, and the amount of said check charged by said Union Bank & Trust Company to the account of said Conecuh Pine Lumber & Manufacturing Company, without any adequate, legal, or valid consideration to said Conecuh Pine Lumber & Manufacturing Company from any person or corporation for the amount of said check, and that when the said Union Bank & Trust Company marked said check paid, and applied the amount thereof to the payment of the interest on said note of Tebb and Chestnutt, and charged the same to the account of the Conecuh Pine Lumber & Manufacturing Company, it knew that said money was being appropriated out of the assets of said Conecuh Pine Lumber & Manufacturing Company on the debt of Tebb and Chestnutt for and on which said Conecuh Pine Lumber & Manufacturing Company was in no manner legally liable.

It is further averred on information and belief that prior to June 30, 1906, said Union

Bank & Trust Company held a note signed by said Tebb and Chestnutt, or on which they were each liable in the sum of \$8,000, and that prior to June 30, 1906, payments were made on such notes or debts at divers times out of the money or assets of said Conecuh Pine Lumber & Manufacturing Company. The said Union Bank & Trust Company, on the debt of said Tebb and Chestnutt aggregating the sum of \$2,000, and that at the time said payments were made, out of the assets of said Conecuh Pine Lumber & Manufacturing Company, said Union Bank & Trust Company knew that said payments were being made out of the assets of the lumber company, and that said payments were illegal and fraudulent as against the rights of the creditors of the lumber company. It is averred that complainant is not advised as to the date of the payments, except that they were made during the years 1905 and 1906, and he avers that there was no legal, adequate, or valuable consideration to said Conecuh Pine Lumber & Manufacturing Company for such payments or either of them so made to the Union Bank & Trust Company on the debt of said Tebb and Chestnutt, and that such payments were fraudulent as against the rights of the Fourth National Bank of Montgomery and other creditors of said Conecuh Pine Lumber & Manufacturing Company holding debts against it at the time said payments were made. It is further averred on information and belief that on March 1, 1907, the check of the Conecuh Pine Lumber & Manufacturing Company, for the sum of \$5,096.44, was delivered to said Exchange National Bank of Montgomery (this check is made an exhibit), and that the amount of said check was delivered by Exchange National Bank to itself, and \$5,000 of said amount credited on said note for \$7,000 made by said Tebb and Chestnutt, and the balance of said check, \$96.44, applied to the interest on said note by said Exchange National Bank, and that the amount of the check is charged to the account of said Conecuh Pine Lumber & Manufacturing Company, on the books of said Exchange National Bank of Montgomery and taken out of the money which said Conecuh Pine Lumber & Manufacturing Company had on deposit with the said Exchange National Bank, and that at the time of the payment of said check and the charging of it to the account of the Conecuh Pine Lumber & Manufacturing Company, by said bank, the bank knew that said money was being received and credited on said note of Tebb and Chestnutt on which said Conecuh Pine Lumber & Manufacturing Company was in no manner legally liable. It is then alleged that these transactions were separately and severally made with the intent to hinder, delay, and defraud the creditors of the said Conecuh Pine Lumber & Manufacturing Company, and without legal or adequate valuable consideration to said

Conecuh Pine Lumber & Manufacturing Company; or that said payments were voluntary on the part of said Conecuh Pine Lumber & Manufacturing Company, and without any legal, adequate, valuable consideration to it, and constituted a mere gift or unlawful disposition of its assets or money to that extent in such manner that it was and is a fraud on and against its creditors, and void or voidable as against the rights of its creditors. Then follows an averment of the different debts owing by said company with the prayer for relief. A number of demurrers were filed to the bill raising the points decided in the opinion.

Fred S. Ball and J. M. Chilton, for appellants. R. L. Harmon, for appellee.

DOWDELL, J. In its simple analysis the bill is a creditor's bill to set aside an alleged fraudulent transfer of the property by an insolvent debtor and for an accounting, and as such contains equity.

It is no objection to the bill that the creditor may have his action at law for money had and received. The bill is authorized under the statute. Code 1907, § 3739.

The bill is properly filed in the name of the trustee in bankruptcy. As such he stands in the place of the creditors, and may recover in any case where the creditors could have recovered.

Money is leviable property, and, when fraudulently disposed of by a debtor corporation, may be reached by creditors by bill in chancery. Hall v. A. T. I. Co., 143 Ala. 481, 39 South. 285, 2 L. R. A. (N. S.) 130.

Checks drawn by a debtor corporation, which are paid out of its assets, are equivalent to money, and the proceeds of the checks or the money represented by them may be recovered as property fraudulently transferred, the same as money. Hall & Farley, Trustees, v. Henderson, 126 Ala. 449, 485, 486, 28 South. 531, 61 L. R. A. 621, 85 Am. St. Rep. 53; Wolfe v. State, 79 Ala. 206, 58 Am. Rep. 590.

We think the averments of the bill that the payments in question were made "with the intent to hinder, delay, and defraud the creditors of said Conecuh Pine Lumber & Manufacturing Company and without legal and adequate valuable consideration to said Conecuh Pine Lumber & Manufacturing Company for the same" are sufficient as to want of consideration for the said payments in an allegation of fraudulent transfer as to creditors, and render the bill unobjectionable to demur in this respect.

The bill, as a creditor's bill to set aside fraudulent transfers, is not open to the objection of multifariousness, or misjoinder of defendants, in that it joins two or more defendants alleged to be fraudulent grantees in different transfers and transactions. It has

often been decided by this court that this may be done. Hill Bros. v. Moone, 104 Ala. 353, 16 South. 67; Guyton v. Terrell, 132 Ala. 66, 31 South. 83; 5 Mayfield's Dig. p. 840, § 78; Henderson v. Hall, 134 Ala. 507, 32 South. 840, 63 L. R. A. 673; Wimberly v. Montgomery Fertilizer Co., 132 Ala. 107, 31 South. 524.

We find no error in the decree appealed from, and it will be affirmed.

Affirmed.

SIMPSON, ANDERSON, and DENSON, JJ., concur.

(158 Ala. 231)

WEEKS v. BYNUM et al.

(Supreme Court of Alabama. Jan. 14, 1909.)

1. COUNTIES (§ 105*)—COUNTY BOARDS—REVIEW OF ACTION BY COURTS.

Under Code 1907, §§ 131, 133, making it the duty of the court of county commissioners to erect and keep in repair courthouses and other county buildings, the court of county commissioners has exclusive power in the matter of determining the necessity for a new courthouse, and its decision that the courthouse is unsafe, and to erect a new building, in the absence of fraud or unfair dealing, cannot be controlled by the courts.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 165; Dec. Dig. § 105.*]

2. INJUNCTION (§ 172*)—TEMPORARY INJUNCTION—DISSOLUTION.

Where, though a bill shows a cause for injunctive relief, the sworn answers deny all the averments thereof upon which any right to relief could be predicated, a temporary injunction issued is properly dissolved.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 376, 377; Dec. Dig. § 172.*]

Appeal from Chancery Court, Lamar County; W. H. Simpson, Chancellor.

Bill by C. M. Weeks against B. C. Bynum and others. From a decree dissolving a temporary injunction, complainant appeals. Affirmed.

Bankhead & Bankhead, for appellant. J. C. Milner, Walter Nesmith and S. D. & J. B. Weakley, for appellees.

DENSON, J. This bill is presented by O. M. Weeks, a taxpayer and resident citizen of Lamar county, against B. C. Bynum, doing business under the name of Bynum Construction Company, and the members of the court of county commissioners of said county, individually and in their official capacity. The purpose of the bill is to enjoin the respondents from taking down the courthouse of that county, and from the erection of a new one in the town of Vernon. The bill was presented to the judge of the law and equity court of Walker county, who granted a temporary injunction. The respondents answered the bill under oath, and upon filing their answers moved to dissolve the injunction for want of equity in the bill and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

upon the denials contained in their answers. This motion was heard by Chancellor Simpson, in vacation, on the 22d day of July, 1908, and a decree dissolving the injunction was enrolled July 27, 1908. From that decree this appeal is taken.

By statute county buildings are to be erected and kept in order and repair at the expense of the county, under the direction and control of the court of county commissioners, and that court is authorized to make all necessary contracts for that purpose. Code 1907, § 181. Section 133 of the Code makes it the duty of the court of county commissioners to erect courthouses and other county buildings. This court is committed to the doctrine that in all cases, in the discharge of these statutory duties, the court of county commissioners exercises a discretion which cannot be controlled by any judicial tribunal, in the absence of fraud, corruption, or unfair dealing. 7 Am. & Eng. Ency. Law, 996; Hays v. Ahlrichs, 115 Ala. 239, 22 South. 15; White v. Hewlett, 143 Ala. 374, 42 South. 78; Matkin v. Marengo Co., 137 Ala. 155, 34 South. 171. In the case last cited the court uses this language: "Under our statutes there can be no doubt of the proposition that the court of county commissioners has sole and exclusive power and authority in the matter of determining the necessity for a new courthouse for the county and having the same erected, and in these matters they act, at least, in a quasi legislative capacity, and that their acts, when free from fraud, corruption, and unfair dealing, cannot be controlled by any other court." In the case at bar it appears that the court of county commissioners determined that the courthouse was unsafe and insufficient as a public building, and in the exercise of their authority in the premises entered into a contract with the Bynum Construction Company for the removal of the old, and the erection of a new, courthouse in Vernon. We concur in the opinion of the chancellor that in the bill there are no sufficient averments of fraud, corruption, or unfair dealing on the part of the commissioners. But even if the bill did show a case for injunctive relief, yet we further concur with the chancellor that, upon a careful reading of the sworn answers of the respondents, "it appears that they fully deny all the averments of the bill, upon which any right to the relief sought could be predicated," and hold that, for this reason, the injunction was properly dissolved.

Without prolonging the discussion, the court concludes that the decree dissolving the injunction must be affirmed.

Affirmed.

HARALSON, DOWDELL, and SIMPSON, JJ., concur.

(158 Ala. 33)

YOUNG v. STATE.

(Supreme Court of Alabama. Jan. 18, 1909.)

INTOXICATING LIQUORS (§ 145*)—OFFENSES—KEEPING OPEN AT PROHIBITED TIMES.

Act Aug. 2, 1907 (Gen. Acts 1907, p. 518) § 1, Code 1907, § 7378, makes it unlawful to have open, or to admit any person into, a place where intoxicating liquor is sold, or to sell the same, between certain hours. Section 2, Code 1907, § 7379, makes a person who shall sell intoxicating liquor within the prohibited hours guilty of a misdemeanor, and fixes the penalty. Code 1907, § 7622, provides for the punishment of a misdemeanor at common law or by statute, where no punishment is particularly specified in the Code. *Held*, that the having open of a place where intoxicating liquor is sold within the prohibited hours cannot be criminally punished, since section 2, Code 1907, § 7379, neither provides any penalty for having such a place open within the prohibited hours, nor declares it to be a misdemeanor, the penalty provided being confined to a sale within the prohibited hours; and, since it not being a misdemeanor at the common law, or made so by statute, Code 1907, § 7622, has no application.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 145.*]

Appeal from City Court of Montgomery; W. H. Thomas, Judge.

John Young was convicted of violating Act Aug. 2, 1907 (Gen. Acts 1907, p. 518), regulating the opening and closing of saloons and the sale of intoxicating liquor, and he appeals. Reversed and remanded.

Hill, Hill & Whiting, for appellant. Alexander M. Garber, Atty. Gen., for the State.

DOWDELL, J. This appeal is prosecuted by the defendant, John Young, from a judgment of conviction in the city court of Montgomery, on an indictment preferred under an act of the Legislature approved August 2, 1907 (Gen. Acts 1907, p. 518), and entitled an act "To further regulate the opening, closing and operating saloons, and giving away or selling spirituous, vinous or malt liquors under a license from the state, and to punish the violation thereof." The act was adopted into the Code of 1907 as article 3, c. 248, p. 773, Cr. Code 1907, embracing sections 7378-7382, inclusive. The indictment followed the form prescribed in the act, and hence was not subject to the grounds of demurrer assailing its sufficiency in this respect. The first section, among other things, makes it unlawful "to have open or to admit any one or more persons into the house or place where spirituous, vinous or malt liquors are stored, kept or sold," etc., after certain hours of the day. Section 2, which provides a penalty for a violation of the statute, reads as follows: "That any person or persons having a license to sell spirituous, vinous or malt liquors, or the agent, employé or servant of such person or persons who directly or indirectly sells or gives or delivers any spirituous, vinous or malt liquors to any person in or from such house or place in which license

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

authorizes the doing of business at any time prohibited by this act shall be guilty of a misdemeanor and on conviction shall be fined not less than fifty nor more than five hundred dollars and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than six months." It will be observed that by this section, and it is the only one that relates to punishment, no punishment is provided for having open doors within the prohibited hours mentioned in section 1, nor is it declared to be a misdemeanor. The punishment provided for in the statute is confined to a violation of the provision in respect to the selling or otherwise disposing of the spirituous, vinous, or malt liquors within the prohibited hours. As to having open doors the statute does nothing more than to declare the same unlawful within the prohibited hours, without even declaring it to be a misdemeanor to do so. Not being a misdemeanor at the common law, nor made so by the statute, section 7622 of the Code of 1907, which provides for the punishment of a misdemeanor where no punishment is particularly specified in the statute, is without application.

The undisputed evidence was that the defendant ran a restaurant, in which he also conducted a bar where spirituous liquors were retailed under a license from the state. The front door of his place of business was open within the prohibited hours; a servant being at the time engaged in sweeping out the place. There was no evidence of any sale or giving away or delivering by the defendant, directly or indirectly, of any spirituous, vinous, or malt liquors within the prohibited hours; indeed no pretense of such by the prosecution, the state relying for a conviction solely upon the fact of the defendant having open the door of his place of business within the prohibited hours. As we have observed above, this was no offense for which he could be criminally punished under the statute. The defendant was therefore entitled to the general charge as requested in writing, and the trial court erred in its refusal.

Reversed and remanded.

HARALSON, SIMPSON, and DENSON, JJ., concur.

(158 Ala. 410)

BIRMINGHAM RY., LIGHT & POWER CO.
v. MCGINTY.

(Supreme Court of Alabama. Jan. 14, 1909.)

1. CARRIERS (§ 815*)—INJURIES TO PASSENGER—PLEADING—VARIANCE—"AT."

A complaint against a street railway company alleged that a passenger was injured while alighting "at" C., which appears to have been a shed station, and not a town or city. The evidence showed that the accident occurred about two car lengths from the station. *Held*, that

there was no variance; "at" as pleaded meaning "at or near."

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 315.*]

For other definitions, see Words and Phrases, vol. 1, pp. 596-598; vol. 8, p. 7585.]

2. CARRIERS (§ 314*)—ELECTRIC RAILROADS—INJURY TO ALIGHTING PASSENGER—PLEADING—SUFFICIENCY.

A complaint claimed specified damages against an electric railway company on allegations that, while plaintiff passenger was alighting at his destination, the car started or jerked, or the speed thereof was suddenly increased, proximately causing him to fall, resulting in specified injuries; that he was thrown or caused to fall through and as a proximate consequence of defendant's negligence in and about carrying him as its passenger. *Held*, that the complaint was not demurrable as being vague, uncertain, and definite, as not showing any duty or any violation of any duty.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 314.*]

3. CARRIERS (§ 303*)—ELECTRIC RAILROADS—SETTING DOWN PASSENGERS—DUTY.

It was an electric railway company's duty to hold a car at a stopping place sufficient time to allow passengers to alight, and not to start it while a passenger was alighting; but it would have been a defense to an action for injury to him that the car had stopped a sufficient time, and that those in charge did not know that he was alighting.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1228, 1228½; Dec. Dig. § 303.*]

4. CARRIERS (§ 320*)—ELECTRIC RAILROADS—INJURY TO ALIGHTING PASSENGER—JURY QUESTION.

In an action against an electric railroad company for injury to an alighting passenger, *held* under the evidence a jury question whether the conductor saw that the passenger was about to alight and might have prevented it, or prevented the starting of the car while he was alighting.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 320.*]

Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge.

Action for damages by Andrew J. McGinty against the Birmingham Railway, Light & Power Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The complaint was in the following language: "Plaintiff claims of the defendant \$5,000, as damages, for that heretofore, to wit, on the 5th day of March, 1907, defendant was a common carrier of passengers by means of a car operated by electricity upon a railway from Birmingham to and by Cleveland in Jefferson county, Ala.; that on said day, while plaintiff was defendant's passenger on said car, having paid his fare to the defendant to be carried to said Cleveland, and while plaintiff was engaged in or about alighting from said car at said Cleveland, the said car started or jerked, or the speed thereof was suddenly increased, and as a proximate consequence thereof plaintiff was thrown or caused to fall [here follows a catalogue of the injuries and special damages claimed], and plaintiff alleged that he was thrown or caused to fall as aforesaid by rea-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

son, and as a proximate consequence of the negligence of defendant in and about carrying plaintiff as its passenger as aforesaid, and suffered said injuries and damages as aforesaid." The second count is in wanton or intentional negligence. Demurrers were filed as follows: "The averments of said count are vague, uncertain, and indefinite. It does not appear with sufficient certainty what duty the defendant owed to the plaintiff. It does not appear therefrom with sufficient certainty wherein or how the defendant violated any duty it owed to the plaintiff. It is not averred that the car was negligently started or jerked. The facts relied on do not show negligence, except by way of conclusion." The following charge was refused to defendant: "(3) I charge the jury that the conductor was not guilty of negligence."

Tillman, Grubb, Bradley & Morrow, for appellant. Frank S. White & Sons, for appellee.

SIMPSON, J. This action is for damages claimed to have been sustained by the plaintiff in the act of alighting from a car of the defendant. The first count of the complaint alleges that plaintiff was a passenger on the car of the defendant, from Birmingham to Cleveland, and that while plaintiff was alighting "at said Cleveland," the car "started or jerked," etc., and plaintiff was thrown, etc. There is no proof that there is any city or town by the name of Cleveland, but it is spoken of as a "station," "a little shed on the left-hand side," and it seems to be not far from Tate station. According to the evidence, including the plaintiff's own testimony, the accident did not occur at Cleveland, but, on the contrary, a car which was in front of plaintiff's car stopped at Cleveland, and plaintiff's car was stopped about two car lengths distant from Cleveland station, and merely moved forward to reach that station when the other car moved on, and it seems that the plaintiff was in the act of stepping off when it moved. The word "at" is taken in the sense of at or near, in this complaint, and this did not constitute a variance. Under the decisions of this court the first count of the complaint is not subject to the demurrer interposed; the allegation of the duty and the general allegation of negligence being sufficient.

If, as alleged, the plaintiff was a passenger to Cleveland, and the car had reached that place and stopped, it was the duty of the defendant to wait a sufficient time to allow passengers to alight, and not to start the car while a passenger was in the act of alighting. Under the allegations of this count, if the car had stopped a sufficient length of time to allow the passenger to alight, and those in charge of the car had no knowledge of the fact that he was alight-

ing, these are matters of defense which might have been set up. Postal Tel. Cable Co. v. Jones, 133 Ala. 217, 225, 226, 32 South. 500; Armstrong's Adm'r v. Montgomery St. Ry., 123 Ala. 233, 244, 26 South. 346; Sweet v. Birmingham, etc., Co., 136 Ala. 166, 169, 33 South. 886; 2 Hutchinson on Carriers (3d Ed.) § 1118, p. 1308; Birmingham, etc., Co. v. Moore, 148 Ala. 115, 42 South. 1024.

That part of the oral charge excepted to, although it did not clearly express the idea intended to be conveyed, was cured by other parts of the oral charge.

There was no error in the refusal of the court to give charge numbered 3, requested by the defendant. The evidence shows that the conductor was present, near the plaintiff, when he alighted, and it was for the jury to say whether he saw that the plaintiff was about to alight, and might have prevented it, or prevented the starting of the car while he was alighting.

The judgment of the court is affirmed.

HARALSON, DOWDELL, and DENSON, JJ., concur.

(158 Ala. 123)

PRUETT v. GUNN.

(Supreme Court of Alabama. Jan. 13, 1909.)

1. DETINUE (§ 8*)—DEFENSES.

It is a good defense to detinue for a horse that it is held under an execution levy, notwithstanding the taking of the horse by third persons, whether with or without the levying officer's knowledge and consent, may have been tortious, for the gist of an action of detinue is the tortious detention of the property, not the original caption.

[Ed. Note.—For other cases, see Detinue, Dec. Dig. § 8.*]

2. EXECUTION (§ 186*)—EVIDENCE—ADMISSIBILITY.

Where in detinue against a constable for a horse there was evidence that the horse in fact belonged to a third person, as whose property it had been levied upon, and that plaintiff merely held it to defraud such person's creditors, it was error to exclude the execution against such third person, for if the horse belonged to such third person defendant had a right to retain it under the execution.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 186.*]

Appeal from Circuit Court, Coosa County; S. L. Brewer, Judge.

Action by W. C. Gunn against F. M. Pruett. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

D. H. Riddle, for appellant. Lackey & Bridges, for appellee.

ANDERSON, J. The plaintiff offered evidence of his possession and title to the horse and that the defendant was in possession at the commencement of the suit. The defendant attempted to justify the detention by showing that he held the horse, under the levy of an execution, held by him as con-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

stable against the plaintiff's father, Jack Gunn, and that the horse was the property of said Jack Gunn. "The gist of the action of detinue is the wrongful or tortious detention of the property, not the original caption, and it is regarded as wholly unimportant whether the defendant's possession was acquired by bailment or trespass." *Oliver v. McClellan*, 21 Ala. 675; *Salter v. Pearce*, 4 Ala. 669. Conceding therefore, without deciding, that the taking by Darden and Riddle of the horse from the lot, whether with or without the knowledge and consent of the defendant, Pruett, was tortious, yet he seized the horse under the execution after it had been taken to Goodwater and detains him thereunder, and if the execution was valid and the horse belonged to the defendant, under said execution, and not to the plaintiff, the detention thereunder was rightful, and should defeat plaintiff's recovery in this action of detinue. As there was proof admitted as well as other evidence offered, and improperly excluded, tending to show that the horse, in fact, belonged to Jack Gunn, and that the plaintiff merely held him as a man of straw and for the purpose of defrauding his father's creditors, the trial court erred in excluding the execution as evidence. It was a question for the jury as to whether or not the horse really belonged to the plaintiff or his father, and if it belonged to the father the defendant had the right to detain it under said execution.

The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

HARALSON, SIMPSON, and DENSON, JJ., concur.

(158 Ala. 590)

**SLOSS-SHEFFIELD STEEL & IRON CO.
v. SAMPSON.**

(Supreme Court of Alabama. Jan. 14, 1909.)

1. MINES AND MINERALS (§ 121*)—INJURIES TO REAL PROPERTY—SURFACE SOIL.

The owner of the mineral below the surface must so mine it as not to injure the surface, in the absence of any stipulation to the contrary, but this applies merely to the surface, not to wells and springs fed by subterranean streams.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 242; Dec. Dig. § 121.*]

2. MINES AND MINERALS (§ 125*)—INJURIES TO REAL PROPERTY—ACTIONS—COMPLAINT—SUFFICIENCY.

A complaint against a mineowner for injury to land due to mining operations beneath it is demurrable where it fails to allege the time when the injury occurred.

[Ed. Note.—For other cases, see *Mines and Minerals*, Dec. Dig. § 125.*]

3. MINES AND MINERALS (§ 125*)—INJURIES TO REAL PROPERTY—ACTIONS—COMPLAINT—SUFFICIENCY.

A complaint against a mineowner for injuries to real property due to mining operations

beneath it is demurrable where it fails to state facts showing whether the mineowner was a trespasser or acted under any right in making the excavation.

[Ed. Note.—For other cases, see *Mines and Minerals*, Dec. Dig. § 125.*]

4. LIMITATION OF ACTIONS (§ 55*)—INJURIES TO REAL PROPERTY—ACTIONS—DAMAGES.

Damages are recoverable against a mineowner only for the injuries to the surface soil occurring within the one year's period of limitation.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 304; Dec. Dig. § 55.*]

5. TRIAL (§ 261*)—INSTRUCTIONS—INSTRUCTIONS BAD IN PART.

Where, though the first paragraph of a requested charge stated the law correctly, yet the remaining part was argumentative, it was not error to refuse the same.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 660; Dec. Dig. § 261.*]

Appeal from Circuit Court, Jefferson County; A. A. Coleman, Judge.

Action by Peter Sampson against the Sloss-Sheffield Steel & Iron Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The complaint is in the following language: "Plaintiff claims of defendant, the Sloss-Sheffield Steel & Iron Company, a private corporation, \$2,000 damages, in this: That he is the owner of the following described real estate situated in Fields Town, near Blossburg, in Jefferson county, Ala., according to map made by Marcus B. Long for A. J. Fields [Here follows a description of the land], and plaintiff avers that defendant heretofore, to wit, before the bringing of this suit, while engaged in its mining operation, excavated from under the surface of the above-described real estate coal and other material, the proximate consequence of which caused the surface of the above-described lands to part or open or cause the same to crack, or part of the surface, greatly injuring and damaging said estate, and greatly damaging the dwelling house situated thereon, and causing the same to become less desirable as a place of residence, causing the land to become drouthy and unproductive. That there was situated on such premises a well of pure and wholesome water, which was and could be used for domestic purposes, and by the excavation of defendant aforesaid said well was rendered valueless. That the rental and market value of said property was greatly impaired, all to plaintiff's damage as aforesaid." The following demurrers were interposed: "(1) It is not alleged that defendant mined the coal under said land negligently. (2) It is not alleged that the surface of the land described in the complaint was not supported by defendant's mining operations, or that the surface was cracked by defendant's mining operations so as to injure plaintiff's well and house. (3) It is not alleged that defendant

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

was a trespasser in mining the coal from under plaintiff's land described in the complaint. (4) The time of the commission of the alleged grievance is not sufficiently set out or stated." The following charges were refused to the defendant: "(1) General affirmative charge. (2) If the jury believe from the evidence that plaintiff's land was damaged by defendant's mining operations, and without negligence on defendant's part, the jury must find for defendant. (3) If the jury believe the evidence, and find for the plaintiff, in assessing plaintiff's damages, the jury can only award him such damages as they believe from the evidence his lands described in the complaint suffered (because of the mining operations of defendant under plaintiff's land) during the year preceding the commencement of this suit. (4) Unless the jury believe from the evidence that defendant negligently mined the coal from under plaintiff's land, the jury must find for defendant. (5) If the jury believe from the evidence that defendant is not guilty of negligence in mining the coal from under the plaintiff's land, the jury must find for the defendant. (6) The market value of the land is based upon the amount it would reasonably sell for in the market, but not at a forced sale, and is not based upon the amount of principal, which at the legal rate of interest would produce the annual rental of the land."

Tillman, Grubb, Bradley & Morrow, for appellant. Frank S. White & Sons, for appellee.

SIMPSON, J. This is an action by the appellee against the appellant for damages caused by the operations of the defendant in mining coal under the lands of plaintiff, causing the surface of same to part and open, or crack, destroying a well and diminishing the value of his real estate.

The complaint does not state whether or not the defendant is the owner of the minerals under said land, nor by what right it was carrying on mining operations thereunder, nor does it contain any allegation with regard to the manner of excavating—whether done negligently or improperly, or in a proper manner.

It seems proper to consider, first, the main contention, around which cluster the special points in the case, and that is as to the respective rights of the owner of the subjacent minerals and the owner of the superjacent surface. The complainant claims that the defendant is liable, without regard to the manner of operating the mines, because the owner of the superjacent surface has a right to demand that he shall not be disturbed in the enjoyment of his rights in the surface by the mining of the coal underneath, while the defendant contends that if

it owned the minerals, with the right to mine them, which necessarily follows, it was its right to take out all of its coal without regard to whether the surface was injured or not. Without entering into an analysis of the numerous decisions on this subject, a reading of them convinces us that, according to the great weight of authority, the principle is (agreeably to the maxim, "*Sic utero tuo ut alienum non lædas*") that, in the absence of any stipulation to the contrary, the owner of the mineral below the surface holds it subject to the obligation that he shall so mine it as not to injure the surface. This means merely the surface, and does not apply to wells and springs which are fed by subterranean streams. 27 Cyc. 788; 18 Am. & Eng. Ency. Law, 555, 556; *Mickle et al. v. Douglass et al.*, 75 Iowa, 78, 39 N. W. 198; *Lillibridge & Lackawanna C. Co.*, 143 Pa. 293, 22 Atl. 1035, 13 L. R. A. 627, 24 Am. St. Rep. 544, 555; *Youghiogheny R. Coal Co. v. Allegheny Nat. Bank*, 211 Pa. 319, 60 Atl. 924, 69 L. R. A. 637; *Noonan v. Pardee*, 200 Pa. 474, 50 Atl. 255, 55 L. R. A. 410, 86 Am. St. Rep. 722. While our court has not directly decided the point, yet expressions in our own decisions recognize the principle, as in accordance with the best authorities. *Williams v. Gibson*, 84 Ala. 228, 233, 4 South. 350, 5 Am. St. Rep. 368; *Hooper v. Dora Coal Mining Co.*, 95 Ala. 235, 238, 10 South. 652.

This matter is elaborately and ably discussed in the concurring and dissenting opinions in the case of *Griffin v. Fairmont Coal Co.*, 59 W. Va. 480, 53 S. E. 24, 2 L. R. A. (N. S.) 1115, and note. While the majority opinion in that case argues very forcibly in support of the proposition that, where the owner of the surface has conveyed the minerals and expressed no stipulations for the support of the surface, the owner of the mineral may take it all, without regard to the effect of the surface, yet the dissenting opinion and the note show that that is against the weight of authority, and the majority opinion itself admits that, when there is no conveyance from the surface owner, he is entitled to have the surface supported, and the annotator very properly says that the court "seems to have based its final decision against the existence of an implied reservation of support upon the particular language of the instrument by which the estates were severed." Page 1116 of 25 L. R. A. (N. S.).

The court erred in overruling the demurrer to the complaint as amended. The complaint should have stated the time when the grievance complained of occurred, and it should also have stated facts showing whether the defendant was a trespasser, or acted under any right, in making the excavation. *Mayor, etc., of Huntsville v. Ewing*, 116 Ala. 576, 582, 583, 22 South. 984.

It results, also, from the principle above

announced, that the court did not err in refusing to give the general charge in favor of the defendant, nor in refusing to give the second, fourth, and fifth charges, requested by the defendant.

The court erred in refusing to give charge No. 3, requested by the defendant. While there is a difference as to the commencement of the running of the statute of limitations between cases where the act complained of was unlawful in itself and those where the act was lawful and the damage claimed is consequential, yet, where the injury is continuing or recurring, the rule in each case is that damages can be recovered only for the injury occurring within the period of limitation. 25 Cyc. 1137-1139; 19 Am. & Eng. Ency. Law, 200; Reed v. State, 108 N. Y. 407, 15 N. E. 735; Mayor, etc., of Huntsville v. Ewing, 116 Ala. 576-585, 22 South. 984; Tutwiler C. C. & I. Co. v. Nichols, 146 Ala. 364, 39 South. 762, 764, 119 Am. St. Rep. 34; Ala. Consol. C. & I. Co. v. Vines, 151 Ala. 398, 44 South. 377, 378. While the first paragraph of charge 6, requested by the defendant, states the law correctly, yet the remaining part of the charge is merely argumentative, in answer to expressions used by the attorney in the argument of the case, and the court cannot be placed in error for refusing to give the same.

The judgment of the court is reversed, and the cause remanded.

HARALSON, DOWDELL, and DENSON, JJ., concur.

(158 Ala. 186) 1

MERRILL v. SMITH et al.

(Supreme Court of Alabama. Jan. 20, 1909.)

1. TRIAL (§ 169*)—DIRECTION OF VERDICT—MOTION FOR AFFIRMATIVE CHARGE.

Notwithstanding Code 1907, §§ 5342-5345, authorizing the parties to demur to the evidence, when plaintiff fails to make out a prima facie case, the court may exclude the evidence on defendant's motion, or give an affirmative charge, requested by defendant in writing.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 169.*]

2. PARTNERSHIP (§ 104*)—PROFITS—ACTION BY PARTNER.

A partner cannot maintain an action for profits against the firm.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 156; Dec. Dig. § 104.*]

3. PARTNERSHIP (§ 108*)—ACTION AGAINST PARTNER—SETTLEMENT.

One partner cannot sue another for demands growing out of the partnership business, unless there has been a settlement and a balance ascertained to be due him.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 157; Dec. Dig. § 108.*]

4. PARTNERSHIP (§ 120*)—ACTION AGAINST PARTNERS—ISSUES AND PROOF.

Where plaintiff's only claim against defendants was for profits growing out of a construction contract accrued to him as a partner in the work, and not on any express agreement by the

firm or by defendant S. individually to make him an independent creditor, plaintiff could not recover on a complaint alleging an express promise to pay plaintiff as distinguished from what plaintiff would be entitled to as profits due him as a member of the firm.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 120.*]

Appeal from City Court of Mobile; O. J. Semmes, Judge.

Action for breach of contract by Frank B. Merrill against the partnership of Charles D. Smith and others. From a judgment for defendants, plaintiff appeals. Affirmed.

The contract is as follows: Plaintiff claims of defendants \$60,000 damages for the breach of an agreement entered into, to wit, July 16, 1903, by the defendants, by which the said defendants agreed and promised to pay plaintiff 40 per cent. of such profit as the copartnership of C. D. Smith & Co. should make from the execution of a certain contract for work of construction on the Gulf & Chicago Railroad if they should obtain said contract; such promise being upon consideration of certain promises and agreements on the part of plaintiff made, and services rendered in and about preparing the bids, and plaintiff said that, although he had complied with all of the provisions of said agreement on his part, the defendants have failed on their part to fulfill their said agreement and pay to plaintiff any moneys whatsoever, although, as plaintiff avers, said C. D. Smith & Co. have claimed said contract and had made great profits upon said contract, and plaintiff avers that Charles D. Smith is his copartner of the firm of C. D. Smith & Co. The complaint was against C. D. Smith & Co., a partnership, composed of main partners, and against C. D. Smith individually. The proof of the plaintiff tended to show that at the time plaintiff resigned as president of the Mobile, J. & K. C. R. R. Co. he and C. D. Smith were interested as contractors and partners under the name of C. D. Smith & Co.; that on July 14, 1902, C. D. Smith came from Mobile, and plaintiff and he left and went to said Smith's room, and talked the situation over and discussed the contract to be let by the railroad company and the nature of the work in all its details and that in the general conversations which followed it was agreed between him and Smith that if plaintiff would not bid upon the projected work, but would go in with said Smith, Smith would give the plaintiff an interest in the contract, and that, in consideration of such interest, he should refrain from bidding and that he did refrain from bidding and agreed to help and did help the said Smith to formulate a bid which was thereafter accepted for said work, and, though he wanted one-half interest in the work, it was finally agreed that he should have a 40 per cent. interest therein, and that with this understanding he

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

assisted with his knowledge and information obtained by him while an officer of the road and his familiarity with the work to be done in making up the bids from the specification.

Pillans, Hanaw & Pillans, for appellants. Stevens & Lyons and Caruthers Ewing, for appellees.

ANDERSON, J. Regardless of the rights of parties to demur to the evidence, as provided by sections 5342-5345 of the Code of 1907 it is settled in this state that, when the plaintiff fails to make out a prima facie case, there is no error on the part of the trial court in excluding the evidence upon motion of the defendant and in giving the affirmative charge when requested in writing by the defendant. *Talladega Co. v. Peacock*, 67 Ala. 253; *Gulf City Co. v. L. & N. R. R. Co.*, 121 Ala. 625, 25 South. 579; *Touart v. Yellow Pine Co.*, 128 Ala. 66, 29 South. 4.

The complaint charges the breach of an agreement by a failure to pay the plaintiff 40 per cent. of the profits "as the copartnership of C. D. Smith & Co. should make from the execution of a certain contract for construction," etc. There was no proof of such a promise either by the company or Smith. The only contract attempted to be proven by the plaintiff was not an obligation to pay him anything, but that he was a partner in the firm of Smith & Co. to the extent of a two-fifths interest, and therefore entitled to 40 per cent. of the profits. If he was a member of the firm, as he claims, we are at a loss to see how he can maintain an action against said firm. On the other hand, he cannot maintain a suit against his copartner for demands growing out of the partnership business, unless there was a settlement and a balance ascertained to be due him. But, if there was a settlement and balance due, it could not be recovered under the present complaint, which is upon an express promise to pay him as distinguished from what he would be entitled to under the law as profits due him as a member of the firm. The plaintiff testified "that, though he wanted one-half interest in the work, it was finally agreed that he should have a 40 per cent. interest therein." Again, the letter provides that the plaintiff was to have such interest in the contract as he then had in C. D. Smith & Co. "under same terms," and there was proof tending to show that they were previously partners in the firm of Smith & Co. to the extent of three-fifths interest in Smith and two-fifths in the plaintiff. Clearly whatever claim he had to the profits growing out of the contract for construction accrued to him as a partner in the work, and not upon any express agreement to make him an independent creditor of the firm or of Smith individually.

The plaintiff having failed to make out a prima facie case, under the averments of

his complaint, the trial court did not err in excluding all of the evidence.

The judgment of the city court is affirmed. Affirmed.

SIMPSON, DENSON, and McCLELLAN, JJ., concur.

(158 Ala. 59)

STATE ex rel. CITY OF BIRMINGHAM v. MILLER, County Treasurer.

(Supreme Court of Alabama. Jan. 14, 1909.)

1. STATUTES (§ 120*) — TITLES — PROVISIONS NOT EMBRACED IN TITLE.

Municipal Corporations Act (Gen. Laws 1907, p. 790) is entitled "An act to provide for the organization, incorporation, government and regulation of cities and towns, and to define the rights, powers, duties, jurisdiction and authority of such cities and towns and of the officers thereof and to prescribe penalties for violations of the provisions of this act." Section 120 provides that courts of the county commissioners and boards of revenue of the county where there is levied a special road and bridge tax, or either, shall pay each year to each municipality therein one-half of the money collected on such taxes on the property located in the municipality, which shall be used to maintain streets and bridges, and if not so used shall be returned to and credited to the county bridge fund, etc. *Held*, that the title of the act relates solely to the organization, etc., of cities and towns and their powers; and section 120, relating exclusively to the duties of boards of revenue of counties, is void as violative of Const. 1901, § 45, providing that each law with immaterial exceptions shall contain but one subject, clearly expressed in its title.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 120.*]

2. STATUTES (§ 146*) — TITLES — PROVISIONS NOT EMBRACED IN TITLE—EFFECT OF INCORPORATING IN CODE.

The fact that section 120, Gen. Laws 1907, p. 847, was embodied as section 1335 in the Code of 1907 imparts to it no validity, because it became a law after the act adopting the Code was enacted, and did not therefore become a part of the Code as adopted.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 146.*]

Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge.

Mandamus by the State, on the relation of the City of Birmingham, against H. O. Miller, County Treasurer. From a judgment denying the writ, relator appeals. Affirmed.

A. G. & E. D. Smith, for appellants. H. O. Selheimer and Nathan L. Miller, for appellee.

DENSON, J. This is a proceeding by mandamus to compel the treasurer of Jefferson county to pay two warrants, issued by the board of revenue of the county in favor of the city of Birmingham. One of the warrants is in the sum of \$10,000, with directions on its face that it be paid out of the "ten cents road fund"; and the other in the sum of \$5,000, with directions that it be paid out of the "public bridge and building fund." These warrants were issued to the city un-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

der the authority of section 120 of the act of the Legislature, generally known as the "Municipal Corporations Act," approved August 13, 1907 (Gen. Laws 1907, p. 847); and the city claims the right to have them paid under that section of said act. The treasurer declines to pay the warrants, questioning the validity of section 120 of the act upon constitutional grounds. The title of the act is in this language: "An act to provide for the organization, incorporation, government and regulation of cities and towns, and to define the rights, powers, duties, jurisdiction and authority of such cities and towns and of the officers thereof, and to prescribe penalties for violations of the provisions of this act."

Section 120 reads as follows: "After the adoption of this act, courts of the county commissioners and boards of revenue of the county where there is levied a special road and bridge tax, or either, shall pay over, each year to each municipality therein one-half of the money collected on such road and bridge tax or either, on the property located in such municipality, such sums when paid over to the municipality shall be used exclusively for the purpose of maintaining the streets and bridges in the corporate limits of such municipality. Any money derived from a levy of a special bridge tax not expended by the municipality in maintaining the bridges within its corporate limits, in any year, shall be returned to the board of revenue or court of county commissioners and credited to the county bridge fund for the purpose of maintaining bridges of the county outside of the corporate limits of such municipality."

The first and principal point made against the section is that the subject-matter thereof is not expressed in the title as required by section 45 of the Constitution of 1901. While it is not contended that it is outside of the competency of the Legislature to dispose of the general funds of the county, nor that the Legislature has no power over the streets and highways of cities and towns, yet it is insisted that a diversion of county funds to municipal purposes would be contrary to the settled policy of the state, and that it cannot be accomplished by a section in an act, masked under a title which gives not the slightest information or a notice of such legislative purpose. Manifestly, the title of the act in judgment relates solely to the organization, government, and regulation of cities and towns, and to the right, duties, and powers of such cities and towns and of the officers thereof; while it is clear that section 120 of the act relates exclusively to the duties of boards of revenue of the counties, and appropriates county revenues, and applies them to city purposes. The history as well as the purpose of section 45 of the Constitution is now too well understood to require extended elucidation here. There

was no design in this clause to embarrass legislation by making laws unnecessarily restrictive in their scope and operation, and thus multiplying their number; but the framers of the Constitution meant to put an end to a species of vicious legislation commonly termed "logrolling," and to require, in every case, that the proposed measure shall stand upon its own merits, so that neither the members of the Legislature nor the people may be misled by the title. *Ballentyne v. Wickersham*, 75 Ala. 533; *Cooley's Con. Lim.* (7th Ed.) 117.

In *Woolf v. Taylor*, 98 Ala. 254, 13 South. 688, it was attempted by mandamus to compel the probate judge of Marengo county to pay over to the city authorities of the city of Demopolis certain moneys collected by him for liquor licenses, as required by an act of the Legislature approved February 7, 1893 (Loc. Laws 1892-93, p. 272). The title of the act was, "An act to amend an act to establish a new charter for the city of Demopolis." Section 26 of the act provided "that all funds arising under the general revenue law of the state for liquor licenses issued to parties carrying on business within the police jurisdiction and limits of said city, shall be paid over by the probate judge of Marengo county to the treasurer of the said city of Demopolis, to be held and used exclusively for the maintenance and support of the public schools in the said Demopolis school district." The judge of probate resisted the payment, on the ground that section 26 was violative of the Constitution. This court sustained the contention saying: "No one would gather therefrom (the title) any information or suspicion of a purpose to incorporate into the act an entirely new provision, making an appropriation by the state, out of its revenues, to support and maintain the public schools of the city."

The case of *Sanders v. Elmore County*, 117 Ala. 546, 23 South. 788, involved the validity of an act, the title of which was, "An act to regulate the fine and forfeiture fund of Elmore county, and to better provide for the payment of claims against the same." A certain section of the act, requiring the commissioner's court to appropriate a part of the general fund of the county to the payment of claims against the fine and forfeiture fund, was held void because not expressed in the title of the act.

The case of *Wheeler v. State ex rel.*, etc. (Neb.) 102 N. W. 773, referred to in appellee's brief, is a case directly in point. The act involved was entitled, "An act to provide for the incorporation, government, regulation, duties and powers of all cities having more than twenty-five thousand inhabitants." Section 87 of the act (Sess. Laws 1901, p. 294, c. 18) provided that "the treasurer shall pay over on demand to the treasurer of any city all money received by him arising from taxes levied belonging to the city, together

with all money collected as a tax on dogs from residence of such corporation for use of the general fund therein, and also all money arising from the levying of a road tax against or upon property in said city, which shall be expended upon the streets and grades in said city." The Supreme Court of Nebraska said of this section of the act: "There is nothing in the title of the act, and nothing in the subject-matter to which it refers, indicative of an intent to legislate with respect to the powers or duties of county officers, or with respect to the administration of moneys or revenues raised by their authority. But this is precisely the thing that section 87 of the charter purports, and the only thing that it attempts to do. In explicit terms it assumes to prescribe the duties of the county treasurer with reference to county funds in his official custody. This can only be done by an act expressing that object in its title." From the foregoing considerations and authorities, there is left in our minds no reasonable doubt that section 120 of the act in judgment is void, as having been passed in violation of section 45 of the Constitution.

The fact that section 120 is embodied in the Code of 1907 as section 1335 imparts to it no validity, for the reason that it became a law after the act adopting the Code was enacted, and did not, therefore, become a part of the Code as adopted. Therefore the act under consideration must be construed as originally adopted. *Bullders' & Painters' Supply Co. v. Lucas*, 119 Ala. 202, 24 South. 416; *Bluthenthal & Bickart v. Trager & Co.*, 131 Ala. 640, 31 South. 622.

The judgment of the circuit court denying mandamus is affirmed.

Affirmed.

HARALSON, DOWDELL, SIMPSON, and McCLELLAN, JJ., concur.

(158 Ala. 18)

BAILEY v. STATE.

(Supreme Court of Alabama. June 30, 1908.
Rehearing Denied Feb. 5, 1909.)

1. CONSTITUTIONAL LAW (§ 89*)—FREEDOM TO CONTRACT — INTENTION TO PERPETRATE FRAUD.

When an individual contracts with the intention of perpetrating a fraud, he is not within the constitutional guaranty of the free right to contract, and the Legislature may render his act a crime.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 157; Dec. Dig. § 89.*]

2. CONSTITUTIONAL LAW (§ 83*)—PERSONAL RIGHTS—IMPRISONMENT FOR DEBT.

Code 1896, § 4730, as amended by Gen. Acts 1903, p. 345, and Gen. Acts 1907, p. 636, providing an employé who, with intent to defraud, contracts in writing to perform services and receives money or property, and, without refunding the same fails to perform such services, shall be punished as for larceny is not re-

pugnant to Bill of Rights 1901, § 20, declaring that no person shall be imprisoned for debt.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 151½; Dec. Dig. § 83.*]

3. CONSTITUTIONAL LAW (§ 55*)—ENCROACHMENT ON JUDICIARY.

That part of Code 1896, § 4730, as amended by Gen. Acts 1903, p. 345, and Gen. Acts 1907, p. 636, which renders the act of an employé in refusing to refund money received from his employer, or to perform the services called for by his written contract, *prima facie* evidence of an intent to defraud, is not unconstitutional, as an invasion of the province of the judiciary.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 59; Dec. Dig. § 55.*]

Appeal from City Court of Montgomery; W. H. Thomas, Judge.

Application by Alonzo Bailey for discharge from imprisonment by writ of habeas corpus. From an order refusing his discharge he appeals. Affirmed.

Troy, Watts & Letcher, for appellant. Alexander M. Garber, Atty. Gen., and Thomas W. Martin, Asst. Atty. Gen., for the State.

DENSON, J. Alonzo Bailey, after a preliminary trial had before B. O. Young, a justice of the peace in Montgomery county, on a charge made against him for obtaining \$15 under a contract in writing, with intent to injure or defraud his employer, was regularly committed for said offense to the custody of the sheriff of said county, for detention until he should be legally discharged. He was received into custody by the sheriff, and by him imprisoned in the county jail on the 6th day of April, 1908. On the 14th day of April Bailey applied to the Hon. William H. Thomas, associate judge of the city court of Montgomery, for his discharge by the writ of habeas corpus. On the hearing the judge fixed bail at \$150, but refused to discharge the petitioner absolutely. From the order refusing his discharge the applicant comes here by appeal.

The law under which the applicant was charged with crime, and under which the commitment was made, is an act entitled "An act, to amend an act entitled an act to amend section 4730 of the Criminal Code of 1896, approved October 1, 1903." Gen. Acts 1907, p. 636. The statute, in its form as section 4730 of the Code of 1896, came before this court for construction in the case of *Ex parte Riley*, 94 Ala. 82, 10 South. 528, and there it was clearly pointed out that a mere breach of contract is not by the statute made a crime, but that the criminal feature of the statute consists in the entering into a contract with the intent to injure or defraud the employer, and the refusal of the employé to perform the contract, with a like intent. *Dorsey's Case*, 111 Ala. 40, 20 South. 629; *McIntosh's Case*, 117 Ala. 128, 23 South. 668. In neither of the cases cited was the constitutionality of the statute pre-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

sented for consideration; but in the case of *State v. Vann*, 150 Ala. 66, 43 South. 357, the constitutionality of the statute, as section 4730 of the Code of 1896, was presented for determination, and it was there insisted that the statute was obnoxious to the twentieth section of the Bill of Rights of 1901, which is in this language: "That no person shall be imprisoned for debt." The insistence was overturned, and the statute was held not to be unconstitutional, the court, as the basis of the ruling, again pointing out the fact that "a mere breach of contract is not by the statute made a crime," but that the criminal feature consists in the intent to injure or defraud. This intent to injure or defraud marks the line of cleavage between the statute in judgment and the one approved March 1, 1901 (Acts 1900-01, p. 1208), which made it a misdemeanor for any person, who had contracted in writing to labor for or serve another for any given time, etc., and who, before the expiration of such contract, and without the consent of the other party, and without sufficient excuse (to be judged by the court), shall leave such other party, etc. This last statute was by Judge Jones of the federal court held to be obnoxious to the state Constitution (Peonage Cases [D. C.] 123 Fed. 671); and was by this court held to be unconstitutional in *Toney's Case*, 141 Ala. 120, 37 South. 332, 67 L. R. A. 286, 100 Am. St. Rep. 23, because of the restrictions it attempts to place on the right to make contracts. These two cases are now urged as authority in support of the insistence of appellant that the statute under consideration is violative of the Constitution, and we are asked to overrule the *Vann* case, *supra*. While it is clear that a mere breach of contract cannot be made the foundation for a criminal offense, and that undue restrictions cannot be placed on the right of an individual to enter into contracts, yet when the individual enters into a contract, with the intention to perpetrate a fraud, it is equally obvious that he passes over the constitutional boundary line in respect to the free right to contract; and it is within legislative competency to enact a law penalizing the entering into a contract with such intent, and obtaining money or other personal property through such agency. This is all that is effectuated by the legislation in question. On its face the purpose is to punish fraudulent practices, not the mere failure to pay a debt. Thus considered, it is constitutional. Without further extension of the argument we not only decline to depart from the ruling made in *Vann's Case*, on this subject, but reaffirm it. *Banks v. State*, 124 Ga. 15, 52 S. E. 74, 2 L. R. A. (N. S.) 1007.

In *Ex parte Riley*, 94 Ala. 82, 83, 10 South. 528, 529, it was said: "As the intent

is the design, purpose, resolve, or determination in the mind of the accused, it can rarely be proved by direct evidence, but must be ascertained by means of inferences from the facts and circumstances developed by the proof. In the absence, however, of evidence from which such inferences may be drawn, the jury are not justified in indulging in mere unsupported conjectures, speculations, or suspicions as to the intentions which were not disclosed by any visible or tangible act, expression, or circumstance." It is no doubt true that the difficulty in proving the intent, made patent by that decision, suggested the amendment of 1903 (Gen. Acts 1903, p. 345) to the statute, which provides that the refusal or failure of a person who enters into such contract to perform such act or service, or refund such money, or pay for such property, without just cause, shall be prima facie evidence of the intent to injure or defraud his employer. This amendment has twice been declared by this court to be a constitutional enactment. *Thomas' Case*, 144 Ala. 77, 40 South. 271, 2 L. R. A. (N. S.) 1011, 113 Am. St. Rep. 17; *Vann's Case*, 150 Ala. 66, 43 South. 357. However, these cases are here assailed, and the conclusions reached therein are vigorously combated in brief of appellant's counsel. A re-examination of those cases, together with the consideration of others, has not only not shaken our faith in the correctness of the conclusion there reached, but confirmed it, and we decline to recede therefrom. *Banks v. State*, 124 Ga. 15, 52 S. E. 74, 2 L. R. A. (N. S.) 1007.

We have discussed all questions presented by the record, and conclude that there is no error shown.

The order appealed from is affirmed.

TYSON, C. J., and HARALSON and SIMPSON, JJ., concur.

(158 Ala. 54)

STATE v. QUARLES.

(Supreme Court of Alabama. Jan. 21, 1909.)

1. ATTORNEY AND CLIENT (§ 49*)—DISBARMENT—CONSTRUCTION OF STATUTE.

Though the punishment provided for a violation of Code 1896, § 590, subd. 6, and Acts 1900-1, p. 2227, § 1, making it unlawful for an attorney at law to wrongfully encourage litigation is only disbarment, such statutes are penal in character, and must be strictly construed.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. § 48; Dec. Dig. § 49.*]

2. ATTORNEY AND CLIENT (§ 49*)—DISBARMENT—NATURE OF PROCEEDINGS.

A proceeding on information in the name of the state for disbarment of an attorney under Code 1896, § 590, subd. 6, and Acts 1900-1, p. 2227, § 1, making it unlawful for an attorney at law to wrongfully encourage litigation, while not strictly criminal, is quasi criminal.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. § 48; Dec. Dig. § 49.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3. ATTORNEY AND CLIENT (§ 52*)—DISBARMENT—SUFFICIENCY OF INFORMATION.

An information for the disbarment of an attorney for unlawfully encouraging litigation in violation of Code 1896, § 590, subd. 6, and Acts 1900-1, p. 2227, § 1, is insufficient if it fails to allege that defendant is an attorney at law.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 70; Dec. Dig. § 52.*]

Appeal from Circuit Court, Dallas County; B. M. Miller, Judge.

Proceedings by information in the name of the State against William W. Quarles. From a judgment for defendant, plaintiff appeals. Affirmed.

Walter R. Shafer, for the State. Pettus, Jeffries & Pettus, S. J. Bowle, and Mallory & Mallory, for appellee.

DOWDELL, J. This is a proceeding by information in the name of the state, filed by the circuit solicitor, against the appellee in the circuit court of Dallas county. The complaint contained two counts as follows: "First count. That said William W. Quarles is guilty of a violation of the provisions of an act entitled 'An act to prevent the encouragement of litigation and provide for the punishment of persons engaged in encouraging litigation, approved March 4th, 1901' (Acts 1900-1, p. 2227), in this: that the said William W. Quarles did promise, or give or offer, or promise to give, a valuable consideration to one John D. Mosely as an inducement to the said Mosely to the placing, or in consideration of having placed, in the hands of the said William W. Quarles a demand or claim against one William P. Molette, for the purpose of bringing suit or making claim against the said William P. Molette." "Second count. That the said William W. Quarles is guilty of a willful violation of subdivision 6 of section 590 of the Code of Alabama, in this: That the said William W. Quarles did encourage the commencement or continuance of an action or proceeding against one William P. Molette for motive of interest."

Section 1 of the Act of March 4, 1901 (Acts 1900-1, p. 2227), on which the first count is based, reads as follows: "That it shall be unlawful for an attorney at law, either before or after action brought, to promise or give or offer to promise or give a valuable consideration to any person as an inducement to placing, or in consideration of having placed in his hands or in the hands of any partnership of which he is a member, a demand of any kind, for the purpose of bringing suit or making claim against another, or to employ a person to search for and procure clients to be brought to such attorney." Subdivision 6 of section 590 of

the Code of 1896, on which the second count is based, is as follows: "Duties of Attorneys. It is the duty of attorneys * * *. 6. To encourage neither the commencement nor continuance of an action or proceeding from any motives of passion or interest." While in the violation of either of these statutes, no punishment by fine or imprisonment is incurred, still the punishment imposed, that of disbarment from the practice of the law, renders them highly penal in their character. Such statutes are to be strictly construed. And proceedings under them on information in the name of the state, while not strictly criminal, are quasi criminal. *Thomas v. State*, 58 Ala. 365.

These statutes are manifestly directed against a particular class—attorneys at law. *Thomas v. State*, supra. Unless the defendant against whom the charge is brought comes within that class, no conviction can be had. It is an essential element in the constitution of the offense—a fact not only required to be proven, but one which should be averred in the complaint in order to charge an offense. Neither of the counts charges that the defendant is an attorney at law, and in this omission fails to state a substantial cause of action. The statutes under which the proceeding is had being criminal in their nature, in order to support the proceeding it is essential "that the information should with certainty disclose that the defendant is amenable to the proceeding and the facts constituting the misconduct of which complaint is made." *Thomas v. State*, supra. The complaint in that case was much fuller and more particular in its averments than is the present complaint, and yet in that case it was held insufficient. We might repeat more that was said in that case which would be apposite here, but forbear to do so, being content with a reference to it as an authority conclusive of the case at bar.

The judgment of the lower court was in favor of the defendant, and no presumptions will be indulged here for the purpose of reversing that judgment. The information failing to charge an offense, errors arising on the trial in the introduction of evidence can but be regarded as errors without injury. Certainly, if the information is insufficient to support a judgment of conviction, in the failure to charge an offense, then the only proper judgment to be rendered would be one in favor of the defendant. These views render it unnecessary to consider other questions discussed by counsel.

Affirmed.

SIMPSON, ANDERSON, and MCLELLAN, JJ., concur.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(158 Ala. 453)

MONTGOMERY TRACTION CO. v. KNABE.(Supreme Court of Alabama. Nov. 24, 1908.
On Rehearing, Jan. 14, 1909.)**1. COURTS (§ 62*)—TERMS—STATUTES—REPEAL.**

Act Dec. 6, 1900 (Acts 1900-01, p. 122), providing that the city court of Montgomery shall hold three terms in each year, in February, July, and October, was repealed by Act Feb. 28, 1907, providing that the October term of such court should be held on the first Monday in October in each year, and continue until the Saturday before the second Monday in July following, and that the July term should begin on the second Monday in July, and continue until the Saturday before the first Monday in October following, unless sooner adjourned, though the latter act contained no repealing clause, since the latter act in effect converted the court from one of three terms into one of two.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 62.*]

2. STATUTES (§ 255*)—TIME OF TAKING EFFECT.

Where no time is fixed for the taking effect of an act, it becomes operative from the day of its approval.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 336; Dec. Dig. § 255.*]

On Rehearing.

3. TIME (§ 9*)—TERMS—STATUTES—CONSTRUCTION—"UNTIL."

Under Act Feb. 28, 1907, continuing one of the terms of the city court of Montgomery "until" the Saturday before the second Monday in July, the Saturday named should be included within the term, the rule to be applied being that in statutes limiting the continuance of terms of court until a certain day, which is the last day of the week or month, the interpretation to be placed upon the word "until" is that the last day named is to be included.

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 11-32; Dec. Dig. § 9.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7217-7219; vol. 8, p. 7825.]

4. EXCEPTIONS, BILL OF (§ 40*)—TIME OF SIGNING—RULES OF COURT.

Practice rule 30 of the Supreme Court, providing that bills of exceptions may be signed by the presiding judge at any time during the term at which the trial is had, or by written consent of the parties, or their counsel, filed in the cause, at any time before the next succeeding term of such court, and not afterwards, applies only to bills signed under agreement of counsel, and not to bills signed under an order extending the time so to do.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 44, 57; Dec. Dig. § 40.*]

5. EXCEPTIONS, BILL OF (§ 40*)—TIME FOR SIGNING—EXTENSION OF TIME—AUTHORITY.

Section 10 of the act of February 7, 1901 (Acts 1900-01, p. 830), prescribing rules of practice in the city court of Montgomery, requires all bills of exceptions relating to the trial of civil cases in such court to be signed by the presiding judge within 30 days after the issues of fact to which the bill of exceptions relates are tried, unless the time is extended by agreement of the parties or counsel or by order of the presiding judge. *Held*, that the statute did not authorize the court to extend the time, but only the trial judge.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 58; Dec. Dig. § 40.*]

6. EXCEPTIONS, BILL OF (§ 36*)—TIME OF SIGNING—EFFECT ON PRESENTATION OF QUESTIONS.

A bill of exceptions, though not signed in time to present for review questions arising on the trial of an action in the city court of Montgomery, is sufficient to present for review questions arising on the motion for a new trial, where it is signed within 30 days after the overruling of such motion.

[Ed. Note.—For other cases, see Exceptions, Bill of, Dec. Dig. § 36.*]

7. NEW TRIAL (§ 145*)—IMPEACHMENT OF VERDICT—TESTIMONY OF JURORS.

Declarations of a juror in a civil action, made after the rendition of the verdict, and after the juror has gone out on the street, cannot be used on a motion for new trial to impeach the verdict, where the testimony proposed involved no fraud, corruption, or misconduct.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 300; Dec. Dig. § 145.*]

8. NEW TRIAL (§ 145*)—GROUNDS—MISCONDUCT OF JURORS—EVIDENCE.

Evidence that, after the rendition of a verdict in a civil action, three of the jurors entered the drug store of plaintiff's sons and shook hands with them and with one of plaintiff's attorneys, and laughed and talked with them, was inadmissible to impeach the verdict, where no effort was made to show that the incident was in any way connected with improper conduct on the part of the jurors, or that of the persons with whom they laughed and talked, or that the conversation or laughter even related to or grew out of the case.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 300; Dec. Dig. § 145.*]

9. APPEAL AND ERROR (§ 933*)—REVIEW—EVIDENCE.

The refusal of the trial court to grant a new trial for insufficiency of the evidence to sustain the verdict, or because the verdict is contrary to the evidence, will not be reversed unless, after allowing all reasonable presumptions of its correctness, the preponderance of the evidence against the verdict is so decided as to clearly convince the court that it is wrong and unjust.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3425, 3772, 3776; Dec. Dig. § 933.*]

10. NEW TRIAL (§ 162*)—VERDICT—REDUCTION OF DAMAGES.

On motion to set aside a verdict on account of excessive damages, followed by an offer of plaintiff to reduce the verdict to a certain amount, the trial court, if of opinion that plaintiff is entitled to recover, but that the judgment is excessive, may properly make such reduction of the verdict, and enter judgment accordingly.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 324-329; Dec. Dig. § 162.*]

11. DAMAGES (§ 132*)—PERSONAL INJURY—EXCESSIVENESS.

Injuries to a healthy and active woman, 75 years of age, who was able to walk downtown and return, and to attend to her flowers, caused her constant suffering, necessitated the amputation of her leg, caused her confinement in an infirmary for about six weeks or two months, called for a great deal of care and attention, and prevented her from going about otherwise than in a roller chair, she being too weak to walk on crutches. *Held*, that a verdict of \$10,000 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385; Dec. Dig. § 182.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

12. APPEAL AND ERROR (§ 1004*) — REVIEW —
VERDICT—EXCESSIVE DAMAGES.

The authority invested in courts to disturb the verdict of a jury on the ground of excessive damages is one which should be exercised with great caution and discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.*]

Appeal from City Court of Montgomery; A. D. Sayre, Judge.

Action by Matilda A. F. Knabe against the Montgomery Traction Company. From a judgment for plaintiff, reducing the verdict from \$12,500 to \$10,000, defendant appeals. Affirmed.

Rushton & Coleman and H. F. Crenshaw, for appellant. Hill, Hill & Whiting, for appellee.

DENSON, J. This cause was tried, and verdict and judgment were rendered for the plaintiff in the sum of \$12,500, on the 14th day of June, 1907. The defendant entered its motion to set aside the verdict and that a new trial be granted. The record shows that this motion was heard and determined on Saturday, the 6th day of July, 1907, and that the court on that day, upon the plaintiff offering to remit so much of the judgment as was in excess of \$10,000, overruled the defendant's motion, and rendered judgment against the defendant in the sum of \$10,000. The record shows that it is from this latter judgment the present appeal is taken.

By an act of the General Assembly entitled, "An act to fix the time of holding the city court of Montgomery," approved December 6, 1900 (Acts 1900-01, p. 122), it is provided that the city court of Montgomery shall hold three terms in each year, commencing, respectively, the first Monday in February, the first Monday in July, and the second Monday in October. By an act of the Legislature entitled, "An act to fix the time of holding the city court of Montgomery," approved February 28, 1907, it is provided that the October term of the city court of Montgomery shall be held on the first Monday in October of each year, and shall continue until the Saturday before the second Monday in July following, and that "the July term of said court shall begin on the second Monday in July of each year and continue until the Saturday before the first Monday in October following unless sooner adjourned by an order thereof." The latter act contains no repealing clause, but it is manifestly repugnant to the act of December 6, 1900. There is absolutely no field of operation for both acts, and the conclusion inevitably follows that it was the intention of the Legislature that the act of February 28, 1907, should operate as a substitute for the act of December 6, 1900. Therefore the act of December 6, 1900, is repealed by im-

plication. City Council of Montgomery v. National, etc., Ass'n, 108 Ala. 336, 18 South. 816. The effect of the act of February 28, 1907, was to convert the city court from a court of three terms to one of two terms, with the October term beginning on the first Monday in October and continuing until the Saturday before the second Monday in July following, and the July term beginning on the second Monday in July. By the act of February 28, 1907, no time is fixed for its taking effect, and it therefore became operative from the day of its approval. 4 Mayfield's Dig. 856.

From the foregoing considerations it follows that the term at which the instant cause was tried was extended until the Saturday before the second Monday in July, which was July 6, 1907. This being true, then according to the language of the statute and to previous decisions of this court that term ended, by operation of law, at 12 o'clock, Friday night, July 5, 1907. According to this construction, Saturday, the 6th, was not in term time, and consequently the session of the court held on that day was held at a time not authorized by law; and judgments and orders purporting to have been rendered and made on that day are void. Johnson's Case, 141 Ala. 7, 37 South. 421, 109 Am. St. Rep. 17; Richardson's Case, 142 Ala. 12, 39 South. 12; Kidd v. Burke, 142 Ala. 625, 38 South. 241. If, however, by any rule of construction, it could be said that the term at which the cause was tried was not affected by the act, then that term expired by operation of law (Act Dec. 6, 1900) on the Saturday before the first Monday in July, 1907, and this would throw the entire week, including Saturday, July 6th, out of term time, because there can be no doubt that the July term, 1907, commenced by law (Act Feb. 28, 1907) on the second Monday of that month, and not earlier. So that in either view it must follow that what purports to be a judgment entered on July 6, 1907 (that appealed from), is void, and will not support an appeal. Therefore the appeal must be dismissed. Kidd v. Burke, supra.

Appeal dismissed.

TYSON, C. J., and HARALSON and SIMPSON, JJ., concur.

On Rehearing.

The original opinion in support of the order dismissing the appeal is based upon the construction or meaning given to the word "until" as it is used in the act which fixes the terms of the city court of Montgomery. The writer of that opinion (also the writer of this), deeming the question not an open one in this court since the promulgation of the decision in the case of Johnson v. State, 141 Ala. 7, 37 South. 421, 109 Am. St. Rep.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

17, did not discuss it, but based the conclusion attained on that case, which, as must be conceded, is on all fours with the case at bar. The act involved in the Johnson Case provided that the regular terms of the city court of Gadsden should be held as follows: "Beginning on the third Monday in January in each year, and continuing until the last Saturday in June, and on the third Monday in September in each year, and continuing until the third Saturday in December." Acts 1900-01, p. 1291. In the opinion of the court in that case it is stated that: "The well-settled rule is that the use of the word 'until' generally implies an intention to exclude the day to which it refers, unless the contrary appears from the context of the statute or instrument in which the word is used." From this premise the court, speaking through Justice Haralson, after citing and commenting on the authorities, reached the conclusion that: "There is nothing in the statute to indicate that the third Saturday in December, the day on which the trial occurred, was included within the limits of the term. Unaided by anything in the context of the statute to the contrary, we must be governed by what the Legislature said, and presume that they said what they intended to say. 'Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the Legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction.' 'Possible or even probable meanings, when one is plainly declared in the instrument itself, the courts are not at liberty to search for elsewhere.'" *Oooley on Con. Lim.* 69, 70; *State ex rel. Robertson v. McGough*, 118 Ala. 166, 24 South. 395. The court there held that the judgment appealed from was void and would not support an appeal. I have examined all the cases cited by the appellant in support of the application for a rehearing, and find in every one of them that the contract or act construed contained some word, phrase, or sentence which gave to the word "until" as therein used an inclusive meaning.

According to my view, there is not a single word, in the statute under consideration, which can be seized upon as indicating that "until" was used in an inclusive sense. There is no difference between the act construed in the Johnson Case and that here in judgment. I hold to the opinion that the Johnson Case is sound and should be allowed to stand, and that the attack here made upon it should not be suffered to prevail. However, all of the other Justices concur in the conclusion that the Johnson Case is unsound, and that it must be, and is hereby, overruled, and that the word "until," as used in the statute, must be taken and interpreted in an inclusive sense. From this conclusion of the majority it follows that Saturday, July 6, 1907, was a day in term time, and the judgment of the city court rendered on that

day will support the appeal. This necessitates further consideration of the cause as presented by the record.

The first question to be determined is whether or not the appellant has a valid bill of exceptions, and, if so, to what extent and for what purposes it may be considered. The trial of the issues of fact, as stated in the original opinion, was had on the 14th day of June, 1907. Section 10 of the act approved February 7, 1901 (Acts 1900-01, pp. 826, 830), prescribing rules of practice and procedure in the city court of Montgomery, provides that "all bills of exceptions relating to the trial of civil causes in said court must be signed by the presiding judge of said court within thirty days after the issue or issues of fact to which said bill of exceptions relates was tried, unless the time for signing such bill of exceptions is extended by agreement of parties or of their counsel or by order of the *presiding judge* [italics ours], as now authorized by law, respecting the signing of bills of exceptions in the circuit court." The bill of exceptions was signed on July 27, 1907. After the 14th day of June—but during that month—the defendant made its motion for a new trial. The record shows that the motion was heard on the 6th day of July, 1907, and that it was by the court overruled, and also that an order was made by the court, and embraced in the minute entry containing the judgment overruling the motion, allowing the defendant 30 days in which to prepare and present its bill of exceptions. This order is relied upon to save the bill of exceptions.

First, it is said by the appellee that the bill cannot be considered because the judgment overruling the motion and granting 30 days within which to present the bill of exceptions was made on a day out of term time. This contention has been disposed of by the conclusion reached by the majority of the Justices (as above announced) whereby the Johnson Case is overruled.

It is next contended that as the extension order prolonged the time for the signing of the bill into another term of the court, and the bill was signed during the following term time, the bill was signed in violation of rule 30 of Supreme Court practice, and cannot be considered. This contention is without merit, as it has been decided that this rule applies only to bills signed under agreement of counsel. *Driver v. King*, 145 Ala. 585, 40 South. 315.

The next contention is that the order extending the time within which the bill of exceptions might be signed was made by the court, and not by the presiding judge, and that the statute does not give such power or authority to extend the time to the court, but to the judge only, and therefore that the order of the court cannot save the bill of exceptions as a part of the record. This contention—in so far as the bill of exceptions presents for review questions which arose

on the trial of the issues of fact before the jury—has been determined by previous decisions of this court in appellee's favor; and, adhering to these decisions, we must hold that such questions cannot be reviewed on the present bill. *Arnett v. Western Railway of Alabama* (Ala.) 39 South. 775; *Western Railway of Alabama v. Russell*, 144 Ala. 142, 39 South. 311, 113 Am. St. Rep. 24; *Montgomery Traction Co. v. Bozeman* (Ala.) 44 South. 559; *Montgomery Traction Co. v. Haygood* (Ala.) 44 South. 560; *Central of Georgia Railway Co. v. Geopp* (Ala.) 45 South. 65. But from a reading of the cases above cited it will be seen that the bill of exceptions, having been signed within 30 days from the time the motion for a new trial was overruled, is valid for the review of questions which arose on the hearing of the motion, and of the judgment on the motion, and we must so consider it. See cases, *supra*.

The court correctly ruled against the defendant's offer to prove the declaration of one of the jurors, made after the verdict was rendered and the juror had gone out on the streets. The testimony proposed involved no fraud, corruption, or misconduct. Neither did the court err in refusing to allow defendant to make proof that soon after the trial three of the jurors were seen to enter the drug store of the sons of the plaintiff (the Messrs. Knabe), and shake hands with them and with W. W. Hill, one of plaintiff's attorneys, and to laugh and talk with them. No effort nor offer was made to show that the incident was in any way connected with improper conduct on the part of the jurors, or that of the person with whom they laughed and talked, or that the conversation or laughter even related to, or grew out of, the case. So far as the bill of exceptions shows, it was a mere incident.

The only other question presented by the motion for a new trial is that the verdict of the jury is contrary to the evidence, and excessive in amount. It was contended in the lower court by the plaintiff that the car by which she was injured stopped for the taking on of passengers, and that while it was so standing still, and while she with the aid of her son was in the act of boarding the car, or was making the attempt to get thereon, said car, without any notice to plaintiff or to others, started off, and she was thrown under the trucks. If this was the true statement of the facts, then negligence *vel non* was at least a question for the jury. This contention was supported by the testimony of as many as 7 witnesses, while the testimony of 18 or 19 witnesses testifying for the defendant tended to show that the car had not actually stopped, but was in motion when plaintiff attempted to board same. All the witnesses who testified that the car had not stopped stated that it was running at a very slow rate of speed. But, waiving consideration of the question as to whether or not—

if the car had not stopped—it was negligence for a woman of plaintiff's age to board a car moving as slowly as, under the tendencies of the evidence of some of the witnesses, the car in question was running, and, recurring to the question as to whether the car did or did not stop, we find the testimony sharply in conflict on this point, with the advantage—so far as number of witnesses is concerned—in favor of defendant, while, as to intelligence of statement and definiteness of testimony, these witnesses cannot be said to possess any advantage over those of the plaintiff, so it becomes a question of plurality of witnesses. The manner of witnesses, their demeanor on the stand, and the degree of intelligence manifested by them are matters for the consideration of the jury in determining the weight which should be accorded to testimony; and the same is true in respect to the consideration and determination of questions of fact by the court or presiding judge. The credibility of the witnesses and the weight of their testimony were passed upon in this case both by jury and court favorably to plaintiff. The presiding judge was satisfied with the verdict. Moreover, as was said in the leading case of *Cobb v. Malone*, 92 Ala. 630, 635, 9 South. 738, the refusal of the court to grant a new trial on the ground of the insufficiency of the evidence, or because the verdict is contrary to the evidence, will not be reversed, unless, after allowing all reasonable presumptions of its correctness, the preponderance of the evidence against the verdict is so decided as to clearly convince the court that it is wrong and unjust. Here, the "utmost that can be said is that it is against the preponderance of the evidence," and this cannot avail to a reversal of the order overruling the motion.

It is unnecessary to discuss the theory of plaintiff that the defendant was negligent in respect to allowing too many persons to enter the inclosure where the cars were boarded by the passengers without a sufficient force of guards, etc.

The question of contributory negligence was likewise a question for the determination of the jury.

The court reduced the verdict from \$12,500 to \$10,000, overruled the motion for a new trial, and entered judgment in favor of the plaintiff for the last-named amount; plaintiff's attorney having first stated to the court that, "if the court is of opinion that the verdict is excessive, we are willing to remit \$2,500." On motion to set aside a verdict on account of excessive damages, followed by the offer of the plaintiff to reduce the verdict to a certain amount, the trial court, if of opinion that the plaintiff is entitled to recover, but that the judgment is excessive, may properly make such reduction of the verdict and enter judgment accordingly. Indeed, that such power and authority inhere in the trial court seems to be fully recognized by this court in the case of *Richardson*

v. Birmingham Cotton Co., 116 Ala. 381, 22 South. 478. See, also, *Western, etc., Co. v. Frith*, 105 Tenn. 167, 58 S. W. 118; 13 Cyc. 134. The testimony shows that the plaintiff was severely and permanently injured. The attending surgeon testified that her leg was mangled and crushed, and was hanging by shreds of muscle and skin, and that her condition was such as necessitated its amputation, that her injury was permanent, and that she suffered a great deal, and that she was confined in the infirmary about six weeks or two months, requiring a great deal of care and attention. The testimony further showed that, while plaintiff was 75 years old, her physical condition prior to the injury had been very good for a lady of her age; that she was active, able to walk down town and return, and to attend to her flowers; that since the injury plaintiff suffers almost constantly and is very weak; that she cannot go about otherwise than in a roller chair, being too weak to walk on crutches. We have given to this question that consideration which its great importance demands, and, considering the elements of damage in the case, and remembering that the authority invested in courts to disturb the verdict of a jury on the ground of excessive damages is one which should be exercised with great caution and discretion, are constrained, under the circumstances in proof, to hold that the ruling of the trial court declining to set aside the verdict after its reduction to \$10,000, should not be disturbed. 8 Am. & Eng. Ency. Law, 628; *New Orleans, etc., Co. v. Hurst*, 36 Miss. 660, 74 Am. Dec. 785; *Southern Railway Co. v. Crowder*, 130 Ala. 256, 30 South. 592; *A. G. S. R. R. Co. v. Bailey*, 112 Ala. 167, 20 South. 813; *Roth v. Union Depot Co.*, 13 Wash. 525, 43 Pac. 641, 44 Pac. 253, 31 L. R. A. 855.

All the Justices concur in the conclusion that the trial court committed no error in overruling the motion for a new trial, and in the affirmance of the judgment.

Affirmed.

The majority of the court, in overruling the *Johnson Case*, do not wish to be understood as declaring a rule with regard to the word "until" in any other connection, save as in that case and this one. We hold that in statutes fixing the terms of court until a certain day, which is the last day of the week or month, the practical interpretation which has universally been placed upon the expression in this state is that the last day named is included.

(158 Ala. 44)

GLENN v. STATE.

(Supreme Court of Alabama. Jan. 13, 1909.)

1. GAME (§ 4*)—REGULATION OF HUNTING—STATUTES.

General Game Law (Laws 1907, p. 94) § 44, makes it unlawful to hunt on lands of another

without a written permission from the owner or agent. Section 48 repeals all laws, general, special, or local, in conflict with the act. The local game law for Montgomery and Elmore counties (Laws 1888-89, p. 406) did not make it an offense to hunt upon the lands of another in Montgomery county without the written consent of the owner. *Held*, that the local law was repealed by the general game law.

[Ed. Note.—For other cases, see *Game*, Dec. Dig. § 4.*]

2. STATUTES (§ 248*)—CONSTRUCTION—TIME OF TAKING EFFECT.

There being no special provision in the general game law (Laws 1907, p. 81) as to when section 44 thereof, making it unlawful to hunt on lands of another without written permission of the owner or agent, should become effective, the section became effective 30 days after the adjournment of the Legislature which enacted it, under the express provisions of Code 1896, § 5540.

[Ed. Note.—For other cases, see *Statutes*, Dec. Dig. § 248.*]

3. INDICTMENT AND INFORMATION (§ 87*)—SUFFICIENCY OF ACCUSATION—TIME OF OFFENSE.

An indictment for hunting on lands of another without written consent of the owner or agent, in violation of General Game Law (Laws 1907, p. 94) § 44, presented within a year after the law took effect, and charging that the offense was committed within 12 months prior to presentment, was bad for failing to aver that accused hunted, etc., subsequent to the time the law became effective.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. § 254; Dec. Dig. § 87.*]

Appeal from City Court of Montgomery; W. H. Thomas, Judge.

Richard Glenn was convicted of hunting on the lands of another without written permission of the owner or agent, and he appeals. Reversed and remanded.

Hill, Hill & Whiting, for appellant. Alexander M. Garber, Atty. Gen., for the State.

ANDERSON, J. Section 48 of the general game law (Acts 1907, p. 95) repealed all laws, local, special, or general, in conflict therewith, and, as there is a conflict between it and the local law for Montgomery and Elmore counties (Acts 1888-89, p. 406), the former was repealed by the latter.

It was not an offense to hunt upon the lands of another in Montgomery county without the written consent of the owner prior to Acts 1907, p. 81. This law was enacted February 19, 1907, and there is no special provision making section 44 effective upon its approval or at any fixed time. It therefore became effective under the terms of section 5540 of the Code of 1896 (section 7805 as changed by Code of 1907) 30 days after the adjournment of the Legislature, and which was considerably less than 12 months before the indictment. The act does make some of its penal sections effective upon the approval thereof, but is silent as to when section 44 shall go into effect. Moreover, the act was passed less than 12 calendar months prior to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the indictment, even if it went into effect as to all of its provisions, upon the approval of same, but which we do not decide. The indictment in question was presented February 15, 1908, and, being a misdemeanor, in effect charged that the offense was committed within 12 months prior thereto, and which included time anterior to the time said law became effective, and was therefore bad for failing to aver that the defendant hunted, etc., subsequent to the time the law became effective. *McIntyre v. State*, 55 Ala. 167; *Dentler v. State*, 112 Ala. 75, 20 South. 592; *Bibb v. State*, 83 Ala. 84, 8 South. 711.

The trial court erred in not sustaining the defendant's demurrer to the indictment, and the judgment is reversed, and the cause is remanded.

Reversed and remanded.

HARALSON, SIMPSON, and DENSON, JJ., concur.

(158 Ala. 166)

ALABAMA CONST. CO. v. WATSON.

(Supreme Court of Alabama. May 29, 1908. Rehearing Denied Feb. 5, 1909.)

1. PLEADING (§ 248*)—AMENDMENT OF COMPLAINT—NEW CAUSE OF ACTION.

Where the original complaint was for an account for work done by plaintiff for defendant, amended counts claiming recovery for work done by plaintiff and another as partners and for an account stated between the parties, and averring the acquirement by plaintiff before suit of his partner's interest, were improper, as setting up new causes of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 701; Dec. Dig. § 248.*]

2. JUDGMENT (§ 623*)—OPERATION AS BAR.

A judgment on an account between plaintiff individually and defendant would not bar recovery on an account due a firm composed of plaintiff and another, though plaintiff has acquired the interest of his partner.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1096; Dec. Dig. § 623.*]

Appeal from Circuit Court, Calhoun County; John Pelham, Judge.

Assumpsit by W. L. Watson against the Alabama Construction Company. From a judgment for plaintiff, defendant appeals. Reversed.

The first complaint contained three counts: (1) For work and labor done by plaintiff for defendant at its request. (2) Account due between plaintiff and defendant. (3) Work and labor done by plaintiff for the defendant at its request in railroad grading at or near Haleyville. Counts 1 and 3 of the amended complaint claim for: (1) Work and labor done by plaintiff and T. P. Harrison, as partners under the firm name of Harrison & Watson, for the defendant at its request; and it is averred that Harrison sold and transferred to the plaintiff all of his interest and claim in and to said sum so due by defendant and all of his interest and

claim in and to the partnership effects of the said Harrison & Watson. (3) For an account stated between defendant and plaintiff and T. P. Harrison, as partners under the firm name of Harrison & Watson, with the allegation that plaintiff had acquired Harrison's interest before bringing the suit.

Blackwell & Agee, for appellant. Knox, Acker & Blackmon, for appellee.

ANDERSON, J. The only question presented by this record is whether or not the first and third counts offered as an amendment were such a departure from the original complaint as to constitute an entirely new cause of action. The original complaint was for an account between the plaintiff and the defendant and for work done by the plaintiff for the defendant. The amended counts 1 and 3 claim for work done by the plaintiff and one Harrison as partners and for an account stated between said parties. It is true the amended counts aver the acquirement of Harrison's interest before the commencement of the suit; but this fact cannot constitute the claim as being for the same cause of action, and this case falls squarely under the influence of *Ivey Coal Co. v. Long*, 139 Ala. 585, 38 South. 722. It is true in the case cited it was a change from an account due Walter Moore, the plaintiff's assignor, to one due immediately to the plaintiff, and in the case at bar the change is from a claim immediately due the plaintiff to one that was due Watson & Harrison. It is not a change by the mere addition of parties, as Harrison is not added, but a change from one cause of action to another—from a claim due immediately to the plaintiff to one that was earned by or contracted with the firm.

In the recent case of *Alabama, etc., Co. v. Heald*, 45 South. 686, this court, in applying a test as to amendments, in effect said that they were permissible if a recovery under either count would bar a recovery upon the other; non constat, if one would be no bar to the other, the amendment would be a departure. A judgment on the original complaint for labor performed by the plaintiff individually could not bar a recovery for labor done by a firm of which he was a member. Nor would a judgment on an account between the plaintiff individually and the defendant bar a recovery upon one due the firm of Watson & Harrison, notwithstanding the plaintiff has acquired the interest of Harrison. The original complaint is not for what belongs to the plaintiff growing out of dealings between the firm and the defendant, but for something resulting from dealings or transactions between the plaintiff individually and the defendant.

The trial court erred in the allowance of amended counts 1 and 3, over the objection

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of the defendant, and the judgment must be reversed, and the cause is remanded.

Reversed and remanded.

HARALSON, DOWDELL, SIMPSON, and McCLELLAN, JJ., concur.

(158 Ala. 318)

VAN INGEN v. DUFFIN et al.

(Supreme Court of Alabama. Jan. 14, 1909.
Rehearing Denied Feb. 5, 1909.)

1. LIMITATION OF ACTIONS (§ 180*).

Limitations may be set up in equity by demurrer where the bill shows that the cause of action sued on is prima facie within the bar of the statute or offensive to equity rules adopted to discourage stale demands.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 670-671; Dec. Dig. § 180.*]

2. LIMITATION OF ACTIONS (§ 180*)—FRAUDULENT CONVEYANCES, BILL TO SET ASIDE.

That a bill to set aside a fraudulent conveyance did not show that the grantee had held adverse possession was not essential to a prima facie showing by the bill that the suit was barred by limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 180.*]

3. LIMITATION OF ACTIONS (§ 19*)—SUIT TO AVOID FRAUDULENT CONVEYANCE.

A bill to avoid a fraudulent conveyance is a suit to recover land, and is governed by the statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 75; Dec. Dig. § 19.*]

4. LIMITATION OF ACTIONS (§ 44*)—SUIT TO AVOID FRAUDULENT CONVEYANCE.

A creditor's cause of action to avoid a fraudulent conveyance made after his debt matured accrued when the conveyance was made for the purpose, under Code 1907, §§ 4832, 4834, par. 2, of requiring suit for land to be brought within 10 years after accrual of the cause of action.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 44.*]

5. VENDOR AND PURCHASER (§ 231*)—NOTICE—NONRESIDENTS.

Notice effected by the registration statute operates alike on residents and nonresidents.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 231.*]

6. LIMITATION OF ACTIONS (§ 100*)—FRAUDULENT CONVEYANCES.

Under Code 1907, § 4852, providing that in an action for relief against fraud, where the statute has created a bar, the action must not be deemed to have accrued until discovery of the fraud, etc., in the absence of a fiduciary relation, imposing a moral and legal duty to disclose, there must be some act calculated to mislead or deceive or to lull inquiry before the exception to the statute of limitations can be invoked; and hence one suing to avoid a fraudulent conveyance after the lapse of the statute could not rely upon the mere fact that he did not discover the fraud until just before the suit.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 480-493; Dec. Dig. § 100.*]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Bill by Edward H. Van Ingen against P. J.

Duffin and others. From a decree for defendants, plaintiff appeals. Affirmed.

Tomlinson & McCullough and C. E. Elder, for appellant. Arthur L. Brown, for appellees.

SIMPSON, J. The bill in this case was filed by the appellant against the appellees, and seeks to set aside certain conveyances of lands executed to said defendant Elizabeth Duffin, respectively, dated September 25, 1891, April 8, 1896, March 1, 1898, August 25, 1898, and May 20, 1898, and to subject the property therein conveyed to a debt due the complainant January 12, 1889, and reduced to judgment on February 29, 1892, claiming that said lands so conveyed to said Elizabeth Duffin were paid for by her husband, said defendant P. J. Duffin. A demurrer was interposed to said bill, setting up the statute of limitations of 10 years, and the staleness of the demand; also additional demurrers, that the bill is without equity, and to the ninth section because it does not show any effort to discover the fraud, and mere ignorance will not excuse him; also, that no fraudulent concealment of facts is shown.

It is settled by the decisions of this state that the statute of limitations may be set up in equity by demurrer where the bill shows that the cause of action stated in the bill is prima facie within the bar of the statute of limitations or offensive to the rules which courts of equity adopt and for the discouragement of stale demands. *Lovelace v. Hutchinson*, 106 Ala. 418, 424, 17 South. 623.

Appellant insists that it is not apparent on the face of the bill in this case that the cause of action is prima facie within the bar of the statute, because the bill does not allege that the defendant Elizabeth Duffin is and has been for the time required in the adverse possession of the lands in question. It is not a question of adverse possession. A bill to set aside a fraudulent conveyance is a suit for the recovery of land and governed by the statute of limitations. *Washington, Adm'r, v. Norwood*, 128 Ala. 383, 30 South. 405. The statute provides that actions for the recovery of lands must be commenced within ten years "after the cause of action has accrued." Code 1907, §§ 4832, 4834, par. 2. The plaintiff's claim was due and payable before the execution of any of these conveyances, and consequently his "cause of action"—to move against said conveyances—accrued at the time the conveyances were made, the latest one of them being May 20, 1898, and the bill in this case was filed September 25, 1908.

The case of *Washington, Adm'r, v. Norwood*, supra, does not conflict with this conclusion. On the contrary, the point decided in that case is that, where a party was surety on a bond, his "cause of action" did not accrue until the breach of the bond, and, not-

withstanding the adverse possession of the land, the statute of limitations did not commence to run against him until by the breach of the bond his cause of action accrued. In other words, in both cases the decision is that the cause of action accrues at the time when the party could file his bill to set aside the fraudulent conveyance, and the statute of limitations commences to run then. The bill alleges that the complainant has continuously resided in the state of New York, and that he did not discover the fraudulent acts committed by respondents until August 1, 1908, although the conveyances sought to be set aside were duly recorded in the probate judge's office in Jefferson county, Ala. The notice effected by the registration statute is operative alike on residents and nonresidents; but he insists, further, that the decisions on the question of the statute of limitations not commencing to run apply to his case, so that the statute would not commence to run until the facts constituting the fraud were actually brought to his knowledge.

The Code provides that: "In actions seeking relief on the ground of fraud, where the statute has created a bar, the cause of action must not be considered as having accrued until the discovery by the aggrieved party of the facts constituting the fraud, after which he must have one year within which to prosecute his suit." Code 1907, § 4852. Our decisions are that "ignorance of right, there being no more than mere passiveness, mere silence, on the part of his adversary, cannot be ingrafted as an exception on the statute of limitations, without a destruction of its wise policy, and without an encouragement of mere negligence. * * * In the absence of a fiduciary relation between the parties, imposing the moral and legal duty to disclose, there must be some act or conduct calculated to mislead or deceive or to lull inquiry." *Tillison v. Ewing*, 91 Ala. 467, 468, 8 South. 404; *Underhill, Rec'r. v. Mobile Fire Department Ins. Co.*, 67 Ala. 45, 51; *Martin v. Br. Bank at Decatur*, 31 Ala. 115, 122.

The complainant has not brought himself within the terms of the exception.

The decree of the court is affirmed.

HARALSON, ANDERSON, and DENSON, JJ., concur.

(158 Ala. 71)

ELLIOTT v. HOWISON.

(Supreme Court of Alabama. Jan. 19, 1909.)

1. COSTS (§ 185*)—MILEAGE OF WITNESSES.

Though subpoenas for witnesses living more than 100 miles from the place of trial issue without affidavit that their attendance is necessary and that their depositions would not suffice, in contravention of Code 1907, § 4021, their mileage is taxable as costs.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 185.*]

2. COSTS (§ 216*)—RETAXATION—MOTION—PARTICULARS.

Under Code 1907, § 3684, providing that, if taxation of costs be excessive, motion for retaxation, setting forth the particulars in which the clerk erred, may be made, the motion having alleged that the allowance of mileage to certain witnesses was erroneous for a certain reason, relief from such allowance cannot be had on the ground that it was erroneous for other reasons, though not for the one alleged.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 823; Dec. Dig. § 216.*]

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

Action by Allen P. Howison against J. D. Elliott. From an order denying his motion to retax costs, plaintiff appeals. Affirmed.

Bestor, Bestor & Young, for appellant. Gregory L. & H. T. Smith, for appellee.

TYSON, C. J. This appeal is from an order denying a motion to retax the costs of certain witnesses. Section 3684 of the Code of 1907 provides: "If the taxation of costs be excessive by charging the costs of witnesses who were not examined, or by charging costs to an improper party, or taxing costs contrary to law, the party aggrieved may move the court for a retaxation, setting forth the particulars in which the clerk has erred." The motion, after setting out the names of the witnesses, the total amount of the certificate issued to each, showing the separate sum allowed for mileage, and that for attendance, alleges, as the sole ground of error of the clerk with respect to the allowance for the mileage, "that all said witnesses resided more than 100 miles from Mobile, Ala., computed by the route usually traveled, and that all the subpoenas to said witnesses were issued by the clerk of this court without the party summoning them (the plaintiff in this cause), his agent or attorney, making affidavit that the personal attendance of said witnesses, or any of them, was necessary to a proper decision of the cause, and that their depositions, or the deposition of any of them, would be insufficient for that purpose. Defendant therefore shows that the amount allowed to each of said witnesses for mileage, as aforesaid, and as such taxed as costs against said defendant, is contrary to law and in said particular the clerk of this court erred."

The motion was framed upon the theory—and upon no other, and presents no other question than—that the clerk, in issuing the subpoenas to the witnesses, violated section 4021 of the Code of 1907; and from this it is evident the conclusion was reached that the mileage was not taxable as costs. This identical question arose, and was decided adversely to the appellant, in the case of *Alabama Midland Railway Co. v. Rushing*, 103 Ala. 542, 15 South. 853. But it is insisted by appellant's counsel that the evidence intro-

duced upon the trial of the motion established that one of the witnesses was a nonresident of the state and no subpoenas were issued by the clerk to any of them, and therefore, that the case cited above should not control. Suffice it to say that these grounds of contention were not incorporated in the motion, and therefore were not the "particular" which was alleged in which the clerk erred. Having alleged one "particular" as ground of relief, relief cannot be granted upon other and different grounds. Had these grounds been made the bases of the motion, whether or not relief should be granted upon either of them is a question upon which we express no opinion, since it is a point clearly not presented by the record.

Affirmed.

DOWDELL, ANDERSON, and McCLELLAN, JJ., concur.

(158 Ala. 51)

MOBILE LIGHT & R. CO. v. MACKAY.

(Supreme Court of Alabama. Jan. 20, 1909.)

1. STREET RAILROADS (§ 112*)—ACTION FOR INJURY FROM CAR—PROOF OF OPERATION BY DEFENDANT.

Plaintiff, suing for the killing of his mule through the alleged negligent operation by defendant's agents and servants of one of its cars on its street railroad, has the burden of supporting the allegation that it operated the car.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 112.*]

2. STREET RAILROADS (§ 114*) — "RAILROAD" — "RAILWAY."

In the absence of evidence of another corporation of a similar name, the jury may infer that defendant, named in the caption of the complaint as "Mobile Light & Railroad Company, a corporation," was, as alleged, operating the street car in the city of M. that killed plaintiff's mule, from his testimony that he had a mule killed on a certain street in such city, that the railroad track runs on such street, that it was the track of the "Mobile Light & Railway," and that "they" operated cars down that street; the words "railroad" and "railway" being practically synonymous.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 240; Dec. Dig. § 114.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5899-5908; vol. 8, pp. 7777, 7778.]

3. EVIDENCE (§ 22*)—JUDICIAL NOTICE—EXISTENCE OF CORPORATIONS.

It cannot be judicially known whether or not there is another corporation of a name similar to defendant's.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 26; Dec. Dig. § 22.*]

Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge.

Action by Alexander Mackay against the Mobile Light & Railroad Company. After an adverse judgment, plaintiff's motion for new trial was granted, and defendant appeals. Affirmed.

Gregory L. & H. T. Smith, for appellant. Bestor, Bestor & Young, for appellee.

TYSON, C. J. The defendant is named in the caption of the complaint as "Mobile Light & Railroad Company, a corporation." The complaint is for the recovery of damages for the negligent killing of plaintiff's mule. In it is averred that "defendant, being then and there a corporation doing business as a street railroad company, and operating a street railroad in the city of Mobile, * * * did through its agents and servants so negligently and carelessly operate one of its electric street cars on its street railroad track in the city of Mobile aforesaid," etc. On the authority of *McGhee v. Cashin*, 130 Ala. 561, 568, 30 South. 367, it must be held that the burden was upon the plaintiff to offer some proof tending to support the allegation that defendant operated the car on its street railroad that killed plaintiff's mule. If the evidence afforded no reasonable inference of this fact, then the ruling of the court in excluding the testimony introduced in plaintiff's behalf and the giving of the affirmative instruction requested by defendant was correct, and the new trial should not have been ordered. On the other hand, if by any reasonable and fair construction of the testimony it could be found by the jury that the defendant was operating the car on its road that did the damnifying act complained of, the rulings of the court were erroneous, and the motion for the new trial was properly granted.

On this point the plaintiff as a witness testified: "That he had a mule killed * * * on Eslava street, * * * in the city of Mobile. The railroad track runs on that street. That it was the track of the Mobile Light & Railway. That they operated cars down that street." It will be observed that, had the witness employed the word "railroad," instead of "railway," it could hardly be contended that the jury would not be authorized to find that it was the defendant that was operating the car on its road at the point where the mule was killed. The two words "railroad" and "railway" have substantially the same meaning, and in common parlance are understood as meaning the same thing. A railway is certainly a railroad. Indeed, the words may be said to be synonymous. Suppose an amendment of the complaint had been allowed, striking out the word "railroad" and inserting in lieu thereof "railway"; could it be said that it would have wrought an entire change of the parties defendant? Would not the court have the right to infer that it was the same corporation? We think so. *Savannah, Americus & Montgomery Railway v. Buford*, 106 Ala. 303, 17 South. 395 and cases therein cited. If this be true, then certainly the jury would be authorized to infer, from the testimony quoted, that it was the defendant that was operating the car on its road.

And this, in our opinion, is certainly true,

in the absence of all testimony showing that there was another existing corporation of a similar name. If there be such a corporation, we cannot judicially know it. *Western Ry. of Ala. v. McCall*, 89 Ala. 375, 7 South. 650. In that case it was said: "When they [corporations] are parties to litigation, they should be designated by their corporate name; but a slight departure would be immaterial, provided they would be readily recognized by the name used." Speaking of the distinction between the names of natural persons and of corporations, Mr. Thompson in his Commentaries on the Law of Corporations (volume 1, § 285), uses this language: "It has been said: 'The name of a corporation * * * designates the corporation in the same manner that the name of an individual designates the person. There is this difference, however: That the alteration of a letter or transposition of a word usually makes an entirely different name of the person, while the name of a corporation frequently consists of several descriptive words, and the transposition of them, or any interpolation, or omission, or alteration of some of them, may make no essential difference in their sense.'"

Affirmed.

DOWDELL, ANDERSON, and McCLELLAN, JJ., concur.

(158 Ala. 191)

SUNFLOWER LUMBER CO. v. TURNER SUPPLY CO.

(Supreme Court of Alabama. Jan. 21, 1909.)

1. STATUTES (§ 181*)—CONSTRUCTION—LEGISLATIVE INTENTION.

In determining whether a contract is prohibited by a statute, the legislative intention must be ascertained and must control.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 259; Dec. Dig. § 181.*]

2. CONTRACTS (§ 106*)—LEGALITY—VIOLATION OF STATUTE.

When statutory conditions for the conduct of a business or profession are not complied with, agreements made in the course of the business are void if the conditions are made for the benefit of the public, but valid if no specific penalty is imposed and the condition is for administrative purposes, as for revenue.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 477; Dec. Dig. § 106.*]

3. LICENSES (§ 39*)—OCCUPATION LICENSE—RIGHTS OF UNLICENSED PERSONS—VALIDITY OF CONTRACTS.

Where a statute imposes a penalty for engaging in business without a license, a contract made by one not having a license is not invalid, unless the statute expressly prohibits such business without a license or vitiates all contracts made by an unlicensed person.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. § 77; Dec. Dig. § 39.*]

4. LICENSES (§ 39*)—VALIDITY OF CONTRACTS—VIOLATION OF STATUTE.

Code 1907, § 2361, subd. 26, being a part of the general revenue law, requires all domestic corporations to pay a privilege tax. Sec-

tion 2401 makes it unlawful for any corporation to carry on any business or do any act for which a license is required without first paying it, but does not make any specific act a violation of the law. Section 7712 imposes a fine for carrying on certain classes of business without a license. *Held*, that a contract made by a corporation without taking out a license was not invalid, so that a note executed to such corporation in the course of its business could be enforced by it; this conclusion being reinforced by section 5764, expressly making certain contracts made without a license, as for the sale of liquor, void.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. § 77; Dec. Dig. § 39.*]

5. PLEADING (§ 209*)—DEMURRER—SUFFICIENCY OF OBJECTIONS—GROUNDS OF DEMURRER.

Though a plea, in an action on a promissory note, alleging that plaintiff was a domestic corporation and had not taken out a license when the contract was made, was bad because it did not allege that the contract sued on was specially prohibited by law or was made unenforceable by the statute requiring a license, a demurrer thereto on the ground that the failure to pay the tax did not make the sale in which the note was given invalid did not sufficiently point out the defect, within Code 1907, § 5340, requiring objections to pleadings to be distinctly stated in the demurrer.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 520; Dec. Dig. § 209.*]

6. LICENSES (§ 39*)—CONTRACTS BY UNLICENSED PERSONS—ACTIONS—PLEADING—PLEA—SUFFICIENCY.

In an action on a contract made by a corporation, a plea that the corporation had not taken out a license as required by law was bad, in not alleging that the contract sued on was specially prohibited by law, or was made unenforceable by the statute requiring a license, or that the contract was in violation of a law other than one enacted for revenue.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. § 76; Dec. Dig. § 39.*]

7. PLEADING (§ 261*)—AMENDMENT—DEPARTURE.

In an action on a promissory note executed to plaintiff corporation, a plea alleging that plaintiff was a domestic corporation, and at the time the note was executed did not have a license to do business, could not be amended, so as to make it a good defense, without entirely departing from the defense alleged; contracts made by an unlicensed corporation not being invalid under the statute.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 794; Dec. Dig. § 261.*]

8. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—PREJUDICIAL EFFECT—OVERRULING DEMURRER.

Though a demurrer to a bad plea did not sufficiently point out the defect therein, error in sustaining it was not prejudicial, where the plea could not be amended without materially departing from the defense alleged.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4093; Dec. Dig. § 1040.*]

Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge.

Action by the Turner Supply Company against the Sunflower Lumber Company, a partnership. From a judgment for plaintiff, defendant appeals. Affirmed.

The action was on a promissory note made on the 23d day of November, 1907, and payable 60 days after date. The special plea

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

gled is as follows: "That the plaintiff during the years 1907-08 was and is a corporation organized under the general laws of the state of Alabama, and during none of said time has it had a license from the state of Alabama to do business in the state, and the contract sued on in said court is a contract made and to be performed entirely within the state of Alabama. During all of the time mentioned above the plaintiff has been doing business in this state. Said business is, and during all of said time has been, that of a sawmill and railway supply business, and the contract sued on was made in the course of such business." The demurrer interposed to the plea is as follows: "The plea shows that the plaintiff is a corporation organized under the laws of the state of Alabama, and shows that the alleged failure of the plaintiff to pay the license tax required by the laws of Alabama did not make void the sale to the defendant of the goods described in the plea as sold by the plaintiff to defendant during the time it is alleged plaintiff had not paid the license tax required by the laws of the state to be paid by it for doing business as a corporation for the period covered by the sale of some of said business." This demurrer was sustained.

R. H. & R. M. Smith, for appellant. Charles L. Bromberg, for appellee.

ANDERSON, J. In determining whether an agreement is prohibited by statute, the intention of the Legislature must be ascertained and must govern. "When conditions prescribed for the conduct of a business, trade, or profession are not complied with, agreements in the course of such business, trade, or profession are (1) void, if the condition is for the benefit of the public, as for the maintenance of public order or safety, or the protection of persons dealing with those upon whom it is imposed; (2) valid, if no specific penalty is attached to the specific transaction, and the condition is imposed simply for administrative purposes, such as the protection or convenient collection of the revenue." Clark on Contracts, 385. The rule as to the rights of unlicensed or unauthorized persons to recover on contracts, stated in 25 Cyc. p. 633, is as follows: "The rule is that, when a statute imposes a penalty for engaging in a given business or calling without a license, a contract made by one who has no license is not invalid, the penalty attaching to the person and not affecting the contract; but the rule is otherwise where the statute expressly prohibits such business or calling without a license, or expressly vitiates all contracts made by an unlicensed person while engaged therein." It was said by Baron Parke in the case of *Smith v. Mawhood*, 14 Mees. & W. 452 (English), in discussing the right to enforce a contract of sale made by one who had not taken out a license: "I think the object of the legislation was not to prohibit a contract of sale by dealers who

have not taken out a license pursuant to the act of Parliament. If it was, they certainly could not recover, although the prohibition were merely for revenue. But its object was not to vitiate the contract itself, but only to impose a penalty on the party offending, for the purposes of revenue." The Massachusetts court, in the case of *Larned v. Andrews*, 106 Mass. 435, 8 Am. Rep. 346, in considering a sale made by one who had no revenue license, where it was made a violation of the law to carry on business without same, said: "It is to be observed that the act does not expressly declare that sales by a wholesale dealer who neglects to pay the tax shall be illegal. The tax is not laid upon each sale, but upon the business or calling. The illegality does not attach to the sale, but consists in not paying the tax imposed upon the business." The court enforced the contract and quoted from the English case, *supra*. The New Jersey court, in the case of *Ruckman v. Bergholz*, 87 N. J. Law, 440, in discussing the right to enforce a contract of sale made by a party who had no license as required by law, which provided a penalty, said: "The question in such case is whether the statute was intended as a protection, or merely as a fiscal expedient; whether the Legislature intended to prohibit the act unless done by a qualified person, or merely that every person who did it should pay a license fee. If the latter, the act is not illegal." In the case of *Aiken v. Blaisdell*, 41 Vt. 655, the court upheld the contract, notwithstanding the seller had no license and that the law fixed a penalty for doing business without same, basing its conclusion upon the fact that the revenue law was not intended to make any kind of business illegal or to prohibit it. "The purpose was not to diminish, restrain, control, or regulate the business. The transaction of all kinds of business was just as legal after the passage of the law as before. The law is strictly a revenue law, the sole object being to get money into the treasury, and that is accomplished by requiring all persons that engage in certain kinds of business to contribute a certain amount towards paying the liabilities of the government. Its object is to raise money, and not to regulate the business of the country. If a man engage in the kind of business referred to, he is engaged in a legal business, whether he has a license or not. If he has no license, he has no legal right to do it, and subjects himself to the penalty. The law, we think, was intended to operate upon the person, and not upon the business. If the object of the law had been to prohibit certain kinds of business, or to regulate it, with a view to its effect upon public morals or public security by limiting it in its extent, or the place where it is to be carried on, or the person who shall conduct it, or otherwise, in all such cases the law operates upon the business as well as the person. Revenue mainly in such cases is not the object. It is

only incidental, or the means by which the law regulates and controls the business. The act in question imposes no restriction upon the business. All are at liberty to engage therein where, and when, and to any extent they choose, upon paying for the license."

Subdivision 26 of section 2361 of the Code of 1907, requiring a license of all domestic corporations, is a part of the general revenue law, and is intended solely to raise revenue, and not to restrain or regulate business. Section 7712 provides a penalty for doing business without a license. But neither section prohibits doing business, and it is merely penalized under certain conditions. Section 2401 does not make any specific act a violation of the law, but makes it so only in case it is done without a license. The business is lawful, but the failure to procure the license before doing the act is what the law intends to penalize. This section is intended merely to define the doing of business as mentioned in section 2361. This law being a mere fiscal expedient, and not intended as a regulation or protection for the benefit of the public, and there being no statute invalidating contracts made by unlicensed corporations, they should be enforced, unless there was a clear legislative intent to prohibit the thing itself, rather than to merely punish for engaging in business without the license. We are not willing to impugn the motives of the lawmakers by charging them with an intention to encourage bad faith on the part of debtors by permitting them to avoid honest obligations, because of the noncompliance with the revenue law by the party from whom they have obtained in good faith money, goods, or other things of value. Indeed, we are fortified in these views by legislative action, which of itself indicates that the lawmakers did not intend to strike down all contracts made with parties who had no license. For instance, we find that the Legislature has enacted separate statutes striking down contracts made by certain dealers who had no license and who are enumerated in the general revenue law. See section 5764 of the Code of 1907. If, therefore, it had been the legislative intent that all contracts made by all dealers required to have a license, and who had none, should be void, it was unnecessary to have enacted subsequent statutes invalidating contracts made by certain ones who had no license, or prohibiting a recovery upon same.

The foregoing views are not in conflict with former decisions of this court, as they related to contracts specially prohibited by law, or the enforcement of which was specifically prohibited, or the making of which

violated a law, not enacted for revenue purposes only, but for regulation and protection. We shall not attempt to differentiate them all in detail, but will discuss some of the leading cases, and especially those cited in brief of counsel for appellant. In the case of *Western Union Co. v. Young*, 138 Ala. 243, 36 South. 374, the act of Congress made the specific thing for which the defendant was sued for not doing a violation of the law. The statute considered in the *Youngblood Case*, 95 Ala. 523, 12 South. 579, 20 L. R. A. 58, 36 Am. St. Rep. 245, was one for regulation or protection, and made the very act done a violation of law. The *Moog Case*, 93 Ala. 503, 9 South. 596, involved a sale of liquor without a license, and the statute expressly prohibited a recovery for such sales. Code 1907, § 5764, being section 1323 of the Code of 1886, the one in force when said decision was rendered. The contract in the case of *Woods & Co. v. Armstrong*, 54 Ala. 150, 25 Am. Rep. 671, was made by selling fertilizers in violation of a statute "to protect the planters of the state from imposition in the sale of fertilizers," and was therefore one for protection instead of one for revenue only. The case of *Fox v. Dixon*, 58 Hun, 605, 12 N. Y. Supp. 267, was a suit by an unlicensed physician to recover for medical services. The court denied a recovery upon the express grounds that a statute had been violated, which had been "enacted in the interest of the health of the public, to prohibit incompetent persons from practicing as physicians."

The special plea was bad, in that it did not aver that the contract sued upon was specially prohibited by law, or was made nonenforceable by the statute, or that entering into same amounted to the violation of any law other than one enacted solely for revenue. The demurrer, however, did not point out the defect or comply with the requirements of Code 1907, § 5340, and the trial court erred in sustaining same. *Turner Coal Co. v. Glover*, 101 Ala. 290, 13 South. 478; *Broslin v. K. C. M. & B. R. R. Co.*, 114 Ala. 398, 21 South. 475. It plainly appears, however, that this plea could not be amended so as to make it a good plea without departing entirely from the defense therein attempted, and the technical error of the court in sustaining a demurrer on general or inapt grounds was without legal injury to the defendant. *Ryall v. Allen*, 143 Ala. 222, 38 South. 851.

The judgment of the law and equity court is affirmed.

Affirmed.

TYSON, C. J., and SIMPSON and DENSON, JJ., concur.

(94 Miss. 389)

SCHERCK v. MOYSE. (No. 13,393.)

(Supreme Court of Mississippi. March 1, 1909.)

1. FRAUDS, STATUTE OF (§ 110*)—OPTION TO BUY LAND—SUFFICIENCY.

A memorandum reciting that in consideration of \$50 the signer gave plaintiff a 15-day option on 22,000 acres of timber land in Franklin and Jefferson counties, Miss., at \$12.50 per acre, is insufficient under the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 225-236; Dec. Dig. § 110.*]

2. FRAUDS, STATUTE OF (§ 158*)—PAROL EVIDENCE—ADMISSIBILITY TO AFFECT WRITING.

Parol evidence is inadmissible to supplement deficiencies in a memorandum reciting that in consideration of \$50 the signer gave plaintiff a 15-day option on 22,000 acres of timber land in Franklin and Jefferson counties, Miss., at \$12.50 per acre.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 375; Dec. Dig. § 158.*]

3. VENDOR AND PURCHASER (§ 342*)—OPTION—DAMAGES—RECOVERY.

Where one gives an option on land not owned by him, and fails to fulfill his contract, loss of profits on a resale are recoverable only in a common-law action for fraud and deceit.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 1018; Dec. Dig. § 342.*]

Appeal from Circuit Court, Pike County; M. H. Wilkinson, Judge.

Action by R. T. Scherck against J. L. Moyse. From a judgment for defendant, plaintiff appeals. Affirmed.

P. Z. Jones and J. W. Cassidy, for appellant. W. A. Parsons, for appellee.

FLETCHER, J. This is an action to charge the appellee upon the following writing:

"In consideration of \$50.00 I hereby give R. T. Scherck a 15-day option on 22,000 acres of timber land in Franklin and Jefferson counties, Mississippi, at \$12.50 per acre.

"9/23/07. [Signed] J. L. Moyse.

"Attest: S. D. Wilkinson.

"We will furnish a man to show parties the property.

"[Signed] J. L. Moyse.

"Attest: S. D. Wilkinson."

The declaration contains three counts, and states substantially that this option was given by appellee, and that it was understood verbally between the parties that certain named tracts of land were referred to, one lying in Franklin and the other in Jefferson counties; that appellant paid \$50 for the option, and expended considerable sums in having the lands examined and the timber estimated; that he had secured a purchaser, who would buy the lands at an advance over the purchase price of \$1.50 an acre; that appellee did not own the lands at the time the option contract was signed, and had either failed or refused to secure the same; that there was a failure to deliver the lands, although

the purchase money had been tendered; and that by losing the opportunity to make a resale appellant had been damaged to the extent of \$33,000; this being at the rate of \$1.50 per acre on 22,000 acres. To this declaration a demurrer was interposed, and sustained, on the ground that the option memorandum is void under the statute of frauds, since there is no sort of description of the property.

It is obvious that the memorandum does not satisfy the statute, and equally obvious that parol testimony cannot be resorted to in order to supplement the deficiencies in the written memorandum. Indeed, appellant practically concedes that specific performance of the contract could not be enforced; but it is claimed that it may form the basis of a suit for damages. We may dispose of this contention by saying that the only damages sought to be here recovered are the profits on a resale, and that these are not recoverable, except in a common-law action for fraud and deceit. The declaration in this case was manifestly not drawn on this theory, since there is utterly lacking every averment essential to such an action. The rules both of pleading and evidence governing this class of actions have lately been reviewed by this court in the case of *Vincent v. Corbitt*, 47 South. 641, and need not be here repeated. The suit is clearly not such an action.

Affirmed.

(94 Miss. 387)

FAIRFIELD v. LOUISVILLE & N. R. CO. (No. 13,793.)

(Supreme Court of Mississippi. Feb. 22, 1909.)

1. TRIAL (§ 250*)—INSTRUCTIONS—APPLICABILITY TO PLEADINGS AND PROOF.

In an action against a carrier for refusing to admit a passenger to a train, it was error to instruct that she could not recover without showing that the coupon book presented for passage contained coupons which had not been detached, where neither pleadings nor proof raised that issue; defendant having pleaded that admission was denied because the train was already filled.

[Ed. Note.—For other cases, see *Trial*, Dec. Dig. § 250.*]

2. CARRIERS (§ 255*)—PASSENGERS—DETACHED TICKETS—"VOID IF DETACHED."

A condition, "Void if detached," etc., in railway coupon tickets, must be reasonably construed to avoid injustice to either party, and the holder cannot be denied passage merely because the ticket had been inadvertently detached, if both book and ticket are presented, and it can be seen by inspection that they correspond.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1029; Dec. Dig. § 255.*]

3. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—INSTRUCTIONS.

Error in instructing on the measure of damages is not ground for reversal, where the jury finds that no liability existed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4228; Dec. Dig. § 1068.*]

Appeal from Circuit Court, Harrison County; W. H. Hardy, Judge.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Action by Mrs. George W. Fairfield against the Louisville & Nashville Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

This is a suit by Mrs. Fairfield against the defendant railroad company for damages alleged to have been caused by the action of the gateman of said company at New Orleans, who refused plaintiff and her husband admission through the gates to the train which they desired to take for their home in Pass Christian, Miss. Plaintiff had spent the day in New Orleans under medical treatment, and because of the delay she had to take a later train, which was very much crowded, and she was forced to stand up all the way home, and was thereafter made sick through fatigue and nervousness. The case was submitted to a jury under instructions of the court, and a verdict returned for the defendant. On appeal the giving of instructions Nos. 15 and 16, which informed the jury that she could not recover unless, at the time her ticket was presented to the gateman, it was shown not to have been detached from the book. They further assign as error the granting of instructions Nos. 9 and 11, given for defendant, as follows:

"No. 9. The court charges the jury that there is no evidence in this case which would justify the jury in finding that the plaintiff's sickness, after the night of February 12th, was due to the matter complained of in this case.

"No. 11. The court charges the jury that if the gatekeeper explained to the plaintiff that she could not pass through the gate, and she nevertheless insisted upon doing so, and remained at the gate, and continued to present her ticket a number of times, and repeated her demand for entrance several times after the gatekeeper explained to her that he could not let her through, and if she continued nevertheless to stand in the way of other passengers, to interrupt the business of the defendant, by crowding the gate, then the gatekeeper had the right to call an officer to compel her to leave the gate, and she would not be entitled to any damages for injuries suffered by reason of his doing so."

Rucks Yerger and Barrett & Taylor, for appellant. Gregory L. Smith and Harry T. Smith, for appellee.

FLETCHER, J. The testimony of plaintiff and her husband, if believed by the jury, tended to show such treatment by the servants of the railroad company as would warrant recovery. To meet this proof, the company offered nothing of an affirmative or positive character. None of the witnesses for the railroad remembered anything of the circumstances of the occurrence. In this state of the proof, the verdict of the jury is little short of remarkable. But the cause of this verdict can be understood when the instructions asked and secured by the railroad com-

pany are attentively examined. Mr. Fairfield testified that he bought at Pass Christian a coupon book containing ten tickets to New Orleans, good on any train operated over defendant's line. He and his wife used two of the tickets in going to New Orleans, and when ready to return presented the book, with only two tickets missing, to the gatekeeper, and were refused admission. This book containing the tickets was examined by the ticket agent at New Orleans and pronounced good for the train upon which plaintiff sought to take passage. The tickets contained the usual stipulation that they were void if detached from the book; but there is no hint in the pleadings that the company would rely as a defense upon the point that the tickets were so detached. Indeed, the defendant company pleaded that the seats were all sold and occupied at the time plaintiff applied for admission at the gate, and therefore admission was properly refused. There was no suggestion in the proof that the tickets were not fastened to the book when presented, and no complaint by either the gatekeeper or the agent on this ground; and yet in this state of the record the jury was charged in instructions Nos. 15 and 16 that the plaintiff could not recover unless she had shown by the evidence that the book contained coupons which had not been detached, and, again, that she could not recover unless she showed that at the time she demanded entrance she presented to the gatekeeper the book which at the time contained coupons which had not been detached from the fastening by which they were held in the book at the time that it was sold to her husband.

These instructions, even if abstractly and in a proper case correct, have no place in the case made by this record. Their only effect was, after the case had closed, to inject a false issue before the jury, not suggested by the pleadings or the proof. Indeed, these instructions are equivalent to a peremptory charge, since the plaintiff, misled by the pleadings, had offered no proof upon an issue which nobody suspected would be important. Then, too, the instructions are not correct, considered as an abstract proposition of law. It is not true that the holder of such a ticket is to be denied passage merely because the ticket has inadvertently been detached, if both book and ticket are presented, and it can be seen by inspection that they correspond. The condition, "Void if detached," etc., must be sensibly and reasonably construed, to the end that no injustice may be done to either party to the contract. What we consider the only just and tenable view on this question is thus expressed by the Wisconsin court: "The words, 'Not good for passage if detached,' would seem to have been so placed upon the ticket to prevent imposition by the separation of the parts and the use of each as a single-trip ticket; but where such parts of the tickets become separated by such inadvertence, and are then in good faith both

presented together and at the same time to the same conductor on the going trip, the purpose of such words would seem to be as fully attained as though the two parts of the ticket had not been previously separated. In other words, the presentation to the conductor of the two parts of the ticket, under the circumstances found, is the same, in legal effect, as though such parts had not been detached when so presented. It is to be remembered that the ticket was the mere evidence of the contract of carriage, and that such evidence consisted of two parts designed for separation. To imply such forfeiture of the contract from such mere inadvertent separation, under the circumstances found, when no word, letter, or figure on either part of the ticket was thereby obliterated, and when no perceptible injury to the defendant could result therefrom, would be to destroy a statutory right upon the merest technicality, and in the absence of a clearly expressed stipulation to that effect. Even a strict literalism is not to be so rigidly enforced as to defeat the manifest purpose of a contract under a statute. Whether a different rule should prevail where the passenger willfully, and against the protest of the conductor, separates the coupons or parts of a ticket, as in some of the cases cited, need not be here considered." *Wightman v. Chicago & Northwestern R. Co.*, 73 Wis. 169, 40 N. W. 689, 2 L. R. A. 185, 9 Am. St. Rep. 778.

We desire to say that in our judgment instructions Nos. 0 and 11 ought not to have been given; but, since they relate alone to the measure of damages, we would not reverse on this account, since the jury has found that no liability at all existed. They should not, however, be given on another trial.

Reversed and remanded.

(35 Misa. 123)

TROUTMAN v. LOUISVILLE & N. R. CO.
(No. 13,758.)

(Supreme Court of Mississippi. Feb. 8, 1909.)

CARRIERS (§ 320*)—CAUSE OF DEATH OF PASSENGER—QUESTION FOR JURY.

Evidence held to present a question for the jury as to whether the running of the cars was the cause of the death of a passenger, last seen before his death on the platform of the train preparatory to disembarking at his destination.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1217; Dec. Dig. § 320.*]

Appeal from Circuit Court, Harrison County; W. H. Hardy, Judge.

Suit by Anna Virginia Troutman against the Louisville & Nashville Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed.

This was a suit for damages by the appellant for the death of her husband, Herman Troutman, who met his death at the station of Long Beach on the line of appellee's rail-

way. The proof shows that Herman Troutman was a passenger on a train which arrived at Long Beach at night. The declaration alleges, and the proof shows, that there were no lights on the platform of the station, except such as came from within, or from the car windows; that the floor of the platform was rough and irregular; that, when Troutman was last seen before his death, he was standing on the platform of the train preparatory to disembarking; that immediately after the train started from the station, and before it had run a car length, Troutman was seen lying dead by the side of the track, with severe bruises on his head and face, and blood was found on the cross-ties. There were no eyewitnesses to the accident. The defendant denied that the running of its cars was the cause of the death of Troutman, and the court gave a peremptory instruction to find for defendant. Plaintiff, on appeal, contends that under the facts she was entitled to the benefit of the statutory presumption that the death of her husband was caused by the running of the cars, and that therefore the case should have gone to a jury.

J. J. Curtis and J. H. Mize, for appellant.
Gregory L. Smith and Harry T. Smith, for appellee.

WHITFIELD, C. J. There was sufficient evidence in this case, manifestly, as to the question of fact whether the deceased was killed by the running of the cars, to require the submission of that fact to the jury. The peremptory instruction was manifestly erroneous.

Reversed and remanded.

CARTER v. CATCHINGS. (No. 13,702.)

(Supreme Court of Mississippi. Feb. 8, 1909.)

1. EVIDENCE (§ 354*)—BOOKS OF ACCOUNT—PENCIL ENTRY IN LEDGER.

On an issue as to an indebtedness to a decedent, a page taken from his ledger, on which appeared a pencil entry of a payment by the alleged debtor and a certain balance due, is incompetent.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1476; Dec. Dig. § 354.*]

2. APPEAL AND ERROR (§ 1009*)—REVIEW—SUFFICIENCY OF EVIDENCE TO SUSTAIN FINDING.

If, excluding incompetent evidence from consideration, there yet remains sufficient evidence to support a chancellor's finding, it will not be disturbed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

Appeal from Chancery Court, Simpson County; J. L. McCaskill, Chancellor.

Suit by W. W. Catchings, administrator of P. M. Catchings, deceased, against J. C. Carter. From a decree for complainant, defendant appeals. Affirmed.

W. W. Catchings, administrator of the estate of P. M. Catchings, deceased, filed a bill in chancery against J. C. Carter, in which he alleged that Carter had purchased a certain tract of land from complainant's intestate for the sum of \$1,600, \$1,000 of which had been paid in cash, and thereafter the additional sum of \$100 had been paid, and prayed the benefit of a vendor's lien, and that an account be stated showing the balance due complainant. The defendant denies any indebtedness, stating that the entire consideration was the sum of \$1,000, which was paid in cash. The deed recites a consideration of \$2,500 cash paid. Complainant explains this consideration by stating that, the defendant desiring to borrow the entire amount to make the cash payment, the deed was drawn so as to show no balance due, in order that the lender might be induced to make the loan of the amount needed. On the trial the plaintiff introduced testimony tending to show an admission by the defendant of this indebtedness, and also introduced, over defendant's objection, a page taken from intestate's ledger, on which page there appeared an entry in pencil showing the payment of \$1.100 by Carter and a balance due of \$500 and interest. The chancellor entered a decree for \$382, after making deductions because the title to a portion of the property had failed, and from this decree the defendant appeals.

Harris & Willing, for appellant. J. S. Sexton, for appellee.

FLETCHER, J. We agree with counsel for appellant that the ledger entry introduced on the trial of this case was incompetent; but, excluding this from consideration, there yet remained sufficient evidence of the existence of the debt to support the chancellor's finding. At least we cannot say that the decree is so clearly unwarranted as to justify a departure from the rule.

Affirmed.

(95 Miss. 244)

YAZOO LUMBER CO. v. CLARK et al.
(No. 13,586.)

(Supreme Court of Mississippi. Feb. 15, 1909.
Suggestion of Error Overruled
March 1, 1909.)

1. HOMESTEAD (§ 118*)—TRANSFER—JOINDER OF WIFE.

A deed of a homestead, executed by the husband alone, is void.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 203; Dec. Dig. § 118.*]

2. ESTOPPEL (§ 54*)—EQUITABLE ESTOPPEL—KNOWLEDGE OF FACTS.

A party is not estopped by statements as to his interest in property, made in ignorance of his rights.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 129; Dec. Dig. § 54.*]

Appeal from Chancery Court, Yazoo County; G. G. Lyell, Chancellor.

"To be officially reported."

Bill by the Yazoo Lumber Company against Mrs. A. B. Clark and others. From a decree in favor of all defendants except Mrs. A. B. Clark, the complainant appeals, and the defendant Mrs. A. B. Clark files cross-appeal. Affirmed on complainant's appeal, and reversed on the cross-appeal, and decree entered for her.

The facts are in substance as follows: H. H. Breeland owned property which he occupied as a homestead, and while so occupying it conveyed same with general warranty to his son, J. W. Breeland; his wife not joining in the conveyance. Thereafter J. W. Breeland and wife conveyed to Mrs. M. M. Breeland, the wife of H. H. Breeland, the property previously conveyed to them. At the same time Mrs. M. M. Breeland executed a deed in favor of J. W. Breeland and wife to certain other property in another county; her husband, H. H. Breeland, joining with her in the deed. After the death of H. H. Breeland, Mrs. M. M. Breeland, his wife, conveyed with general warranty the property in controversy to her daughter, Mrs. Shackouls, and thereafter Mrs. Shackouls conveyed same to the Yazoo Lumber Company. Thereafter Mrs. A. B. Clark and certain other heirs at law of H. H. Breeland, who had since died, brought suit in ejectment against the Yazoo Lumber Company on the ground that the property had never passed from their ancestor, H. H. Breeland, since the deed from him to J. W. Breeland had not been signed by his wife. It was claimed by the defendant that the deed from H. H. Breeland to J. W. Breeland was executed in trust, and that thereafter J. W. Breeland conveyed the property back to Mrs. M. M. Breeland in compliance with the understanding between the parties, though there are no recitations in any of the deeds to this effect, and no proof showing a prior agreement that it was to be held in trust. The chancellor decreed in favor of all of the defendants except Mrs. A. B. Clark, holding that she was estopped to recover any interest in the land because of the fact that she had signed an affidavit at the time the deed to appellant had been executed, which affidavit recited that she was the same person as Mrs. Alice J. Clark who had signed other conveyances. She testified that, at the time she signed such affidavit, nothing was said to her about her interest in the property in controversy, and that she did not know anything about the conveyance of her father, H. H. Breeland, to J. W. Breeland.

Barnett & Perrin, for appellant. Henry, Barbour & Henry, for appellee.

WHITFIELD, C. J. The very ingenious and able legal argument made by learned

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

counsel for appellant on direct appeal cannot prevail on the testimony in this record, under the decisions of this court touching the invalidity of a deed to a homestead by the husband, not joined in by the wife. The deed executed to the homestead by the husband, H. H. Breeland, was a nullity, the wife not having joined therein. On the direct appeal the case is affirmed.

On the cross-appeal, reluctant as we are to disturb the finding of the unusually painstaking and accomplished chancellor who decided this cause, we are yet constrained to do so, since a repeated examination of the testimony satisfies us that Mrs. A. B. Clark was not estopped to maintain her suit. The doctrine of equitable estoppel, as explained in our decisions, is not brought into successful play against her on testimony disclosed in the record. The decree on the cross-appeal, therefore, is reversed, and a decree will be entered here for the cross-appellant, Mrs. Clark.

(94 Miss. 916)

LOWENBERG et al. v. LEWIS-HERMAN CO. (No. 13,341.)†

(Supreme Court of Mississippi. March 1, 1909.)

1. CHATTEL MORTGAGES (§ 138*)—AGRICULTURAL LIENS—ADVANCES.

Under Civ. Code La. art. 3217, the seller of supplies for a plantation has a lien on crops raised thereon superior to any mortgage not given for plantation supplies, though such lien is not recorded, and the holder may claim the proceeds of cotton delivered in Mississippi to a mortgagee under such a mortgage.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 231, 232; Dec. Dig. § 138.*]

2. PARTNERSHIP (§ 141*)—PARTNER AS AGENT.

Where a member of a partnership which conducted a plantation was placed in charge as manager, his contract for supplies to be used in making a crop bound the partnership, especially since his purchases for the preceding year were ratified.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 214; Dec. Dig. § 141.*]

Appeal from Chancery Court, Adams County; J. S. Hicks, Chancellor.

Action by the Lewis-Herman Company against S. H. Lowenberg and others. From a decree for complainant, defendants appeal. Reversed, and bill dismissed.

Ratcliff & Truly, for appellants. A. M. Pepper, for appellee.

FLETCHER, J. On the 16th day of January, 1904, Geo. W. Farr and J. M. Clower, owners of a certain plantation situated in Catahoula parish, La., known as "Hedgeland," were indebted to the Lewis-Herman Company, a corporation domiciled at Lexington, Miss., in the sum of \$23,000. To secure the payment of this debt Farr and Clower on January 18, 1904, executed a deed of trust to the Lewis-Herman Company conveying certain property in Holmes county, Miss., as

well as the crops to be grown on such property. This trust deed was so drawn as to cover all the future advances that might be made during the year. At the same time, or practically contemporaneous therewith, Farr and Clower executed a Louisiana mortgage on the Hedgeland plantation and all crops to be grown thereon, which was declared to be an additional security to the Holmes county trust deed. There was nothing in this mortgage to show that the money declared to be due was any part of it to be expended in furnishing supplies to the Hedgeland plantation for the year 1904. This mortgage was duly recorded in Catahoula parish. Clower was placed in charge of Hedgeland plantation as manager, and during the year 1904 bought supplies for the plantation from S. H. Lowenberg & Co., merchants doing business in Natchez, Miss., to the amount of some \$3,700. At the close of the crop season of 1904 Clower delivered to Lowenberg & Co. sufficient cotton grown on Hedgeland to pay this debt. Whereupon the Lewis-Herman Company, claiming that this cotton was covered by their mortgage, filed this bill against Lowenberg & Co. to recover the value of the cotton. From a decree in favor of complainant, Lowenberg & Co. appeal. The voluminous record in this case abounds in immaterial matters much discussed in the pleading, the proofs, and the briefs; but the above statement is thought to contain all that is really important in this controversy.

It would seem to be well settled that under the laws of Louisiana Lowenberg & Co. have a lien on the cotton raised on the Hedgeland plantation which is superior to any mortgage lien not given for plantation supplies. This lien is called in the law of Louisiana a "privilege," and exists in favor of the supply merchant, though not recorded. Civ. Code La. art. 3217; *Weill & Co. v. Kent et al.*, 52 La. Ann. 2139, 28 South. 295. There can be, therefore, no room for doubt that the claim of Lowenberg & Co. under their lien is superior to the claim of the Lewis-Herman Company under their mortgage. It seems to be conceded in the brief of appellants that this view is correct, provided the crops had remained in Louisiana, and provided Clower had power to bind the partnership; it being shown that Farr had not acquiesced in the purchase of the supplies from appellant. That Clower's contracts for supplies to be used in making a crop on the plantation of which he was in sole charge as manager are binding on the partnership seems to us too clear for dispute, especially in view of the fact that Clower's purchases for the previous year had been recognized and settled. We fully recognize the distinction between the so-called "planting partnerships" and mercantile or commercial partnerships; but the transaction in question falls within the rule laid down by Judge Story and cited with approval in *Prince*

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

†Suggestion error overruled Dec. 13, 1909.

v. Crawford et al., 50 Miss. 344; that is to say, the authority of Clower, both in his capacity as partner and as agent for Farr, is "implied by the usages of the business or the ordinary exigencies and objects thereof."

But it is said that Lowenberg's lien stopped at the Mississippi river; that it had no extraterritorial force, and is of no avail after the property was removed to Mississippi. And to support this view, reliance is placed in *Chism v. Thomson*, 73 Miss. 415, 19 South. 210; *Hernandez v. Aaron*, 73 Miss. 436, 16 South. 910, and *Millsaps v. Tate*, 75 Miss. 153, 21 South. 663. If it be true that Lowenberg's lien stopped at the state line, it may be interesting to inquire why it is not equally true that appellee's lien stopped at the same place. Both may be considered as having liens; appellants a "privilege" under the laws of Louisiana, and appellee a "conventional mortgage" under the laws of that state—appellants' lien being superior. In this attitude of affairs Clower, the manager in charge and a member of the firm, delivers the cotton to the superior lien holder, who actually receives and applies the cotton to the secured debt. Appellee can derive no consolation from the cases cited. In *Hernandez v. Aaron* the mortgage creditor was defeated in favor of the supply merchant because the mortgage lien stopped at the state line, and the cotton factor in New Orleans actually received the cotton from the debtor; and precisely to the same effect is *Chism v. Thomson*. In *Millsaps v. Tate* the superior lien of the landlord was subordinated to the lien of a mortgage creditor when the cotton was shipped out of the state and actually delivered to such creditor. This case should be examined from the viewpoint of a person residing in Louisiana and shipping cotton into Mississippi, since Clower was located in Louisiana, temporarily at least, and dealing with crops grown in that state and subject to its laws. Lowenberg had the better lien, secured the cotton, which never became subject to appellee's mortgage lien, and must prevail. Of course, no importance can be given to the bill of sale executed by Farr and Clower long after the cotton was delivered to appellants.

The case is reversed, and the bill dismissed. So ordered.

(95 Miss. 180)

GRAHAM v. BRYANT. (No. 13,727.)

(Supreme Court of Mississippi. Feb. 15, 1909.
Suggestion of Error Overruled
Feb. 27, 1909.)

REFORMATION OF INSTRUMENTS (§ 2*)—RIGHT OF ACTION—PERSONS ENTITLED TO REFORMATION.

The grantee in a deed, which conveyed less land than was intended because of an error in the description, gave a deed of trust on the land as described in his deed under the belief that the description was correct, and the purchaser at the trustee's sale under the deed of trust,

whose bid was predicated on the same belief, conveyed to the grantor in the original deed. *Held*, that the grantee, not having been damaged by the error, was not entitled to a reformation of the deed.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Dec. Dig. § 2*]

Appeal from Chancery Court, Covington County; T. A. Wood, Chancellor.

Bill by J. J. Bryant against L. A. Graham. From a decree for plaintiff, defendant appeals. Reversed, and bill dismissed.

Appellant sold to appellee the land in controversy, and in his deed described it as all lying in section 20, when as a matter of fact part of it was in section 29 and part of it in section 21, though both appellant and appellee believed the recitations of the deed to be correct at the time. Appellee afterwards gave a deed of trust on the land as described in his deed, and, default having been made in the payment of the indebtedness secured by said deed of trust, the trustee, after due advertisement according to law, sold said property to one Lott, and afterwards appellant became the purchaser. It was afterwards discovered that this land was not all situated in section 20, and appellee filed a bill in chancery to reform the first deed given by Graham to him.

Corley & Sharbrough, for appellant. McIntosh Bros., for appellee.

MAYES, J. The facts of this case show conclusively that the deed made by Graham to Bryant did not contain in its description all the land intended to be conveyed. Only about 50 acres of the 100 intended to be conveyed by the deed lay in section 20; the other 50 acres being in sections 21 and 29. The deed recited that the whole 100 acres lay in section 20. Graham thought he had conveyed the land in sections 21 and 29, as well as that in section 20; and Bryant thought the deed embraced all the land lying in sections 20, 21, and 29. None of the parties seemed to know that sections 21 and 29 contained any of the land in question, but believed it all lay in section 20. Shortly after the deed was made in which this error occurs, Bryant gave a deed in trust on the land as described in the deed under the impression that it contained all the land. The beneficiary in the trust deed took same under the belief that all the land was in this deed in trust. Subsequently, and because the debt for which the deed in trust was given was not paid, all of the land in section 20, and in 21 and 29, was sold, or believed to have been sold, by the trustee, for the payment of this debt, and the purchaser bought, believing that he was getting the land in section 20, and also the land subsequently found to be in sections 21 and 29, and his bid was predicated on this idea. While it is true that this property was not in the deed, it is also true that Bryant has

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

received all the benefit which could have accrued to him if the property had, in fact, been included in the deed. Every person subsequently dealing with this property dealt with it in the belief that all the property in sections 20, 21, and 29 was in the deed, and paid for it accordingly. Bryant has not been damaged in any way by the failure to put this property in the original deed. While it may be true that the amount bid at the trustee's sale was not as much as the property ought to have been worth, yet it appears from the facts that Bryant himself caused this result by trying to keep away bidders in his own interest. Under the facts in this case it presents no equity which would warrant the court in making the decree reforming and correcting the deed, and vesting title of the land lying in sections 21 and 29 in J. J. Bryant.

Reversed, and bill dismissed.

(96 Miss. 100)

BRANDAU et ux. v. GREER et al.
(No. 13,555.)

(Supreme Court of Mississippi. Feb. 22, 1909.)

1. GUARDIAN AND WARD (§ 69*)—PROPERTY OF WARDS—ACQUIREMENT OF TITLE BY GUARDIAN AND WIFE.

The wife of a guardian could not lawfully acquire title to property of his wards which the law forbids him to acquire.

[Ed. Note.—For other cases, see Guardian and Ward, Dec. Dig. § 69.*]

2. GUARDIAN AND WARD (§ 62*)—DUTY TO PROTECT WARD—PROFIT ON ESTATE.

It is a guardian's duty to protect his ward's estate in every way he can, and he can make no profit on it outside of what is lawfully allowed for conducting his trust.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 288; Dec. Dig. § 62.*]

3. GUARDIAN AND WARD (§ 62*)—NATURE OF TRUST—NEGLECT OF WARD'S INTEREST.

A trustee can be allowed under the law to have no inducement to neglect the interest of his ward, and a guardianship is a trust of the highest and most sacred character.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 288; Dec. Dig. § 62.*]

4. GUARDIAN AND WARD (§ 62*)—ACQUIREMENT OF WARDS' PROPERTY.

A guardian assumes to act for parties whom the law declares without discretion to act for themselves, and, if he acquires their property under circumstances raising a strong suspicion of unfairness, the transaction cannot be allowed to stand when assailed by his wards.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 288; Dec. Dig. § 62.*]

5. GUARDIAN AND WARD (§ 70*)—ACQUIREMENT OF INFANT WARDS' PROPERTY—RATIFICATION AFTER FULL AGE—REQUISITES.

Where a guardian unfairly obtains property of his infant wards, if ratification is claimed after full age, it must clearly appear to be with full knowledge of all the facts and the law relating thereto; and even then, if they assail it, it will not be allowed to stand, except on clear proof that it took place when they were free from his influence.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 308-312; Dec. Dig. § 70.*]

6. GUARDIAN AND WARD (§ 69*)—PROPERTY OF WARDS—ACQUIREMENT OF TITLE BY GUARDIAN AND WIFE.

Wards were inmates of their guardian's household, and the guardian's wife was their aunt, and before they reached majority he obtained title by private contract with them to a part of land belonging to them, and his wife at his instance obtained title to the remainder from a purchaser whom she and her husband procured to buy at a sale under a mortgage executed by the wards' parents before their death. The wards were unlettered, and largely under the influence of their guardian, who cast them out at an early age to support themselves without any estate; the guardian and his wife having acquired the legal title to all that was left to them. Soon after reaching their majority the wards sued for cancellation of the title thus acquired. *Held*, that the guardian and his wife in such case must be treated as the same person, and held to hold title in trust for complainants.

[Ed. Note.—For other cases, see Guardian and Ward, Dec. Dig. § 69.*]

7. GUARDIAN AND WARD (§ 70*)—PROPERTY OF WARDS—ACQUIREMENT OF TITLE BY GUARDIAN—RATIFICATION.

The facts of the case do not show a ratification on the wards' part.

[Ed. Note.—For other cases, see Guardian and Ward, Dec. Dig. § 70.*]

8. GUARDIAN AND WARD (§ 61*)—PROPERTY OF WARD—ACQUIREMENT BY GUARDIAN—ESTOPPEL.

The facts do not warrant a holding that the wards were estopped to claim their property.

[Ed. Note.—For other cases, see Guardian and Ward, Dec. Dig. § 61.*]

Appeal from Chancery Court, Bolivar County; Percy Bell, Chancellor.

Suit by Fannie L. Greer and others against S. W. Brandau and wife. From a decree in favor of complainants, defendants appeal. Affirmed.

Appellees filed a bill in chancery against appellants, S. W. Brandau and his wife, alleging that said S. W. Brandau had been appointed their guardian and took charge of their estate while they were small children, and that certain valuable property which had been left by their father incumbered by a deed of trust had been permitted by their said guardian to be sold under foreclosure proceedings, and that said property was afterwards bought in at said sale and transferred without consideration to Mrs. Brandau, and that appellees never realized anything out of a valuable estate left them by their father. The bill prayed the cancellation of the deed to Mrs. Brandau and for a decree for all the income from said property, less expenses, and for possession, etc. From a decree granting the relief prayed, and appointing a special commissioner to ascertain the amount due complainants, the defendants appeal.

Jones & Hardee, for appellants. Nearing & Townsend and Roy Church, for appellees.

MAYES, J. Under the facts of this case Brandau and his wife must be treated as the same person. If it was unlawful for

Brandau to acquire from his wards the title to their property, it could never be held that one holding so close a relation to him as that of wife, and with such identity of interest as usually exists between parties sustaining this relation to each other, could lawfully acquire a title which the husband was forbidden to acquire.

There may be many disputed facts in this record, but the fact which controls this whole case admits of no dispute. The fact is that S. W. Brandau was the guardian of complainants and took charge of their estate while they were little more than infants. He took them to his home in Lexington, Mo., and for a time and until they went out to earn their own living they became inmates of his household. Mrs. Brandau was their aunt, and before they had reached their majority Brandau, by private contract with them, had succeeded in obtaining the title to one part of the land for himself, and his wife had obtained the title to the remainder from the purchaser whom she and her husband had procured to buy at a sale under a mortgage which had been executed by the father and mother of complainants before their death. In brief, Brandau was appointed guardian of these complainants about the year 1895, and before the year 1903 his wards have no estate, and Brandau and wife have a legal title to the entire estate which was left to them. Under the facts of this case it does not become a question as to whether or not Brandau has acted honestly or dishonestly in the matter of acquiring this title. We do not consider this case from that standpoint. But the question is, can such a transaction as this be allowed to stand, in any event, in a court of equity?

Under all settled rules of law it must be held that whatever title was acquired by either S. W. Brandau, or his wife, under any of the sales or dealings with this property, either by themselves or at the instance of any other party, is held as trustees for the benefit of complainants. No transaction of this sort can or ought to be allowed to stand. It contravenes every rule of law applying to a person in a fiduciary character. It is the duty of the guardian to protect the estate of his ward in every way he can, and he can make no profit on such estate outside of what is provided by law to be allowed him for conducting the guardianship. *Brockett v. Richardson*, 61 Miss. 766; *Wise v. Hyatt*, 68 Miss. 714, 10 South. 37.

We but declare as the law what the courts have time and again announced. A trustee can be allowed under the law to have no inducement to neglect the interest of his ward. A guardianship is a trust of the highest and most sacred character. The guardian assumes to act for the parties, whom the law declares without discretion to act for themselves. If such a trustee acquired their prop-

erty under such circumstances as to raise a strong suspicion of unfairness, the transaction cannot be allowed to stand when assailed by his wards. If ratification is claimed after full age, it must appear by the most undoubted proof that the wards have, with full knowledge of all the facts and the law appertaining thereto, ratified and approved the transaction from which their guardian obtains his vantage. And even then, if the transaction is assailed by the wards, it will not be allowed to stand, except upon the clear proof that the act of ratification took place at a time when they were free from the influence of the confidential relation. In short, the wards must have been fully informed and free of former influence.

In this case there was no ratification. It is impossible that there could have been, under the facts shown here. These complainants were unlettered. They had been cast out at an early age to support themselves. They were under the influence of Brandau to a very large extent. They had not reached the age of majority at the time these conveyances were made. They were but little past 21 years of age at the date this bill was filed asking for a cancellation of the Brandaus' title. The proof falls far short of showing ratification on their part, or any fact which would warrant this court in holding that they were estopped to claim their property.

The decree of the chancellor is eminently correct, and through its instrumentality justice will be done.

Affirmed and remanded.

(94 Miss. 557)

YAZOO & M. V. R. CO. v. FARR et al.
(No. 13,575.)

(Supreme Court of Mississippi. March 1, 1909.)

1. MASTER AND SERVANT (§ 264*)—DEATH OF SERVANT — RAILROADS — NEGLIGENCE — VARIANCE.

The declaration for the wrongful death of a railroad engineer in a head-on collision alleged that the accident was caused by the failure of a telegraph operator to deliver to the conductor and engineer of one of the trains telegraphic orders which had been received to hold the train at H. until the train on which decedent was working could reach there and pass. On the trial it was shown that the conductor of the colliding train went into the telegraph office at H. for orders, and the operator, instead of handing him the orders and having them read aloud, as provided by the rules, laid the dispatches on a table in front of the conductor, and when he left the office discovered that the order requiring him to meet decedent's train had been left on the table. *Held*, that the fact that the evidence showed the conductor was negligent in not taking the train order did not constitute a fatal variance.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 264.*]

2. MASTER AND SERVANT (§ 247*)—RAILROADS —DEATH OF ENGINEER—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE.

Decedent, a railroad engineer, had been directed to meet a train coming in the opposite

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

direction at H., but through the negligence of the operator at H. the opposite train was permitted to pass that station, resulting in a collision on a curve as decedent's train was rounding a hill. Decedent at the time of the collision was at his post on the right side of the locomotive, which was on the outside of the curve, and the fireman was engaged in coaling the engine. *Held*, that the engineer's failure to leave his position and watch from the fireman's side of the engine, if negligence, did not contribute proximately to the injury, and would not, therefore, prevent a recovery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 798; Dec. Dig. § 247.*]

3. DEATH (§ 99*)—DAMAGES—AMOUNT—EXCESSIVENESS.

In an action for the death of a railroad engineer in a collision, a verdict awarding his widow and children \$22,500 damages was not excessive.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 129; Dec. Dig. § 99.*]

Appeal from Circuit Court, Wilkinson County; M. H. Wilkinson, Judge.

Action by Leona Farr and others against the Yazoo & Mississippi Valley Railroad Company to recover for the alleged wrongful death of John Farr, an engineer on defendant's railroad. From a judgment awarding plaintiffs \$22,500, defendant appeals. *Affirmed*.

The facts are in substance as follows: The train on which John Farr was engineer and Lewis Lessley Cobb was fireman, was known as "Extra No. 362." This engine was proceeding southward out of Vicksburg under orders. When it reached the station of Melton on said road, there was a head-on collision with the north-bound train, No. 78. The collision occurred where there was a curve in the track which bent around the point of a slight hill. The curve was toward the left, and the engineer, being seated on the right side of the cab, failed to see the approaching train until within a short distance. At the time of the collision the fireman was engaged in coaling his engine, and did not see the approaching engine in time to prevent the accident. Both Farr and Cobb jumped from the train. Farr was killed under the wreckage, and Cobb severely injured. The declaration alleges that the cause of the accident was the failure on the part of the telegraph operator at Harriston to deliver to the conductor and engineer of north-bound train No. 78 telegraphic orders which had been received to hold said train at Harriston until extra No. 362 could reach Harriston, where they would meet. It developed on the trial that the conductor on train No. 78 went into the telegraph office at Harriston for orders, and the operator, instead of handing him the orders and having same read aloud, laid three dispatches on a table in front of the conductor, and when the conductor left he failed to take one of the dispatches, which was the order requiring him to meet No. 362 there. After the accident the operator aban-

doned his post. On appeal the railroad company assigns as error the variance between the allegations of the declaration and the proof, since it appears that there was negligence on the part of the conductor in not taking his orders from the table. Another assignment of error is that Farr was guilty of contributory negligence in not keeping a proper lookout from his cab at the point of collision.

Mayes & Longstreet, for appellant. J. McC. Martin, for appellees.

FLETCHER, J. Appellant assigns two reasons why this case should be reversed. It is said that there is a variance, because the declaration counts upon the negligence of the telegraph operator at Harriston, whereas the proof discloses that the accident was attributable to the negligence of the conductor on the north-bound train. We cannot yield to this contention. The point is highly technical, and should not operate to reverse the judgment, unless the variance is clearly shown. Here we have no doubt that the operator was gravely delinquent in the discharge of duty. There is no pretense that he delivered the train orders in the way prescribed by the rules of the company. Especially was he derelict in failing to see that the conductor, in his presence, read his orders aloud; this being a most important regulation, designed to preclude all possibility of mistake. The conduct of the operator in abandoning his post after the wreck without waiting for any investigation is an admission that he was at fault. If it be conceded that the conductor was in some degree negligent, still it remains true beyond question that the accident would not have happened, had the operator performed his full duty. We think, the proof, in any practical view of the matter, conformed to the averments of the declaration.

In the second place, it is insisted that the case should have gone to the jury on the question of contributory negligence. It is shown without contradiction that the engineer at the time of the collision was at his usual post of duty, keeping a lookout, but that his view was obstructed by the contour of the hill, around which the track curved. It is shown that the fireman, whose position on the left of the locomotive placed him on the inside of the curve, was engaged in his primary duty of coaling his engine. The argument is that the engineer should have left his own position and kept watch from the left side. But, had he done so, it is shown that he could not have stopped his train in time to prevent the accident. He might have jumped from the engine sooner than he did, but the result would probably have been the same. As a matter of fact he seems to have jumped, but with disastrous results. If we concede that he was negligent,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that negligence certainly did not contribute proximately to the injury, which was caused alone by the carelessness of the company's servants other than the unfortunate engineer.

There is no complaint as to the amount of the verdict, nor, indeed, could there be.

Affirmed.

(94 Miss. 561)

YAZOO & M. V. R. CO. v. COBB.
(No. 13,642.)

(Supreme Court of Mississippi. March 1, 1909.)

1. MASTER AND SERVANT (§ 139*)—INJURY TO SERVANT — MINORS — AGE — MISREPRESENTATION.

Where a railroad's rule forbidding the employment of minors was not complied with, and it appeared that it was a common practice for the railroad company to employ minors, the rule could not be invoked to prevent a recovery for injuries to a minor employé, while in the course of his employment, to which his minority in no way contributed.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 289; Dec. Dig. § 139.*]

2. DAMAGES (§ 131*)—PERSONAL INJURIES—EXCESSIVENESS.

Where plaintiff, a minor, was injured while in the defendant's employ as a locomotive fireman, and the injury, though serious, was not such as to cause permanent disability, a verdict allowing plaintiff \$25,000 was excessive to the extent of at least \$12,500.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 357; Dec. Dig. § 131.*]

Appeal from Circuit Court, Wilkinson County; M. H. Wilkinson, Judge.

Action by Lewis Lessley Cobb, by his next friend, against the Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Mayes & Longstreet, for appellant. J. McC. Martin, for appellee.

FLETCHER, J. This case is a companion to that of *Yazoo & M. V. R. Co. v. Farr* (this day decided) 48 South. 520. This appellee was fireman on the locomotive of which Farr was engineer. Certain questions common to both cases are briefly discussed in the opinion in that case. There is, however, one question peculiar to this case which merits some attention. The appellee is a minor, and, of course, was not of age when he applied for and obtained employment with the railroad company. It appears from the proof that at the time of his making application for employment he made affidavit that he was 21 years of age. It is, therefore, ingeniously and forcibly argued that the youth would not have been employed but for this misrepresentation as to age; that as a consequence of this fact the fireman never became entitled to the protection which the law throws around an employé; but that he was a mere trespasser, to whom the company owed no duty, except not to do

him a willful injury. This view does not seem to have been presented to the court below, and the testimony adduced on this point was manifestly directed to the view that by proving these misrepresentations the credibility of the plaintiff was thereby affected.

Assuming, however, that the appellant is entitled to present the question to this court, we are bound to say that this theory finds some support in the Virginia case of *Norfolk & W. Ry. Co. v. Bondurant*, 107 Va. 515, 59 S. E. 1091, 15 L. R. A. (N. S.) 443, 122 Am. St. Rep. 867. That case does hold, following an alleged analogy to the familiar passenger cases, that an employé who obtains employment by a misrepresentation as to his age is nothing more than a trespasser. As we shall presently point out, we are not called upon to announce positively our accord with, or dissent from, the authority of this case. Suffice it to say that, while it appears to be fairly well established that a passenger who secures transportation at a reduced rate upon a misrepresentation as to a material condition of the contract is entitled to no higher duty from the company than is owing to a trespasser, yet an employé, in our view, falls within quite a distinct category. A passenger, by his fraud, secures an advantage to himself without any corresponding or compensating benefit to the transportation company. The company creates a special and favored class for reasons of its own, and extends the privilege of reduced rates only to individuals of that class. The dishonest passenger who fraudulently secures admission to this class is securing from the company a concession or benefit to which he is clearly not entitled. He is, properly speaking, never a passenger at all, since he has never paid the price necessary to entitle him to the rights of a passenger. But an employé stands in a different attitude. He is a laborer for the company. He is paid for his service at exactly what the service is worth, and in this regard it can make no difference to the company that the employé is a minor and has misrepresented his age. It is not pretended, at least in this case, that the plaintiff was not a competent and skilled employé, or that his minority in any way contributed to the accident. These considerations and others that will readily suggest themselves move us to say that, were we driven to decide the precise question, we would follow the Virginia case, if at all, with great reluctance.

But there is another view which we think sufficient. We have stated that the point under consideration was not distinctly made in the court below. This may account for the fact that there was a total failure on the part of the appellant to prove the existence of any rule of the company prohibiting the employment of minors. True, such a

rule may be inferred from the fact that young Cobb stated that he misrepresented his age for the reason that he would otherwise be denied employment. But it is true that the existence, scope, and terms of the rule are not shown. Further, and of more consequence, it is the undenied testimony of the plaintiff that it is the common practice of the company to employ minors, and that no attention was paid to the rule, if such a one existed. In this state of the record it is clear that the rule was not seriously regarded by the company, and may therefore be held to have been waived. Upon this view, we think a recovery must be upheld.

We think, however, the verdict is grossly excessive. The young man, it is true, is no doubt seriously injured. But we think the injury is not such as will cause permanent disability. We believe that \$25,000 is entirely too much. After the most repeated and painstaking examination of the record, we are driven to the conclusion that one-half of that amount will amply compensate the plaintiff for his injuries.

If the plaintiff will remit \$12,500, the judgment will be affirmed; otherwise, the case is reversed and remanded.

(36 Miss. 174)

FLOWERS-CARRUTH CO. v. J. L. MOYSE & BROS. (No. 13,427.)

(Supreme Court of Mississippi. Feb. 8, 1909.)

LANDLORD AND TENANT (§ 200*)—RENT—PAYMENTS.

Defendant contracted to convey land on payment of annual installments; the first note being for \$100. The purchaser agreed to pay \$150 rent for any year in which he should fail to pay a note as it matured. When the first note was due he paid \$180, but he refused to pay the second note. *Held*, that the \$80 overpaid should be applied on the second year's rent, leaving \$70 due.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 200.*]

Appeal from Circuit Court, Pike County; M. H. Wilkinson, Judge.

"To be officially reported."

Action by J. L. Moyse & Bros. against the Flowers-Carruth Company. From a judgment for plaintiff, defendant appeals. Affirmed, on condition of remittitur; otherwise, reversed.

On January 16, 1906, J. L. Moyse & Bros. executed an instrument, which they called a warranty deed, and which provided that "in consideration of \$100 cash in hand paid, we agree to sell and convey by warranty deed to Oliver Connerly the following lands," etc., "for the sum of \$800." It then provided the manner of payment; the first deferred payment being for \$100, due October 1, 1906, and the next payment for \$175, due October 1, 1907, etc. It further provided: "And if said Oliver Connerly shall fail to make any of the said payments on or before the date they be-

come due, then this contract is to become null and void. For the possession and use of the land for any year in which he shall fail to pay a note as it matures, said Oliver Connerly agrees to pay \$150 as rent for that year, provided that, if the notes are paid each year as they mature, no rent shall be charged or collected; it being further understood and agreed that in case of default," etc., "all payments made prior thereto shall be taken for rent * * * and possession of the land returned." At the time of the execution of this instrument Connerly paid \$100. On October 4, 1906, he paid appellees \$180, and in 1907, having become indebted to the Flowers-Carruth Company, he delivered to them six bales of cotton on account and on the 1st of October, 1907, appellees made demand of him for the payment of the \$175 note, and, payment being refused, they brought suit against Flowers-Carruth Company for \$150, the amount which they claimed as rent for the year 1907, asserting their landlord's lien as a prior claim upon the proceeds of the cotton. There was a judgment below for \$150, and this appeal is prosecuted.

Appellant contends that, having paid \$100 in cash and \$180 on October 1, 1906, making a total of \$280, there was only due a balance of \$20 which he tendered; his contention being that rent should be charged for both years at the rate of \$150, or \$300 in all; that, at most, having paid \$180 when the note for \$100 became due, the \$80 should be credited on the rent, leaving a balance due of \$70 only, even if no credit be given on the rent for the \$100 consideration which was paid in cash at the time of the execution of the instrument.

Geo. Butler, for appellant. Cassedy & Cassedy, for appellee.

WHITFIELD, O. J. The plaintiff was manifestly entitled to recover, but just as manifestly he was entitled to recover only the \$70. If the plaintiff will remit down to that sum, the judgment will be affirmed; otherwise, it will be reversed, and the cause remanded.

(34 Miss. 735)

LONG v. MAYES' ESTATE. (No. 13,734.)

(Supreme Court of Mississippi. Feb. 22, 1909.)

1. WILLS (§ 733*)—CONSTRUCTION.

A will, after charging the estate with a sum sufficient to support testator's wife and children during their lives and the life of the survivor of them, provided that after the wife's death, and when the number of those so to be provided for should be reduced to two or less, and the condition of the estate and the objects to be secured would justify it, the property should be divided, not trenching on the support of those to be provided for, and distributed among testator's surviving children or their descendants, and on the death of the survivor of those for whose support and maintenance the will provided a further division should be made. *Held*, that where, after only two of those entitled to

support survived, the income of the estate was scarcely sufficient to pay the charges on the property and the sum allotted for their support, the preliminary division of the estate could not at that time be made.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 733.*]

2. WILLS (§ 564*)—CONSTRUCTION—"HOME."

A provision in a will that beneficiaries should be provided with a home while they lived included everything necessary to maintain the home, such as paying of taxes and keeping it in proper and comfortable repair, but did not include living expenses involved in the purchasing of supplies.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1230; Dec. Dig. § 564.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3322-3325.]

3. WILLS (§ 730*)—ALLOWANCE TO BENEFICIARIES—ORDER OF COURT.

Whether a sum allowed by the court for support of the beneficiaries can be increased or diminished, or ought to be, and when a division of the property can be made under the will, being matters for future consideration, an order fixing the allowance for the beneficiaries' support is properly made subject to future modification.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 730.*]

Appeal from Chancery Court, Copiah County; G. G. Lyell, Chancellor.

"To be officially reported."

Petition by Robert B. Mayes against John B. Mayes, executor, and others, for construction of the will of Herman B. Mayes. From the decree, there were appeals and cross-appeals. Affirmed and remanded.

Robt. B. Ricketts, for appellant. Harris & Willing, for appellee.

WHITFIELD, C. J. The petition in this case is as follows:

"This, the petition of Robert B. Mayes, this day exhibited against John B. Mayes, executor of the last will and testament of Herman B. Mayes, deceased, John B. Mayes personally, Jos. D. Mayes, Wm. W. Mayes, Alice Mayes, Mrs. Cynthia A. Ware, Mrs. Mary Jane Decell, Mary E. Cook, Nora Belle Cook, and Carrie Cook, would respectfully state and show to the court as follows:

"(1) That the said defendants John B. Mayes, Jos. D. Mayes, Wm. W. Mayes, Alice Mayes, Mrs. Mary Jane Decell, Mary E. Cook, Nora Belle Cook, and Carrie Cook are all resident citizens of the county of Copiah, state of Mississippi, and that defendant Mrs. Cynthia A. Ware is a resident citizen of the county of Hinds, state of Mississippi. That defendants Nora Belle Cook and Carrie Cook are minors, that their parents are dead, and that they have no legal guardian.

"(2) That your petitioner and defendants, except Mary Cook, Nora Belle Cook, and Carrie Cook, are children of the late Herman B. Mayes, who departed this life in the county of Copiah, state of Mississippi, on the _____ day of _____, 18—, and that the defendants Mary Cook, Nora Belle Cook, and

Carrie Cook are the grandchildren of the said Herman B. Mayes, deceased, they being the children and sole surviving heirs of Mrs. Emma Cook, a daughter of the said Herman B. Mayes, deceased; the said Emma Cook having departed this life, intestate on the _____ day of _____, 189—. That your petitioner and said defendants are all the surviving heirs at law of the said Herman B. Mayes, deceased.

"(3) That the said Herman B. Mayes, deceased, left a last will and testament, which was duly admitted to probate on the 10th day of January, 1891, and the said John B. Mayes, the executor and trustee named in said last will and testament, qualified as such executor and trustee and entered upon the discharge of his duties as said executor and trustee of the estate of the said Herman B. Mayes, deceased. That said will is on file among the papers in the above-styled cause, but for more ready reference your petitioner files herewith a copy of said will, marked as 'Exhibit B' to this petition.

"(4) That said Herman B. Mayes, during his lifetime, indorsed a note in favor of the First National Bank of the city of Jackson, Miss., as surety for the said John B. Mayes, for a large sum of money, which sum was afterwards reduced by payment by the said John B. Mayes until there was due a balance of about \$1,525. That the First National Bank brought suit at law on said note against the said John B. Mayes, personally and as executor of the estate of the said Herman B. Mayes, deceased, and a judgment was rendered against them in the sum of \$———. That afterwards, to wit, some time during the year 1896, a petition was filed in the chancery court of Copiah county by the said First National Bank against the said John B. Mayes, executor of the estate of Herman B. Mayes, deceased, and against all the heirs at law of the said Herman B. Mayes, deceased, praying for a sale of the lands belonging to the estate of the said Herman B. Mayes, deceased, for the payment of said judgment held by said First National Bank. That by consent of all the parties to said petition a decree was rendered on the 10th day of August, 1896, by the chancellor in vacation, ordering that the following described lands be sold to pay said debt, to wit: All of section 34 except W. ¼ of N. W. ¼ and W. ½ of W. ¼, section 35, township 10, range 7 E., and N. ½ of N. W. ¼, section 2, and N. ½ of N. ¼ and S. W. ¼ of N. W. ¼, section 3, township 9, range 7 E., containing 1,000 acres, more or less; also lots twelve (12) and thirteen (13), in square 33, in the town of Hazlehurst, Miss.; also lots nine (9), ten (10), and eleven (11), in square 33, in the town of Hazlehurst, Miss., excepting, however, the lot owned by J. S. Sexton in said square 33—Geo. B. Nelson having been duly appointed commissioner to make said sale. That said

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

lands were sold by the said Geo. B. Nelson, commissioner, and on the 11th day of December, 1896, by decree of the chancery court of the county of Copiah aforesaid, all the parties to the petition aforesaid consented thereto, the sale of said lands was confirmed, and the said commissioner was ordered to execute a deed conveying the same to Mrs. Charity Mayes, who was the wife of the said Herman B. Mayes, deceased, and the mother and grandmother of your petitioner and the defendants herein, and in obedience to the decree of said court the said Geo. B. Nelson, commissioner, in consideration of the sum of \$1,525, executed and delivered a deed conveying said lands to the said Mrs. Charity Mayes, which said deed was duly recorded in Book WW, page 188, of the Records of Deeds of said county of Copiah.

"(5) That on the 4th day of June, 1896, the said Mary J. Decell, then Mayes, the said John B. Mayes, Mrs. Cynthia A. Ware, Mrs. Emma Cook, Jos. D. Mayes, Wm. W. Mayes, and your petitioner, Robert B. Mayes, executed a deed wherein they conveyed to the said Mrs. Charity Mayes the lands aforesaid for the expressed consideration of \$100, which deed was duly recorded in Book VV, page 417, of the Records of Deeds of the county of Copiah.

"(6) That the said Mrs. Charity Mayes, in order to settle the amount of her bid and pay the amount owing by the estate to the said First National Bank, to wit, the sum of \$1,525, negotiated a loan with the British-American Mortgage Company, Limited, in the sum of \$3,000, and to secure said loan a deed of trust was executed by her and the said John B. Mayes, in which said deed of trust the lands aforesaid were conveyed to Francis B. Hoffman, trustee for the British-American Mortgage Company, Limited; said deed of trust being of date _____ day of _____, 189____, and recorded in Book _____, page _____, of the Records of Deeds of said county of Copiah. That from the proceeds of said loan the amount aforesaid, owing by the estate of the said Herman B. Mayes, deceased, to the First National Bank, was paid, and the balance of said loan was paid over to and used by the said John B. Mayes individually.

"(7) Your petitioner further states that on the 30th day of November, 1904, there was then due and owing on account of the indebtedness in favor of the British-American Mortgage Company, Limited, aforesaid, the sum of \$2,500, and in order to pay said indebtedness the said Mrs. Charity Mayes and John B. Mayes negotiated a loan with the Merchants' & Planters' Bank, of the town of Hazlehurst, Miss., and to secure said loan executed a deed of trust to F. W. Ellis, trustee for said bank, on said date, wherein was conveyed to said F. W. Ellis, trustee for said Merchants' & Planters' Bank, the lands aforesaid, which deed of trust was duly recorded in Book 71, page 245, of the Records

of Deeds of said county of Copiah; and your petitioner states that there is now due and owing to the said Merchants' & Planters' Bank on account of said deed of trust the sum of \$2,500, with interest thereon from November 30, 1906, up to the present time, which is a valid and subsisting lien on said lands, inasmuch as the said Merchants' & Planters' Bank was a bona fide incumbrancer for value; and your petitioner says that the lien of the said Merchants' & Planters' Bank is in no wise intended to be attacked by him in this petition.

"(8) Your petitioner further states that on the 15th day of February, 1905, the said Mrs. Charity Mayes executed a deed in which she conveyed to your petitioner the lands aforesaid, which said deed was duly recorded in Deed Book 8G, page 108, of the Records of Deeds of said county of Copiah, a certified copy of which said deed is filed herewith, marked 'Exhibit C,' and prayed to be taken as a part of this petition.

"(9) That the said Mrs. Charity Mayes departed this life on the 19th day of December, 1906, intestate, leaving surviving her as her heirs at law your petitioner and the defendants herein.

"(10) Your petitioner says that it was never the purpose or intention of the said Mrs. Charity Mayes, in obtaining the legal title to said lands, to subvert the will of her husband, the said Herman B. Mayes, but that she held the title to said lands at all times in trust for the benefit of the estate of the said Herman B. Mayes, deceased, and during her lifetime the said John B. Mayes, as executor of the estate of the said Herman B. Mayes, deceased, continued to exercise exclusive management and control over said lands, just as he did over the other property, real and personal, belonging to said estate. That the purpose of the said Mrs. Charity Mayes in obtaining the legal title was in order to raise money to pay the debt owing by the estate to the First National Bank as aforesaid.

"(11) That, while the legal title to said lands was conveyed by the said Mrs. Charity Mayes to your petitioner, it was conveyed by her with the distinct understanding that the said lands should be held in trust by the said Robert B. Mayes for the estate of the said Herman B. Mayes, deceased, and that upon the liquidation of all debts due by said Mrs. Charity Mayes to the Merchants' & Planters' Bank, secured by the deed of trust aforesaid, the said lands were to be reconveyed by the said Robert B. Mayes to said estate, it being the intention of the said Mrs. Charity Mayes in her lifetime, at all times, and of your petitioner, to have the status quo restored, and the will of the late Herman B. Mayes, deceased, carried out as written; and ever since the death of the said Herman B. Mayes, notwithstanding the fact the legal title passed out of the estate, said estate has been administered, managed, and controlled by the

said John B. Mayes under the terms of the said will, and is now being so managed and controlled by the said John B. Mayes as executor and trustee under said will.

"(12) That on the — day of September, 1906, the said Mary J. Mayes, named as one of the devisees in item second of said will, intermarried with one John S. Decell, and according to the provisions of item second of said will, upon her marriage, her right to a comfortable support and maintenance out of said estate ceased.

"(13) That by reason of the death of the said Mrs. Charity Mayes and the marriage of the said Mary J. Mayes the devisees entitled to take under item second of said will have been reduced to two, to wit, defendants Alice Mayes and Wm. W. Mayes.

"(14) That under and by virtue of the power conferred upon said John B. Mayes, executor, in item sixth of said will, the said John B. Mayes, after taking possession of said estate, sold small, scattered tracts of land belonging to the estate, and with the proceeds from said sales he from time to time improved the farm lands described in the deed aforesaid, 'Exhibit C,' which for brevity will hereafter be called the 'Browns Wells Plantation.' That he cleared land and built fences and numerous cabins on said Browns Wells Plantation, until the same is now in a high state of cultivation and capable of producing considerable revenue to said estate. That by virtue of the sales aforesaid the estate of the said Herman B. Mayes, deceased, now consists almost entirely of said Browns Wells Plantation and real estate owned by said estate in the town of Hazlehurst, consisting of the family residence and an office and a small residence which said office and small residence are now being rented for the sum of \$— per month. That the Browns Wells Plantation aforesaid, properly managed, ought to bring in a good revenue to the estate.

"(15) Your petitioner states that he has now in his possession, on deposit in the Merchants' & Planters' Bank, in the town of Hazlehurst, the sum of \$—, being the sum turned over to him by John B. Mayes on account of the sale of certain real estate which the said John B. Mayes had sold as executor of said estate, under the power conferred upon him in item sixth of said will. Your petitioner says that in his opinion a reasonable amount ought to be set aside out of the said money now on hand for the comfortable support and maintenance of the said Alice Mayes and Wm. W. Mayes, during the year 1908, and that the balance remaining should be applied to the indebtedness to the Merchants' & Planters' Bank, secured by the deed of trust aforesaid.

"(16) Your petitioner states that although the legal title has been in him since the execution of the deed, 'Exhibit C,' he has not derived one cent of revenue therefrom, but that he has held said lands in trust for the

benefit of said estate, and subordinate to the provisions of the last will and testament of his father, the said Herman B. Mayes, deceased; and he filed this petition for the purpose of surrendering the trust and reinvesting the estate of the said Herman B. Mayes, deceased, with the legal title to said lands, in order that the provisions of the said last will and testament may be strictly carried out; and he asks the court to cancel the deed held by him, subject to the deed of trust held by the Merchants' & Planters' Bank aforesaid, the money secured in said deed of trust having been advanced by the said Merchants' & Planters' Bank in good faith and without knowledge of any trust.

"(17) Your petitioner states that, according to the provision of item second of the said last will and testament, it was the intention of the testator to provide a comfortable support and maintenance for defendants Alice Mayes and Wm. W. Mayes for and during the term of their lives, and that it was further provided in item third of said will that after the death of the said Mrs. Charity Mayes, when the number of those provided for in the second item of the will should be reduced to two by reason of death or by marriage of any of said daughters, and the condition of the estate and the object secured in said item second would justify, the executor should make such division of the property then on hand as might be just and practicable, not trenching on the support of those remaining of the persons mentioned in said second item. Your petitioner says that, while the number of devisees entitled to claim the bounty of the testator under said second item of the will has been reduced to two by death and marriage, yet nevertheless the condition of the estate does not justify any division among the rest of the heirs at the present time; but your petitioner says that, after the payment of debts, taxes, expenses, and the comfortable support and maintenance for the remaining devisees in said item second, there will be little, if any, revenue left from said estate; and your petitioner says that it would best subserve the interests of all parties for the estate to be kept together during the lives of the said Alice Mayes and Wm. W. Mayes, and any net revenue that may be derived therefrom could be divided among the rest of the heirs of said estate.

"(18) Your petitioner further says that he is desirous of having the terms of said will interpreted, and he says that it is to the interest of all parties that an amount necessary for the comfortable support and maintenance of the said Alice Mayes and Wm. W. Mayes, taking into consideration their rank and station in life, should be fixed by the court.

"The premises considered, your petitioner prays that the defendants may be summoned by proper process to make answer to this petition, and that on the hearing of said

petition the court may interpret said will, and by decree declare what shall be a comfortable support and maintenance yearly, each, for the said Alice Mayes and Wm. W. Mayes, and that when said sum shall be so ascertained the executor of the estate be ordered to pay each of them said amount yearly, and that if any surplus may remain after the payment of said sum for their support and maintenance, and after the payment of costs of administration, taxes, and other charges, and debts against the estate, such surplus be divided among the heirs of said estate, and that the deed, 'Exhibit C,' now held by your petitioner, may be cancelled, and that the title to the lands described therein may be decreed to be in the estate of the said Herman B. Mayes, deceased, subject to the rights of the said Merchants' & Planters' Bank, of Hazlehurst, Miss., and that the court may direct your petitioner what disposition to make of the money now in his hands, belonging to the estate as aforesaid. And, if mistaken in the relief prayed for, then your petitioner prays such other, further, and general relief as he may be entitled to in the premises, and as to the court may seem meet and proper. And as in duty bound your petitioner will ever pray, etc. Signed on this 20th December. Robert B. Mayes."

The testimony taken in the case shows every averment or fact in this petition to be true as alleged. The will of Herman B. Mayes, "Exhibit B" to the petition, is as follows:

"The State of Mississippi, Copiah County.

"I, Herman B. Mayes, of the said county and state, being of lawful age and of sound and disposing mind, do make and publish this my last will and testament, revoking all others.

"Item First. I direct that my just debts be paid by my executor, hereinafter named, out of my estate.

"Item Second. My will is that after the payment of my just debts the whole of my property remaining, real and personal, of every kind, be kept together undivided until hereinafter provided, under the control, management and direction of my executor, as such and as a trustee, to whom I hereby devise and bequeath the same, in trust, nevertheless, in the manner and for the purpose as follows, to wit: The property and estate so devised and bequeathed to stand charged, as well the body as the income thereof, primarily with whatever sum or sums necessary for the comfortable support and maintenance of my beloved wife, Charity Mayes, and my daughters Mary Jane and Alice and my son William, for and during the term of their lives, and to remain thus charged to the measure and extent of such comfortable support and maintenance and the measure of the estate for them and each of them and the survivor of them.

"Item Third. It is my will that after the death of my said wife when the number of those provided for in the second item hereof shall be reduced to two or less by death, or by marriage of my said daughters or either of them, and the condition of my estate and the objects secured in the said second item will justify, my executor shall make such division of the property then on hand, not trenching on the support of those remaining of the persons mentioned in the said second item, as may be just and practicable, dividing according to the law of distributions, giving equal shares to my surviving children and to the descendants of a deceased child the parent's share; and on the death of the last survivor of those mentioned in the second item, a complete or further division shall be made, it being my will to postpone a division of my estate until the objects set forth in said second item of this will shall have been secured.

"Item Fourth. It is my will that upon the marriage of one or both of my daughters mentioned in the said second item, that the provision for her support shall cease, and such daughter shall thereafter only be entitled to her share of the estate as may fall to her on a division thereof as hereinbefore provided.

"Item Fifth. It is my will that my beloved wife shall possess and enjoy the use of the dwelling house in which I now reside in Hazlehurst, for and during her life for herself as a home, and as a home for such of the children mentioned in said second item as may choose to remain with her, as a right in her and them; and should it be found necessary or expedient, my said wife shall be provided in any event out of my estate with a home during her life.

"Item Sixth. I appoint my son, John B. Mayes, executor of this my will and trustee for the objects herein declared, and empower and direct him in providing for my debts, to dispose of such property for that purpose as may not be yielding increase by interest, rents, or other issues, giving him power without application to any court, to sell such property for such purpose at public or private sale; and I hereby empower him, for the general objects herein declared and to the end of increasing and making more certain the income from my estate, to improve the property, to lease and sell the same at public or private sale, for reinvestment for the purposes of this my will, without application to any court, having confidence in his judgment and integrity and intending to give him ample power of management and control and direction of my estate, in order the more effectually to secure objects set forth in the provisions of this my will.

"And lastly it is my will and desire that no bond shall be required of him for the faithful performance of his trust."

Process was duly served on all the defendants, and decree pro confesso was had against

defendants John B. Mayes, individually and as executor and trustee of the estate of Herman B. Mayes, deceased, William W. Mayes, Alice Mayes, Mrs. Cynthia A. Ware, Mrs. Mary Jane Decell, Mary E. Cook, and Joseph D. Mayes. The guardian ad litem was duly appointed for the infants, on whom process had been duly executed personally, and the cause proceeded to final hearing upon the petition, and upon process waivers, pleadings, and proof taken in open court, and the cause was taken under advisement for decision in vacation on October 12, 1908. On November 2, 1908, the chancellor entered his final decree, which is as follows:

"Estate of Herman B. Mayes, Deceased.
John B. Mayes, Executor.

"In the Chancery Court of Copiah County,
State of Mississippi.

"On Petition of Robert B. Mayes for Construction of Will, etc.

"This cause coming on for hearing on petition of Robert B. Mayes for the construction of the will of Herman B. Mayes, deceased, etc., and decree pro confesso and proofs submitted at the hearing, oral and record, and it appearing to the court that a decree pro confesso has been heretofore rendered against all the adult defendants named in said petition, it fully appearing that all the adult defendants had either been served with summons or had waived same, and that the minor defendants, to wit, Nora Belle Cook and Carrie Cook, having neither father nor mother living, nor legal guardian, have been duly and legally summoned, the court, having heard all the testimony and being fully advised in the premises, doth find and decree as follows, viz.:

"(1) That in compliance with the prayer of petitioner, the said Robert B. Mayes, it is ordered that the deed executed in his favor on the 5th day of February, 1905, by the late Mrs. Charity Mayes, recorded in Deed Book 3G, page 108, of the Records of Deeds of Copiah county, being 'Exhibit C' to the petition, be and the same is hereby ordered to be canceled by the clerk of this court, and the legal title to all the lands described in said deed is hereby declared to be reinvested in the executor and trustee named in the last will and testament of the said Herman B. Mayes, deceased, in trust for said estate, and subject to all the provisions in said last will and testament contained, and impressed with all the trusts in said last will and testament declared, and Robert B. Mayes is hereby directed and required to execute deed reconveying all property deeded to him by Mrs. C. Mayes to the trustee of the H. B. Mayes estate for the purposes named in the last will and testament of the said H. B. Mayes. And it is further ordered and directed that all the deeds heretofore made to Mrs. C. Mayes, for any purpose, by any party or person, be and the same are hereby ordered to be canceled

by the clerk of this court, and the property is hereby declared to be the property of the H. B. Mayes estate, and the will of the said H. B. Mayes is hereby in all respects reinstated and declared to be the true title and source of power to deal with the estate; it being manifest from the testimony that Mrs. C. Mayes never claimed any of said property, except in subservience to the will, and never paid any actual money for same.

"(2) It appearing that the said Robert B. Mayes has at all times held said lands in trust for said estate, and under the terms of said last will and testament, and that he has made no profit on said estate, but has faithfully administered the same in strict accordance with the terms of said last will and testament, and that he has faithfully accounted for so much of said estate as has been handled by him, it is ordered and declared that he be discharged from any further liability on account thereof.

"(3) It appearing that the corpus as well as the income of the estate is charged with the comfortable support of such of the beneficiaries named in item 2 of the will as now have the right to claim it, and that the objects of the bounty of the said testator named in item 2 of said last will and testament have been reduced, by the death of the said Mrs. Charity Mayes and by the marriage of Miss Mary Jane Mayes, to two, namely Alice Mayes and William W. Mayes; and it further appearing to the court that the conditions of the said estate and the objects declared in said second item of said last will and testament will not justify a division of said estate, and that a sale or partition in kind of any portion of said estate would seriously jeopardize the comfortable support and maintenance of the said Alice Mayes and the said William W. Mayes, and thus defeat the manifest and paramount intent of said testator, it is therefore ordered that the said estate be kept intact, in order to accomplish the main purpose of the will, and that none of said estate be sold for a division or partition in kind.

"(4) It appearing further from the testimony that the sum of nine hundred dollars (\$900.00) per annum is necessary for the comfortable support and maintenance of the said Alice Mayes, in accordance with her rank and station in life and the manifest purpose and intent of the said testator, it is ordered that the executor and trustee of said estate pay over to the said Alice Mayes out of the net income of said estate, for her yearly support and maintenance, said sum of nine hundred dollars (\$900.00); and it appearing further from the evidence that the sum of six hundred dollars (\$600.00) per annum is necessary for the comfortable support and maintenance of the said William Mayes, therefore, until further directed by the court, it is ordered that the said executor and trustee expend said above amounts annually on said William W. Mayes and Alice Mayes, said sums to be

expended under the direction of said Robert B. Mayes, if the beneficiaries named consent thereto, and to remain as the fixed annual allowance of each of the two beneficiaries named, subject to future modifications by the court if there shall arise such necessity, and the trustee shall maintain in good repair a home for the two beneficiaries herein named, to wit, Alice and William Mayes, and the cost of keeping up the said home, excluding the cost of provisioning same, shall be borne by the trustee and not deducted out of annual allowance of Alice and William Mayes, and it shall also be the duty of the trustee to pay all taxes and insurance on said home. It further appearing that William Mayes is now living in the house with Alice Mayes, and a home being maintained for him, it is ordered that the sums herein allowed be deposited in the name of Alice Mayes, and subject to her check alone, under the supervision and direction of Robert B. Mayes, as long as the beneficiaries consent thereto. So long as the home is maintained as now, all money shall be subject to the check of Alice Mayes; but, in the event of the breaking up of the home, then the amount allowed to William W. Mayes is to be spent under the direction of Robert B. Mayes, if the said William Mayes shall consent thereto. Nothing in this decree is to be construed as limiting the right of the beneficiaries to resort to the corpus of the estate for a comfortable support if the estate cannot be made to yield it as an income, nor as limiting the beneficiaries now living and named in item 2 to mere necessities; but they are to be comfortably supported in a home of their own if they so desire, or in such other way as may best suit their wishes, commensurate with the estate and purpose of the will, but there shall be no trenching on the corpus of the estate unless absolutely necessary. In the event that in the future there should not be enough net income from said estate to realize said amounts for the support of said Alice Mayes and the said William W. Mayes, it is further ordered that the said net income be divided between said devisees proportionately to the amounts named for their support, if said Alice Mayes shall not then be maintaining a home for said William W. Mayes; but, if she is, then said pro rata sums shall be deposited to her credit and disbursed by her as the head of the household, and in any and all events all said sums are to be disbursed under the direction of Robert B. Mayes so long as the beneficiaries consent to same.

"(5) Should there be in the future any surplus left of said net income, after the said devisees shall be paid the amounts named for their yearly support as aforesaid, and after all the debts and expenses of all kinds incident to the protection, development, and management of said estate shall have been paid in full, said amount shall be ratably divided among the other children and grandchildren of said Herman B. Mayes, deceased, accord-

ing to the provisions of item 3 of said last will and testament.

"(6) It is further ordered that the deed of trust, executed by the said Mrs. Charity Mayes and John B. Mayes, in favor of the Merchants' & Planters' Bank of Hazlehurst, Miss., recorded in Deed Book 71, page 245, of the Records of Deeds of said county of Copiah, shall remain in force and be in no wise impaired by the cancellation of deed. 'Exhibit C,' or any intermediate deeds appearing in the name of Mrs. C. Mayes, but that said lien shall remain in full force and effect as a substituting liability against said estate, and as a paramount lien on the lands belonging to said estate and described therein. This decree shall in no way affect any security held by the Merchants' & Planters' Bank, whether same is specifically mentioned herein or not.

"(7) It is ordered that defendants be allowed 90 days in which to file a bill of exceptions, and that the cost of this proceeding be taxed against said estate. It further appearing that the court having, by written order on the minutes of said court, ordered that this cause be taken under advisement for decree in vacation, and now having maturely considered same, signs this decree in vacation, and directs the same be spread upon the minutes of the court as the final decree in this case.

"Ordered, decreed, and adjudged on this 2d day of November, 1908.

"G. G. Lyell, Chancellor."

From this decree, an appeal and cross-appeal have been regularly prosecuted.

On November 7, 1908, a petition was filed by Robert B. Mayes, showing to the court that within a few days last before November 7, 1908, the said John B. Mayes, executor, etc., had signified his desire to be relieved from the executorship and trusteeship of the said estate, and had in writing declared that he would have nothing further to do with the management of the estate, and consequently the estate was, at the date of the petition, without an executor and trustee. Now, in the decree which had been just rendered November 2, 1908, it had amongst other things, been decreed, in item 1 of said decree, that the "legal title to all the lands described in said deed from Charity Mayes to Robert B. Mayes was thereby declared to be reinvested in the executor and trustee named in the last will and testament of the said Herman B. Mayes, deceased, in trust for said estate, and subject to all the provisions in said last will and testament contained, and impressed with all the trusts in said last will and testament declared," etc. This reinvestment of the title in the executor and trustee, John B. Mayes, was made in pursuance of this decree on the 2d of November, 1908; and, as shown before, his resignation and the appointment by the court, under this last petition, of John S. Decell, as adminis-

trator with the will annexed and trustee of the estate of Herman B. Mayes, deceased, was made. As the record before us stands, therefore, the decree appealed from is one which reinvested the title in John B. Mayes. The decree appointing Decell administrator with the will annexed and trustee, etc., is not complained of in this proceeding in any way.

We think it is perfectly manifest, from the terms of the will of Herman B. Mayes, that all his estate, as well the body as the income thereof, stood charged primarily with whatever sums were necessary for the comfortable support and maintenance of his wife, Charity Mayes, and his daughters, Mary Jane and Alice Mayes, and his son, William Mayes, during the term of their natural lives, and during the lives of the survivors or survivor of them. Mary Jane Mayes married and under the terms of the will ceased to be entitled to this provision. The mother is dead, and the two surviving objects of this bounty of the testator are Alice Mayes and William Mayes alone. It is also, we think, clear that it was the purpose of the testator that his estate should be kept together, undivided, until, as stated in item 3 of the will, the number of the beneficiaries should be reduced to two or less, and "the condition of my estate and the objects secured in the said second item will justify my executor in making such division of the property then on hand, not trenching on the support of those remaining of the persons mentioned in the said second item." He provided in this third item, provisionally and contingently, for a preliminary partial division, if one could be made that should be just and practicable, keeping in view always, as the paramount consideration, that the condition of his estate and the comfortable maintenance and support of those named in item 2 should be kept in mind; the last clause of item 3 expressly stating that it was his will "to postpone a division of his estate until the objects set forth in said second item of his will should have been secured."

Looking through the testimony in this case, it is perfectly manifest that there cannot, within the spirit and purpose of this will, be any division made at this time of the property. The income seems scarcely sufficient to pay the charges on the property and the \$125 per month allowed for the support and maintenance of Alice Mayes and William Mayes. They manifestly are entitled to a home as "a right in them" whilst they live. The provisioning of such home, however, is not included in this clause of the will. Everything necessary to maintain the home, paying of taxes, and keeping it in proper and comfortable repair is included; but the living expenses involved in the purchasing of supplies, such as groceries, etc., was never meant to be included, over and above a money allowance for that same purpose. Consequently the clause in the decree directing "that the trustee shall maintain in good re-

pair a home for the two beneficiaries herein named, to wit, Alice and William Mayes, and the cost of keeping up the said home, excluding the cost of provisioning same, and that these expenses shall be borne by the trustee, and not deducted out of the annual allowance of Alice and William Mayes, and that it shall also be the duty of the trustee to pay all taxes and insurance on said home," was correct. We have critically examined this whole record and the decree of November 2, 1908, and we affirm said decree in all respects.

It is complained that the chancellor should have made his order final as to the \$900 per year to be paid to Alice Mayes and the \$800 per year to be paid to William Mayes, etc., and not, as he did, subject to future modifications by the court, if there should arise such necessity. We cannot concur in this criticism of the decree. We think the chancellor's decree was eminently correct in this respect, and in every other respect. Whether this support can be increased or diminished, or ought to be, is a matter for future consideration, depending upon circumstances at the time. When a division or partition in kind, or a sale of said property for the division of proceeds, can be made, is for the chancellor's future judgment, governed by the third item in said will. Circumstances to occur in the future alone can settle this, in view of said third item. Whilst that matter is not before us on this appeal, it is obvious that John S. Decell, having been appointed administrator with the will annexed and also trustee under the will, John B. Mayes, the former executor and trustee having resigned, and this appointment of Decell having occurred after this decree was entered, that the chancellor, on the return of this case, should enter a decree reinvesting the title in the said John S. Decell, as it had been theretofore invested in John B. Mayes.

The direct appeal in this case is prosecuted by J. H. Long, guardian ad litem of minors, and the assignments of error are that the decree was erroneous in not directing a partition of the property to be had, and in allowing too large a sum for the maintenance of the two beneficiaries, Alice Mayes and William Mayes; and the evidence manifestly shows that the decree is entirely correct under the provision of this will on both these points, and the decree on the direct appeal is affirmed.

The cross-appeal of Robert B. Mayes, petitioner, assigned as error, first, that the court erred in not making the amounts necessary for the comfortable maintenance of Alice Mayes and William Mayes sufficiently large, because they were not enough to support them, respectively, in accordance with their rank and station in life, and in accordance with the manifest purpose and intent of the testator; and, secondly, because the court erred in making said allowance subject to future modification by the said court, if there

should arise such a necessity. It is perfectly obvious, under the terms of the will and the evidence in this case, that these assignments of error on this cross-appeal are untenable. The decree on the cross-appeal is therefore affirmed.

No other errors are assigned, either on the direct or cross appeal, than those we have specifically mentioned, and the chancellor committed no error in respect to any of these things assigned as error. Consequently we affirm the decree on appeal and cross-appeal, as stated. But all parties in interest on the direct and cross appeal have joined in asking us to construe the provisions of this will, so far as would be necessary for the guidance of the administrator with the will annexed and trustee, John S. Decell; and therefore, in addition to what we have already said, we desire now to say further that we do not think the decrees should have left any doubt as to the primary duty of discharging the indebtedness due the Merchants' & Planters' Bank. As to that, the chancellor is directed to enter a supplemental decree, expressly providing that all the money derived from the income of this estate, of every kind, after the payment of taxes, repairs, and other proper charges, and the sum of \$125 per month to Alice and William Mayes, as stated in the decree, and any other proper costs incurred in the cause shall be devoted—that is to say, such surplus shall be wholly applied—to the extinguishment of the debt due the said Merchants' & Planters' Bank, and shall be continuously so applied—that is, all of said surplus—until said debt shall have been fully paid off and discharged. The chancellor should further, in such supplemental decree, recite that the property should be kept intact, without division, until such debt shall have been paid off and discharged, and that when such debt shall have been paid off and discharged, then, at that time, any party interested may make an application for further directions from the court, as to what disposition shall be made of said surplus thereafter accruing, and generally for further directions.

Decree affirmed on direct and cross appeal, and remanded.

MAYES, J. takes no part in the decision of this cause.

BARRETT v. INTERNATIONAL HARVESTER CO. (No. 13,422.)

(Supreme Court of Mississippi. March 1, 1909.)

Appeal from Chancery Court, Hinds County; G. G. Lyell, Chancellor.

Action between O. P. Barrett and the International Harvester Company. From the judgment, Barrett appeals. Affirmed.

Harper & Potter, for appellant. Williamson, Wells & Peyton, for appellee.

PER CURIAM. Affirmed.

QUILLIN v. TOWN OF NETTLETON.†

(No. 13,722)

(Supreme Court of Mississippi. March 1, 1909.)

Appeal from Chancery Court, Monroe County; J. Q. Robins, Chancellor.

Action between H. T. Quillin and the Town of Nettleton. From the judgment, Quillin appeals. Affirmed.

Mitchell & Clayton, for appellant. Lettich & Tubb, for appellee.

PER CURIAM. Affirmed.

SOUTHERN COMMERCIAL CO. v. KELLY.

(No. 13,766.)

(Supreme Court of Mississippi. March 1, 1909.)

Appeal from Chancery Court, Adams County; J. S. Hicks, Chancellor.

Action between the Southern Commercial Company and George M. D. Kelly. From the judgment, the company appeals. Affirmed.

Ratchiff & Truly, for appellant. W. C. Martin and Marion Kelly, for appellee.

PER CURIAM. Affirmed.

WHITE v. STATE. (No. 13,866.)

(Supreme Court of Mississippi. March 1, 1909.)

Appeal from Circuit Court, Panola County; W. A. Roane, Judge.

Will White was convicted of murder, and appeals. Affirmed.

Pearson, Eckles & Carothers, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

HEWES BROS. v. UNDERWOOD TYPEWRITER CO. (No. 13,790.)

(Supreme Court of Mississippi. March 1, 1909.)

Appeal from Circuit Court, Harrison County; W. H. Hardy, Judge.

Action between Hewes Bros and the Underwood Typewriter Company. From the judgment, Hewes Bros. appeal. Affirmed.

Rucks Yerger, for appellants. Barrett & Taylor, for appellee.

PER CURIAM. Affirmed.

TENDALL BROS. v. ATEs. (No. 13,390.)

(Supreme Court of Mississippi. March 1, 1909.)

Appeal from Circuit Court, Simpson County; R. L. Bullard, Judge.

Action between Tendall Bros. and R. B. Ates. From the judgment, Tendall Bros. appeal. Affirmed.

Sullivan & Whitworth, for appellants. J. P. Edwards, for appellee.

PER CURIAM. Affirmed.

† Motion for attorney's fees sustained March 22, 1909.

(122 La. 1079)

No. 17,098.

**LOUISIANA RY. & NAVIGATION CO. v.
MAYOR, ETC., OF TOWN OF COU-
SHATTA et al.**

(Supreme Court of Louisiana. Jan. 18, 1909.
Rehearing Denied Feb. 15, 1909.)

**1. RAILROADS (§ 34*)—MANDAMUS (§ 143*)—
PUBLIC AID—UNREASONABLE DELAY.**

As the taxes herein referred to have not been transferred or assigned to the plaintiff company, it has no right of action upon the same. Mandamus should not issue when there has been unreasonable delay in applying for it, especially where the rights of third parties will be prejudiced by the delay.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 34;* Mandamus, Cent. Dig. § 285; Dec. Dig. § 143.*]

2. MANDAMUS (§ 143*)—DELAY.

When the taxpayers of a town have voted that all the property in the town shall (in aid of the construction of a railroad) be taxed during specified years at five mills on the dollar upon the assessments of those years, and the beneficiary of the taxes takes no steps to compel the town authorities to levy, assess, and collect the same, until years after the taxes should have been levied, assessed, and collected, the court will not order mandamus to issue in aid of the levying, assessing, and collection of the taxes.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 285; Dec. Dig. § 143.*]

(Syllabus by the Court.)

Appeal from Eleventh Judicial District Court, Parish of Red River; Samuel Jamison Henry, Judge.

Mandamus by the Louisiana Railway & Navigation Company against the Mayor and Councilmen of the Town of Coushatta and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Wise, Randolph & Rendall (Nettles & Teer, of counsel), for appellant. William Augustus Wilkinson, John Franklin Stephens, and William Hampton Scheen, for appellees.

Statement of the Case.

NICHOLLS, J. This is an application for a mandamus by the plaintiff, which alleges that it is the legal successor of the Shreveport & Red River Valley Railway Company, a corporation organized to build and operate a railroad in the state of Louisiana, and that said Shreveport & Red River Valley Railway Company is now dissolved and has been succeeded by plaintiff, who now owns all its rights, property, and estates for a valuable consideration.

That the property taxpayers of the town of Coushatta, on September 23, 1897, voted a special tax of five mills on the taxable property therein for 10 years in favor of the said Shreveport & Red River Valley Company, and under same the town of Coushatta entered into a contract with said company to collect and pay over said tax for 10 years, and in pursuance with said vote and contract that the town council, on July 5, 1898, levied

a tax of five mills on the taxable property in the town for the years 1898, 1899, 1900, 1901, 1902, 1903, 1904, 1905, 1906, 1907, in aid of said Shreveport & Red River Valley Railway Company, and provided for its annual collection and payment to said company.

That under said ordinance and contract this tax was collected for the years 1898, 1899, 1900, 1901, 1902, but since the year 1902 the town council has refused to collect or cause to be collected the tax for 1903, 1904, 1905, 1906, and 1907, and that the assessor for the town has refused to extend said tax on the rolls, and the collector has failed to collect the tax for the years 1902 to 1907, inclusive.

It alleged that the town council assumed to repeal the ordinance levying the tax, but said action was without just cause and an absolute nullity, and that the failure to collect said tax and pay same over to petitioner was without excuse. It prayed for judgment decreeing the contract referred to and the tax levied by ordinance of July 5, 1898, for a period of 10 years to be in full force, and any attempt to repeal said ordinance to be a nullity, and that petitioner be decreed the assignee and beneficiary of said tax for the years 1903 to 1907, inclusive, and that a writ of mandamus issue to W. H. Walmsley, assessor, and to the tax collector of said town, to extend the said special tax on the rolls for the years 1903 to 1907, inclusive, and to collect and pay over same to petitioner.

Defendants answered with a general denial, and alleging that the plaintiff was not entitled to the writ of mandamus for the reason:

That the town council of Coushatta passed an ordinance in 1902 repealing the tax levied in aid of the Shreveport & Red River Valley Railway Company, and that said tax should not be extended on the tax rolls of said town for the year 1903 and subsequent years, that this action was taken after the final termination of the litigation in the suit of J. B. Atkins et al. v. Shreveport & Red River Valley Railway Company, 106 La. 568, 81 South. 106, and this action was well known to plaintiff, its officers and agents, and was acquiesced in by it during the years 1903, 1904, 1905, 1906, 1907, and no demand was made to have the alleged tax placed on the rolls for said years, and by such acquiescence the plaintiff, or the Shreveport & Red River Valley Railway Company, has lost any right it might have had to have extended said tax on the rolls for those years, if any right it ever had.

That defendants were now unable to have said tax extended on said rolls, for the reason that all the taxes for those years have long since been levied, the tax rolls have long since been made up, and the taxes extended thereon; that the taxes on said rolls have been collected and the collector discharged; that said tax rolls have passed beyond the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

reach of any of the defendants, and were beyond any action demanded of defendants; that by the long silence and acquiescence of plaintiff the position of parties and properties have been changed, and the time for the levy of the tax claimed has long since been allowed to pass by it, and any right it might have ever had to have said tax levied, extended, and collected had passed, and could not now be accomplished by defendants, nor could your defendants be legally commanded to do that which was impossible for them to do.

In the alternative they alleged that, when the aid was voted in favor of the said Shreveport & Red River Railway Company, it agreed to make Coushatta the terminus of the road, and same was one of the material stipulations of the contract, and was explained to the voters as being a condition of the aid, but same was violated, and by its violation the taxpayers were released from further liability and the tax no longer collectible.

Further, that, at the same time that the vote was taken in the town of Coushatta, there was a vote in the parish of Red River and contracts made on the vote taken on the same day; that they were each dependent one upon the other, and were in fact one and the same, and that the contract with the parish was for the town as well, and said town was entitled to all of its provisions and conditions; that by the express condition the contract of the town was dependent upon that with the parish, and that the express condition on which the aid was voted was that the said company should operate two boats in Red river, and there has been a failure to earn the tax proposed in this respect, as has been finally decided by the judgment of the Supreme Court (106 La. 568, 31 South. 166), which is pleaded as *res judicata*. The defendant showed that this decision applied to the town of Coushatta as well as to the parish, and that this was the contemporaneous construction placed thereon by both parties, the plaintiff having fully acquiesced in the action taken by defendants under said decree; that, by the violation of the terms and conditions of its contracts, it had long since forfeited any right it or any one else might have had in said tax.

That the tax voted was in aid of the Shreveport & Red River Valley Railway Company, and was personal to it, and, it having gone out of existence, there is no one who was legally entitled to collect anything, if any sum should be due, which was denied, and especially showed that the said Shreveport & Red River Valley Railway Company had never transferred any rights it had therein to the plaintiff, and that it was without right to sue to recover, it not being the owner or beneficiary. The prescription of one, two, and three years was pleaded.

On the trial of the case in the lower court there was judgment for defendants rejecting the demands of plaintiff, from which judgment it was now prosecuting this appeal.

The taxpayers of the town of Coushatta voted at an election held on the 23d of September, 1897, in favor of a special tax of five mills on the taxable property in said town for 10 years in aid of the construction of the Shreveport & Red River Valley Railroad to that town. This election was ordered by an ordinance passed on the 19th of August, 1897, upon a petition of taxpayers, in which petition they alleged that the construction of the Shreveport & Red River Valley Railroad by the Shreveport & Red River Valley Railway Company from the city of Shreveport, parish of Caddo, on a line intersecting the northern boundary of the parish of Red River, and running thence in a southerly direction to within the incorporated limits of the town of Coushatta in said parish, said town to be the terminus of said road, would be of great benefit to the people and property of said town of Coushatta. They therefore prayed the town council to levy a special tax of five mills annually on the property of said town in aid of said Shreveport & Red River Valley Railway Company, commencing January 1, 1898, and for 10 years annually thereafter, provided this tax is to be voted and levied under the following conditions, to wit:

"The said railway company shall commence work on the construction of said road from the city of Shreveport within thirty days after a favorable vote taken thereon and shall fully complete the same ready and put in operation from the city of Shreveport to within the incorporated limits of the town of Coushatta, within twelve months from the promulgation of said favorable vote taken thereon, and shall continually operate through trains thereon. * * * Provided further, that the town of Coushatta shall donate to said Shreveport and Red River Valley Railway Company, free of charge, suitable grounds of easy access for depot and terminal facilities at such point as said town may select."

They prayed that the town authorities order an election to take the sense of the property taxpayers of said town for or against said proposed aid according to law, the ballots to be printed or written in the following form, viz.:

"For a special tax in aid of the Shreveport & Red River Valley Railway Company, for the time on the conditions set forth in the petition of the property tax payers."

The election prayed for to be held in conformity to the petition of the taxpayers and subject to the conditions and stipulations set forth in that petition, which was made part of the ordinance.

The election resulted in a unanimous vote in favor of the proposed tax. The result was promulgated, and the road to the town of Coushatta was completed on the 19th day of August, 1898. The tax in aid of and in favor of the railroad company was levied and collected in the years 1898, 1899, 1900, 1901, and 1902, but in what manner and by whom these special taxes were extended on the tax rolls of those years does not appear.

The ordinance or ordinances levying the tax are not in the record. It is conceded that in 1903 the town council repealed the ordinance levying the tax, and since that year the tax has not been collected. The repealing ordinance is not in the record. On the same day that the taxpayers of the town of Coushatta voted, as has been stated, upon the question of voting a special tax on all the property in that town in favor of the railroad named, the people of the whole parish of Red River held an election upon the question of levying a special tax on all the property in that parish in favor of the same road company. That election was held by virtue of and under authority of an ordinance of the police jury of that parish, based upon a petition of the taxpayers thereof.

In that petition the taxpayers signing the same alleged that:

"The construction of the Shreveport & Red River Valley Railroad from the city of Shreveport to * * * within the incorporated limits of the town of Coushatta, said town being the terminus of the road, would be of great benefit to the people and property of said parish."

They therefore prayed that the police jury levy a special tax of five mills annually for a period of 10 years in favor of said Shreveport & Red River Valley Railroad Company, commencing January 1, 1898, said tax to be levied for the years 1898, 1899, 1900, 1901, 1902, 1903, 1904, 1905, 1906, and 1907:

"Provided that this tax is voted for and to be levied under the following conditions, to wit: That said railway company shall commence the construction of said railroad and fully complete and put in operation said railroad from the city of Shreveport to within the incorporated limits of the said town of Coushatta, within twelve months; * * * provided further, that said railway company shall operate two towboats or steam tugs with convenient barges at such points on the stream of Red river as to furnish transportation of such freight and agricultural products as may be assembled at such points and to operate such boats or steam tugs with convenient barges as low down on said stream of Red river as the present site of Lake End, La."

They therefore prayed the police jury to order an election to be held, submitting to the taxpayers of the parish of Red River the question as to whether said special tax should be levied for the purpose stated.

The election was ordered and held, resulting in a vote in favor of the levying of the tax. The railway company completed the railroad to Coushatta. It was inspected and accepted by the police jury of the parish. The special tax was levied in aid of the construction thereof "as long as said company continue to comply with the contract." The taxes for the years 1898 and 1899 were paid.

On September 10, 1900, certain taxpayers of the parish for themselves, and the police jury for the body of the taxpayers, brought an action to have declared forfeited the special tax of five mills voted for as stated by

the taxpayers of the parish, on the ground that the railroad company had not fulfilled the conditions attached to the grant. In March, 1901, judgment was rendered adverse to the plaintiff, and it appealed to the Supreme Court. This court thereafter reversed the judgment appealed from, and rendered a judgment forfeiting the rights to the special tax for 1900, the evidence disclosing that it had failed to comply with its obligation of operating tugboats on the Red river as it had bound itself to do. The court declined to extend the forfeiture of the tax beyond that year, for the reason that the railway company might comply later with its obligations so to do. The rights of all parties for the future were reserved.

In its opinion in that case this court said, referring to the claim made by the plaintiff that the railway company had forfeited its right to the tax voted by the taxpayers of the parish of Red River for the reason that it had extended its road beyond the town of Coushatta:

"We do not think the contract stipulates as a condition of the grant that the town of Coushatta should be and remain the final terminus of the road, since the town is referred to in the taxpayers' petition as being the terminus of the road; but this is held to have been descriptive merely. * * * The reference to Coushatta as the terminus of the road is found only in the first clause of the petition of taxpayers, where it is recited that the construction of the road into the parish and to the town of Coushatta would be, in the opinion of the signers, 'of great benefit to the people and property' of the parish.

"But in that part of the petition following the prayer for the levy of the special tax in aid of the railway, where the conditions of the grant are set forth, no mention is made that Coushatta should be and remain the terminus of the road."

The charter of the Shreveport & Red River Valley Railway Company declares in its first article that the object and purposes for which the corporation was organized and founded and the nature of the business to be carried on was the construction, establishment, operation, and maintenance of a railroad from Shreveport to a point at or near Coushatta in the parish of Red River.

The railway company, after completing its road to Coushatta on the 19th of August, shortly thereafter extended it beyond and below that town. The special tax voted by the taxpayers continued to be levied and paid up to and inclusive of the taxes of 1902.

Shortly after the decision of the Supreme Court in the Atkins Case (106 La. 568, 31 South. 166, Atkins et al. v. Shreveport Red River R. R. Co.), the town council repealed the ordinance levying the tax voted in aid of the Shreveport Red River Valley Railroad Company, and ordering that said tax should not be extended on the tax rolls of said town for the year 1903 and subsequent years, and since that time the special tax has not been levied or extended on the rolls, or collected.

In an act passed on the 22d day of June, 1903, the Shreveport Red River Valley Railroad Company declared it granted, bargained, sold, conveyed, and delivered to the Louisiana Railway & Navigation Company (the plaintiff company)—

"the following described property, to wit: All the capital stock of the said Shreveport & Red River Railway Company and all its property to wit:"

[Here follows in the act a detailed enumeration and description of the things transferred, among which the special tax voted by the taxpayers of the town of Coushatta does not appear. It is under this condition of things and under those circumstances that this action has been brought and defended.]

Opinion.

The object of the present action as shown by the pleadings and statement of facts is to have issued a mandamus compelling "W. H. Walmsley, assessor," and "the tax collector of the town" to extend the said special tax (the special tax referred to in relator's petition being the special tax voted by the taxpayers of the town of Coushatta on the property in that town in aid of the construction of the railroad therein mentioned) on the rolls for the years 1903 to 1907, inclusive, and to collect and pay over the same to relator. Coupled with this was a prayer that the tax levied by ordinance of July 5, 1898, for a period of 10 years be recognized as in full force, and to decree that any attempt which had been made to repeal said tax be decreed a nullity, and that relator be decreed to be the assignee and beneficiary of said tax.

The evidence discloses that the town council of the town of Coushatta did, by ordinance passed in 1903, declare repealed a prior ordinance which it had adopted in 1898 in respect to a special tax which had been voted by the taxpayers of that town in favor of the Shreveport & Red River Valley Company for the purpose of aiding in the construction by that corporation of the railroad from Shreveport to Coushatta. It further shows that since the year 1902 the town council had refused to collect or cause to be collected the said special tax for the years 1903 to 1907 (both years inclusive).

The charter of the town is not in the record, but the testimony shows that W. H. Walmsley mentioned in plaintiff's petition was an "employee" of the town, "employed by it for the purpose of preparing the town assessment rolls," and that the "marshal of the town" was ex officio its tax collector. The taxes referred to in plaintiff's petition, and which it seeks to have assessed and collected by mandamus, are not taxes levied by the town council for the use and benefit of the government of the town and for its administration under the powers of taxation conferred upon it for those purposes, but a contribution in the nature of taxes voted by the property taxpayers of Coushatta them-

selves on their property in aid of the construction of a railroad which presumably benefits themselves and their property. Taxation of that character is outside of the general powers of taxation granted for municipal purposes. Town authorities in authorizing and in ordering elections at which taxpayers in the town are to determine by their vote whether aid should be extended to a railroad corporation for the purpose of building a railroad, and in enacting or in endeavoring to enforce the levying and collection of such quasi taxes, serve simply as instrumentalities provided by law to carry out the will of the people in respect to the special matters so submitted to and decided by them. Town councils are therefore without authority or capacity to set aside the will of the people when they should have voted favorably upon extending such aid. The action of the town council of Coushatta in attempting to do this in reference to the granting by the taxpayers of the town of Coushatta of the aid voted to be extended to the Shreveport & Red River Valley Company to construct the railroad from Shreveport to Coushatta was therefore, from a legal standpoint and per se, without force and effect. This action none the less carried with it serious practical results when acquiesced in and not promptly remedied by parties holding an interest in the subject-matter.

For the purpose of carrying out the will of the people in respect to these taxes, the statute required the town authorities to levy and collect annually the special taxes so voted on by the taxpayers of the town, and, unless and until this shall have been done, assessors are powerless to extend the tax on the tax rolls, and tax collectors are powerless to collect it. Particularly is this the case where the party charged with the preparation of the extension of the town taxes on the tax rolls is a mere employé whose authority is confined to what he is ordered and directed to do by his employer. The tax collector of the town of Coushatta appears to be an officer of the town, and to derive his power from the town council. Inactivity by the town authorities in annually levying the tax operates as effectually to prevent the extension of the specific taxes on the tax rolls as direct adverse action. The tax collector cannot go behind the tax rolls as placed in his hands for collection. The situation in this particular case is that the town council has not levied the special tax voted by the taxpayers of Coushatta in 1898 since 1902, and no action has been taken by any party in interest to compel them to do so.

As matters stand, neither assessor nor tax collector has as yet been clothed with the authority to extend the tax involved herein on the tax rolls or to collect the same. They have neither failed to perform a duty imposed upon them, and the writ of mandamus cannot be made to reach them. The only ac-

tion asked by relator in respect to the town council is that action in which it has taken part, setting aside the ordinance which it adopted in 1898 relative to this special tax, be declared null and void. Our views on that question have already been announced, but they do not carry with them any obligation to take affirmative action of any kind, as the court is not asked to render any decree to that extent. The court is not called upon in this case to express any opinion whether the Shreveport & Red River Valley Railway Company has or has not forfeited its right to the aid voted to be extended to it by reason of its having extended its road beyond Coushatta. The mayor and the town council of Coushatta, not itself owing the tax, have not the legal capacity and right to raise that question and have it decided contradictorily with themselves.

The defendants urge the court that under no circumstances would the plaintiff company be entitled to a mandamus, as it is not the holder and owner of the taxes ordered to be levied. That the Shreveport & Red River Valley Railroad Company has never assigned them to it. They are not referred to as having been transferred to the plaintiff in the descriptive enumeration of the rights and property conveyed to it by the Shreveport & Red River Valley Railroad Company. Whether this was caused by the recognition of the last-named company that it did not at that time have any right itself to those taxes, or whether the omission resulted from inadvertence, we do not know. *Scovell v. R. R. Co.*, 117 La. 459, 21 South. 723.

Defendants claim that, even if the proper parties were before the court and appropriate pleadings had been made by the plaintiff in this case praying for a writ of mandamus to issue, none could issue in its behalf in the premises, as the time for levying, extending, and collecting the special taxes had passed, and the town council is without capacity or authority to levy for back years a special tax voted by the taxpayers of a town to be levied on their property annually for years specifically named; that the values of property have enhanced beyond what they were during these years, and the ownership of the property has materially changed during that time; that the town council is without authority to levy in one single year taxes which were voted to be levied, assessed, and collected in successive years, and, by so doing, making the special tax operate oppressively upon the property tax payers and upon many persons who had not voted nor had an opportunity to vote upon the question of extending aid to the railroad for the construction of its road; that the laws concerning those quasi taxes by which dissenting minority voters are bound by the vote of a majority are exceptional in character, and in derogation of common right, and should be strictly construed, and rights acquired thereunder promptly enforced; that

if the plaintiffs would under any circumstances have been entitled to a mandamus they should have had timely recourse to it, and if they have lost anything in the premises it is by their fault and laches, which they cannot visit upon others.

Defendants submit the following position taken by them in this case, with the authorities upon which they rely in support thereof:

"The petition asks that defendants be compelled to extend this tax on the identical rolls for the different years for which it is claimed, and not that a new one should be made up for the purpose of extending this tax, and it would certainly not be compelled to complete new tax rolls in the place of those which have passed beyond its reach in order that this tax should have a roll upon which it could be extended. Such would be ultra petitionem, and, of course, could not be allowed."

The position taken is fully supported by the authorities, and this relief should be denied. Mandamus will not go to the board of commissioners after the levy of a tax has been completed, the tax has been extended on the rolls, and the rolls have been placed in the hands of the tax collector for collection, because it would be nugatory for want of power in such board to make the correction required, it being *functus officio*. *Gaither v. Tax Coll.*, 40 La. Ann. 362, 4 South. 210; High, §§ 140, 141.

The right to interfere in the proceedings of a corporation by mandamus is one of so summary a character that it should be asserted at the earliest convenient time or it will not be sustained. 1 *Redfield on Railroads*, 692.

Nor will the writ be granted, commanding a tax to be imposed for a special and particular purpose, after the time prescribed for its levy has elapsed. High, p. 120; *Ellicott v. Levy Court*, 1 Har. & J. (Md.) 360.

A mandamus to compel the assessment of a tax will not be granted where the time within which the assessment can lawfully be made had already passed. *Wells v. Hyattsville*, 77 Md. 125, 26 Atl. 357, 20 L. R. A. 89.

It is a fundamental principle of the law of mandamus that a writ will never be granted in cases where, if issued, it would prove unavailing.

So it is a sufficient objection to issuing the writ to compel the performance of an official duty that the officer is *functus officio* and therefore unable to comply with the writ, so that it would prove unavailing if granted. High, p. 35; *State v. Waterman*, 5 Nev. 323.

Mandamus will not lie to compel performance at an unauthorized time. *Stacy v. Hammond*, 96 Ga. 125, 23 S. E. 77; *Bourd v. County Com'rs*, 20 Md. 449; *Board v. Klein*, 51 Miss. 807; *State v. Medbery*, 7 Ohio St. 532.

The court will refuse a mandamus where there has been an unreasonable delay in applying for it. In determining what will con-

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stitute such unreasonable delay or laches as will defeat the right to a mandamus, regard should be had to the circumstances justifying the delay, to the nature of the case, the relief demanded, and the question of whether the rights of defendants or other persons have been prejudiced by the delay. 107 La. 162, 31 South. 662, McCabe v. Police Board; A. & E. Ency. of Law (2d Ed.) vol. 19, p. 775.

The court may, in the exercise of its discretion, deny an application for mandamus made after an unreasonable delay, especially where the delay has resulted prejudicially to the rights of respondents or others interested. 26 Cyc. p. 393, and note 8; State ex rel. Fisher et al. v. Mayor, etc., New Orleans, 121 La. 762, 46 South. 798.

Plaintiff's counsel refer the court to Dugas v. Town of Donaldsonville, 33 La. Ann. 670; Funke v. Dreyfus & Co., 34 La. Ann. 86, 44 Am. Rep. 413; State v. Knowles, 117 La. 130, 41 South. 439; Arkansas S. Ry. Co. v. Wilson, 118 La. 399, 42 South. 976; and to People v. Board, 12 Barb. (N. Y.) 446, quoted in volume 19, A. & E. Ency. of Law, p. 756, wherein it is declared that:

"Where mandamus is sought to enforce a substantial right, as distinguished from correction of mere errors in practice, delay not exceeding the time allowed by the statute of limitations for an action for similar injuries ought not to prejudice the application."

Defendant pleads prescription against the continued existence and enforcement of special tax laws. We do not think they have legal interest to raise such plea.

We think the judgment appealed from is correct, for several reasons: First. The taxes herein referred to have not been transferred to or assigned to the plaintiff company.

Second. Mandamus should not issue when there has been an unreasonable delay in applying for it, especially where the rights of third parties will be prejudiced by the delay.

Third. When the taxpayers of a town have voted that all the property in the town shall (in aid of the construction of a railroad) be taxed during specified years at five mills on the dollar upon the assessments of those years, and the beneficiary of the taxes takes no steps to compel the town authorities to levy, assess, and collect the same until years after the taxes should have been levied, assessed, and collected, the court will not order mandamus to issue in aid of the levying, assessing, and collection of the taxes.

For the reasons herein assigned, it is hereby ordered, adjudged, and decreed that the judgment appealed from be, and the same is hereby, affirmed.

PROVOSTY, J., concurs in the decree, and solely on the ground that the application for mandamus comes too late.

No. 17,387.

STATE v. RYAN.

(Supreme Court of Louisiana. Feb. 1, 1909.)

1. CRIMINAL LAW (§ 720*) — ARGUMENT OF COUNSEL.

The remarks of the district attorney to the jury complained of by the accused were within the limits of legitimate argument.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 720.*]

2. CRIMINAL LAW (§ 457*)—OPINION EVIDENCE—INTOXICATION.

Testimony given by the accused in his own behalf that at the time he had made certain statements "he was drunk or under the influence of dope" can be disproved by the testimony of "nonexpert" witnesses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1046; Dec. Dig. § 457.*]

3. CRIMINAL LAW (§ 829*)—REQUESTED INSTRUCTION COVERED BY INSTRUCTIONS GIVEN.

The refusal of the district judge to give a certain special charge, which he was requested to give to the jury on the ground that "several paragraphs of that charge were contrary to law" and because the general charge covered the law of the case, was not reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

4. CRIMINAL LAW (§§ 913, 972*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—MOTION IN ARREST—GROUNDS.

The application of the accused for a new trial was not well grounded. The defendant was indicted under section 832, Rev. St., as amended by Act No. 72, p. 95, of the Acts of 1898, charging him with receiving and having money that had been feloniously taken, stolen, embezzled, or by false pretenses obtained from any other person, knowing the same to have been stolen. The reason assigned for a new trial was that the person from whom the evidence showed defendant had received the money had been himself tried on the same charge as the defendant before the district court for Calcasieu and had been acquitted, and therefore defendant should by reason of that fact be also acquitted. The court held that the acquittal of that party did not affect the case. The parties were tried before different juries. Case differentiated from State v. Antoine, 42 La. Ann. 945, 8 South. 529.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2423; Dec. Dig. §§ 913, 972.*]

(Syllabus by the Court.)

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; Edmund Dennis Miller, Judge.

Kaye Ryan was convicted of receiving stolen money, and he appeals. Affirmed.

Mitchell & Rosenthal, for appellant. Walter Gulon, Atty. Gen., and Joseph Moore, Dist. Atty. (Leland Hugh Moss and Ruffin Golson Pleasant, of counsel), for the State.

Statement of the Case.

NICHOLLS, J. The indictment in this case charged that Kaye Ryan \$50, in lawful money of the United States of America, of the value of \$50 in said lawful money, of the property of George Look, then lately

before feloniously stolen, taken, carried away, he, the said Kaye Ryan, then and there well knowing said money so to have been feloniously stolen, taken, and carried away, did then and there feloniously receive, conceal, and have, contrary to the form of the statute of the state of Louisiana in such cases made and provided, in contempt of the authority of the state, and against the peace and dignity of the same.

The prosecution in this case was based upon section 832 of the Revised Statutes of 1870, as amended by Act No. 72, p. 95, of the Acts of 1898. As so amended the section reads:

"Whoever shall receive, have or buy any goods, chattels, money or things of value, that shall have been feloniously taken, stolen, embezzled or by false pretenses obtained, from any other person, knowing the same to have been taken, stolen, embezzled or by false pretenses obtained shall suffer imprisonment with or without hard labor not exceeding two years. Whoever shall receive, harbor, or conceal any thief knowing him or her to be a thief, shall suffer imprisonment not exceeding one year."

Appellant's complaints of error are embodied in five bills of exceptions. From the first bill it appears that the state was permitted to establish by several witnesses that on the night when he is alleged to have made certain denials to the sheriff he was in apparent normal condition, and not, as he had testified to, that he was drunk and under the influence of dope at the time when he made such denials, and that counsel of accused objected to the testimony of said witnesses on the ground that they were not qualified either as physicians or experts, and could not testify, therefore, as to the mental condition of the accused. The court overruled the objection, assigned as a reason that it was permissible to allow witnesses, even though not experts or physicians, to testify as to the conduct and conditions of the mind and body of an accused at the time of his arrest as well as before an act; that in this case Ryan had made a confession, which had been admitted in evidence. As a witness in his own behalf he had testified that he had no recollection of having made such a confession, and that at the time he was drunk, or under the influence of "dope," and this testimony was to show that his mind was clear, and as a matter of fact that he was not drunk and had not been "doped." That it was a well-established rule that non-expert witnesses may testify as to whether a man is drunk or sober. From bill of exception No. 2, it appears the district attorney in his argument to the jury stated—

"that it was common knowledge that in many parts of the country, particularly in New York, there were many criminals, high in social and public life, being tried and convicted of crime, and that no doubt thousands of men could be produced to testify that previous to that time these men had spotless reputations,"

—to which objection was made by defendant's counsel, on the ground that these remarks were improper and calculated to bias and

prejudice the minds of jurors and affect their verdict in a manner prejudicial to defendant. He asked the court, therefore, to discharge the jury. The court refused so to do, assigning as his reason that no possible injury could have been suffered by the accused on account of the language employed by the district attorney in making his illustration. Accused had offered evidence of his previous good character, and the district attorney was arguing as to the weight and effect to be given to proof of good character when met with convincing proof of guilt. The court instructed the jury to disregard the remarks of the district attorney. It did this, not because it thought the remarks prejudicial, but simply out of abundance of caution.

From the third bill of exception it appears that the court refused to give the following special charges to the jury:

"(1) Unless you believe beyond a reasonable doubt that the person from whom the goods are alleged to have been received was the thief, it is your duty to acquit.

"(2) Unless you believe beyond a reasonable doubt that the accused knew at the time he received the goods that the goods were stolen, it is your duty to acquit.

"(3) Receiving goods from one who himself had guiltily received goods from the thief is not receiving stolen goods.

"(4) One who receives goods though knowing them to be stolen is not guilty if his purpose is to return them to the owner, or merely to detect a thief.

"(5) In all cases, in order for the jury to convict, you must be convinced beyond a reasonable doubt that the accused knew at the time he received the goods that they were stolen, and that he knew that the person from whom he received the goods was the thief."

The court refused to give the special charges because the special charges contained many paragraphs which are contrary to law and cannot be sustained by sound reason or authority. The charge by the court was given orally, and was taken down by a stenographer at the instance of counsel for the accused, and, although it was perhaps not as concise as if specially prepared in writing, it was not at all complained of, the only complaint being that the court refused to give the special charges.

Bill of exception No. 4, was taken to the refusal of the court to grant a new trial for the reason stated in the application for the same, which was on the ground of newly discovered evidence, and that the verdict of the jury was contrary to the law and the evidence. Appellant alleged in that application that he was tried and convicted on the 11th November, 1908, on the charge of receiving stolen money, knowing the same to be stolen, and it was proved and was a conceded fact that the defendant received the money from one Lee Carrier, and that the said Lee Carrier was subsequently tried and found not guilty; further, for the reason that the newly discovered evidence referred to was as follows:

"That Mrs. Warren Lovelace received one of the alleged stolen bills from either the Lake

Charles National Bank of Lake Charles or the First National Bank of Lake Charles, and that the said Mrs. Lovelace gave the money to her niece, Miss Fanny Lovelace, who in turn gave it to Mr. Arthur Vatter, who in turn gave it to Mr. Fred McLeod, who in turn gave it to the First National Bank of Lake Charles, president of said bank being Capt. George Look, who is the same George Look from whom the money is alleged to have been stolen, and that the cashier of the First National Bank of Lake Charles asked the said Fred McLeod where he obtained the said bill, and at the same time informed him that the bill was one of the bills alleged to have been stolen from Capt. George Look on the night of September 17, 1908, nothing having been said during the trial of the said Kaye Ryan concerning the said bill that had turned up at the First National Bank in the manner aforesaid. That Lee Carrier was tried before the district court for Calcasieu on the same charge as the defendant Kaye Ryan, and the said Lee Carrier was acquitted; that unless the said Lee Carrier had stolen money in his possession, knowing the same to be stolen, that the said Kaye Ryan, the defendant, could have had knowledge that the said money was stolen, as he, the said Kaye Ryan, received the said money that he had in his possession from the said Lee Carrier."

The court overruled the motion for a new trial because the evidence fully sustained the verdict. The fact that Lee Carrier was not convicted does not affect the guilt of Kaye Ryan. A different jury sat upon the case of Lee Carrier from that that sat on the case of Ryan. It happens sometimes that the jury fails to appreciate the probative force and effect of evidence, and the case of Lee Carrier is one in point. The case against Kaye Ryan and Lee Carrier depended largely upon circumstantial evidence, and, while it is true that the evidence tended to show that the stolen property found in the possession of Kaye Ryan had come from Lee Carrier and that Lee Carrier was acquitted, that is no reason why Kaye Ryan cannot be held where the case is fully made out as to him. As regards the newly discovered evidence, the statement in the application for a new trial is substantially correct as to the transmission of the bill found to the several parties mentioned, and Mr. McLeod was not absolutely certain as to what Mr. North, the cashier, is positive—that he did not say that the bill in question was one of the stolen bills. Four \$50 bills, together with other money, had been stolen from Capt. George Look. Two of them were traced into the possession of Lee Carrier, and he had turned one of these two bills over to the accused. Two other bills were never found, and the alleged newly discovered evidence relates to these two missing bills. The McLeod incident is at a period some time after the arrest of both accused parties. The four \$50 bills stolen were gold certificates. Mr. North, upon receiving the \$50 bill from Mr. McLeod, asked one of the tellers, in the presence of Mr. McLeod, to give him (Mr. North) the numbers of the four stolen bills, at the time telling Mr. McLeod why he (North) was doing so. The number of this bill however proved to be entirely different. To this Mr. North swore positively, but even if this bill had been one

of the Look notes that would not relieve Kaye Ryan of having in his possession one of the stolen bills, knowing it to be stolen property, and with the intent to deprive the owner of the same.

Opinion.

Bill of exception No. 5 was reserved to the refusal by the trial judge to grant a motion in arrest of judgment. As the matters which were urged in support of that motion were not apparent on the face of the record, but required the introduction of evidence to establish them, it is unnecessary to discuss the bill. Motions of that character must be based upon matters apparent on the face of the record.

Bill No. 1. There was no error committed by the trial judge in permitting a nonexpert witness to testify that the defendant was not "drunk" or "under the influence of dope," as he had testified he was.

Jones on Evidence, vol. 2, § 362; Hennen's Digest, Title "Evidence," subd. 16, p. 569; State v. Marceaux, 50 La. Ann. 1142, 24 South. 611; State v. Lyons, 113 La. Ann. 973, 37 South. 890; Encyclopedia of Pleading & Practice, vol. 8, pp. 745, 746; State v. Smith, 106 La. Ann. 36, 30 South. 248; State v. Brown, 111 La. Ann. 170, 35 South. 501.

Bill No. 2. The district attorney in his remarks to the jury did not pass beyond the limit of legitimate arguments. Defendant had no ground of complaint. State v. Thompson, 109 La. Ann. 296, 33 South. 320; State v. Forbes, 111 La. Ann. 473, 35 South. 710; State v. Thomas, 111 La. Ann. 804, 35 South. 914; State v. Feazell, 116 La. Ann. 284, 40 South. 698.

Bill No. 3. The general charge of the judge covered the law of the case. He would not have been called upon to give an additional charge even had it been correct. Marr's Crim. Jurisp. p. 790. The trial judge's reason for refusing to give the special charge which was requested warranted his ruling.

Bill No. 4. We find no reversible error in the refusal of the court to grant a new trial. The fact that Lee Carrier from whom the defendant Ryan received the stolen money was acquitted (for aught we know, on different evidence) would furnish no reason why the defendant, who was convicted, as the trial judge declares, on full evidence of his guilt, under the statute, should be granted a new trial. The statute under which the present defendant was found guilty is different in its terms from that in the case of State v. Antoine, 42 La. Ann. 945, 8 South. 529. The accused and Carrier were tried under distinct indictments by different juries. Marr's Crim. Jurisp. p. 207, § 126; Murray v. Pontchartrain R. Co., 31 La. Ann. 491.

Bill No. 5. We have already said that the motion in arrest was properly refused, as it was based on reasons not apparent on the face of the record.

We find no ground for reversing the judgment. It is therefore affirmed.

(159 Ala. 340)

REACH v. QUINN.

(Supreme Court of Alabama. Jan. 19, 1909.)

**1. APPEAL AND ERROR (§ 680*)—RECORD—QUESTIONS PRESENTED—RULING ON DEMUR-
RER.**

Where a minute entry recites that a demurrer to a count as amended was sustained, but the record does not show what the amendment was, the court's action cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2882; Dec. Dig. § 680.*]

2. MALICIOUS PROSECUTION (§ 48*)—ACTIONS—SUFFICIENCY OF COMPLAINT.

A count in a complaint averring that defendant maliciously and without probable cause made an affidavit against plaintiff on a charge of refusing to work the public road, as a proximate result of which plaintiff was arrested and required to give bond, and that the charge had been judicially investigated and plaintiff discharged, is insufficient as a count in case for malicious prosecution, because of its omission to aver the issuance of process.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 93; Dec. Dig. § 48.*]

3. FALSE IMPRISONMENT (§ 20*)—ACTIONS—SUFFICIENCY OF COMPLAINT.

The count is insufficient as a count in trespass for false imprisonment, because it fails to aver that defendant arrested and imprisoned plaintiff, or caused him to be arrested and imprisoned.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. § 86; Dec. Dig. § 20.*]

4. CRIMINAL LAW (§ 218*)—WARRANT—SIGNATURE OF MAGISTRATE—STATUTORY PROVISIONS.

Under Cr. Code 1896, § 5208, providing that a warrant must be signed by the magistrate with his name and initials of office, or the same must in some way appear from the warrant, a warrant issued by a justice of the peace, but signed by him as an individual, and not in any official character or with the initials of his office, which nowhere appears thereon, was invalid.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 448; Dec. Dig. § 218.*]

5. EVIDENCE (§ 49*)—JUDICIAL NOTICE—JUSTICES OF THE PEACE.

While a court will take judicial notice of who are justices of the peace, where a warrant is signed with the name of a justice of the peace, but as an individual, without his initials of office, the court cannot take judicial notice that the signature is that of a justice of the peace, since it cannot judicially know that there is but one person by that name.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 71; Dec. Dig. § 49.*]

6. EVIDENCE (§ 415*)—PAROL EVIDENCE—ADDING TO TERMS OF WRITTEN INSTRUMENT.

As the warrant should be valid on its face to justify an officer in serving it, it could not be aided as to its validity by parol evidence that the person who signed it was a justice of the peace.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1863; Dec. Dig. § 415.*]

Appeal from Circuit Court, Bibb County; B. M. Miller, Judge.

Action by W. L. Reach against Oliver J. Quinn. From the judgment, both parties appeal. Affirmed.

The fifth count was as follows: "Plaintiff claims of defendant said sum of \$500 as damages, for that said defendant maliciously and without probable cause therefor made

an affidavit against plaintiff on a charge of refusing to work the public road, and as the proximate result of the making of such affidavit the plaintiff was arrested, as the defendant intended he should be, and required to give bond for his appearance for trial upon said charge before J. W. Jones, justice of the peace of beat 11, Bibb county, Ala.; and plaintiff avers that such charge had been judicially investigated and determined, and plaintiff herein discharged. And plaintiff avers that by reason of such prosecution the plaintiff lost one day's work, of the reasonable value of \$6, for which he specially sues." The demurrers raised the question decided in the opinion.

Lavender & Thompson, for appellant. Daniel Collier and John T. Ellison, for appellee.

DOWDELL, J. The first assignment of error goes to the ruling of the court below in sustaining a demurrer to the fourth count as amended. The minute entry recites that the demurrer to the fourth count as amended is sustained, but it nowhere appears from the record in what the amendment to the fourth count consisted. In this state of the record, not knowing in what the amendment consisted, we cannot review the court's action.

The fifth count, whether intended as a count in case for a malicious prosecution or as a count in trespass for false imprisonment, was in either aspect faulty, and subject to the demurrer interposed. As a count in case for malicious prosecution, it is faulty omitting to aver the issuance of process. *Davis v. Sanders*, 133 Ala. 275, 32 South. 499, and authorities there cited. As a count in trespass for false imprisonment, it fails to aver that the defendant arrested and imprisoned, or caused to be arrested and imprisoned, the plaintiff. Manifestly it was intended by the pleader as a count in case for malicious prosecution, since it contains all of the necessary averments of such a complaint (form 20, Code 1896, p. 947, c. 91), except the averment of the issuance of the warrant.

There was no error in excluding the warrant offered in evidence. Section 5208 of the Criminal Code of 1896, in reference to warrants, provides, among other things: "And the warrant must be signed by the magistrate, with his name and initials of office, or the same must in some way appear from the warrant." The statute in the latter clause of the foregoing extract seems to emphasize the requirement as to the signature of the officer and the initials of his office appearing on the warrant in order to give it validity. The warrant offered in evidence was signed by "J. W. Jones" as an individual, and not in any official character, or with the initials of his office, and this nowhere appeared on the warrant. It is no answer in such case to say that the courts judicially know who are justices of the peace. This would be true if J. W. Jones had signed the warrant

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in his official character, by designating himself as such officer by the initials of his office, or letting that fact somewhere appear on the warrant. We cannot judicially know that there is but one J. W. Jones, and hence when J. W. Jones signs a paper as an individual, without more, we cannot judicially know that he is a particular officer. We do not think that the paper can be aided as to its validity by parol evidence of the fact that the J. W. Jones who signed it was a justice of the peace. The warrant should be valid on its face to justify the officer in executing it. In this connection, see *Oates v. Bullock*, 136 Ala. 537, 33 South. 835, 96 Am. St. Rep. 38.

We find no reversible error in the record, and the judgment appealed from will be affirmed.

Affirmed.

SIMPSON, ANDERSON, and McCLELLAN, JJ., concur.

(158 Ala. 234)

SMALL et al. v. HOCKINSMITH et al.

(Supreme Court of Alabama. Dec. 18, 1908.
Rehearing Denied Feb. 5, 1909.)

1. WILLS (§ 740*)—CONTINGENT REMAINDERS—CONVEYANCE.

Where a will devised land to one for life, with remainder to two others, the interests in remainder to be devested on the death of a remainderman without issue pending the life estate, and such devested interest to pass to the surviving remaindermen, a conveyance by one of the remaindermen to the life tenant passed no title, since the interest of the grantor was contingent on her surviving the life tenant.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1888, 1890, 1891; Dec. Dig. § 740.*]

2. TRUSTS (§ 105*)—CREATION—CONSTRUCTIVE TRUSTS—CONVERSION OF PROPERTY.

Where a life tenant of personality took possession of the property and invested it in realty, she became at least a quasi trustee for the remaindermen as to the sum invested, and could not destroy their rights in the corpus of the trust estate not consumed in the using.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 156; Dec. Dig. § 105.*]

3. TRUSTS (§ 350*)—FOLLOWING TRUST PROPERTY—RIGHTS OF REMAINDERMEN—CONVERSION BY LIFE TENANT.

Where a life tenant took possession of the personal estate and invested it in realty, and thus rendered herself a trustee for the remaindermen, the remaindermen could elect to take the realty, with any enhanced value, in lieu of the funds invested therein, if the rights of innocent purchasers for value did not intervene.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 515-517; Dec. Dig. § 350.*]

4. TRUSTS (§ 365*)—FOLLOWING TRUST PROPERTY—ACTION BY REMAINDERMEN—LACHES AND LIMITATIONS.

In order to bar a remainderman from maintaining a bill to enforce her election to take realty, where the life tenant, who was also executrix of the estate, invested the corpus of the estate in realty without making any settlement, and thus stood in the position of trustee to the remainderman, acquiescence for the prescriptive period of 20 years after the conversion must be

shown; the statute of limitations not applying to parties so related.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 571-573; Dec. Dig. § 365.*]

5. TRUSTS (§ 365*)—FOLLOWING TRUST PROPERTY—ACTIONS BY REMAINDERMEN—LACHES.

Where the life tenant in personality, after investing the funds in realty, recognized the trust character of the land in favor of the remaindermen, she could not assert their acquiescence in the purchase for a long period, though short of 20 years, so as to bar the remaindermen from maintaining a bill to enforce her election to take the realty in lieu of the funds invested therein, and the life tenant's heirs and devisees stand in the same position.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 571-573; Dec. Dig. § 365.*]

6. EXECUTORS AND ADMINISTRATORS (§ 224*)—PRESENTATION OF CLAIMS—EQUITABLE CLAIMS—NECESSITY.

Where the life tenant of personality invested it in realty, so as to become a trustee of the realty for the remaindermen, the statute of non-claim, relating to the presentation of claims against an estate to the administrator, would not apply to bar an action by the remaindermen to enforce their equity in the lands; their right not being a money demand.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 780; Dec. Dig. § 224.*]

Appeal from City Court of Montgomery; A. D. Sayre, Judge.

Bill by Mary L. Hockinsmith and others against William H. Small, individually and as administrator of Sarah M. Cooner, deceased, and others. From a decree overruling demurrers to the bill and adjudging pleas thereto insufficient, defendants appeal. Affirmed.

Arrington & Houghton, for appellants.
Gunter & Gunter and C. P. McIntyre, for appellees.

McCLELLAN, J. R. H. Cooner by his last will and testament created in his estate a life estate in his surviving widow, and remainder in Mary L. Hockinsmith and Mary E. Le Sage, subject to divestiture by the death, pending the life estate, of one of such remaindermen without issue, and the investiture, under that condition, of the remainder in the survivor of such remaindermen. The life tenant, Mrs. Cooner, in 1889 became, it appears, the grantee of all the interest of Mary E. Le Sage in the estate of R. H. Cooner. In order that any interest of Mary E. Le Sage should have passed to Mrs. Cooner by that conveyance, Mary E. Le Sage must have survived Mrs. Cooner, who died in May, 1906. If Mary E. Le Sage died without issue before Mrs. Cooner died, the remainder devised to her was divested, and passed to Mrs. Hockinsmith, the original complainant; the conveyance to Mrs. Cooner being vain in the transmission of an interest or estate in the property. But, if Mary E. Le Sage survived Mrs. Cooner, the remainder of Mary Le Sage became indefeasible, and passed to Mrs. Cooner, and was devised by her to the cross-complainant. As these considerations indicate,

the controlling inquiry is when Mary E. Le Sage died, if she is in fact dead, as the original bill alleges, which allegation is denied by the cross-bill. Such was the view of the court below, and we approve it.

The original bill proceeds on the idea that Mary E. Le Sage died without issue pending the life estate, and hence the conveyance to Mrs. Cooner carried no interest or estate of Mary E. Le Sage. If so, the bill's theory that Mrs. Hockinsmith became entitled, as the survivor, to the defeated remainder of Mary E. Le Sage, and the devise of Mrs. Cooner to Russell Cooner Hockinsmith, the cross-complainant, was a nullity, and the original complainant could follow the converted (by the life tenant) substance of the remainder and establish a trust therein, must be sustained. The cross-bill, predicated upon the theory that the remainder of Mary E. Le Sage became indefeasible by her survival of the life tenant, Mrs. Cooner, and hence passed to Mrs. Cooner the Le Sage remainder, under the conveyance executed in 1889 to Mrs. Cooner, thus clothing Mrs. Cooner with the estate devised to Russell Cooner Hockinsmith, the cross-complainant, is likewise, on those conditions, sound; and we affirm that conclusion of the city court.

Necessarily, neither the original nor cross bill is, on its face, without equity, nor are they subject to the demurrers interposed.

From the original bill it appears that the personal assets of the estate of R. H. Cooner were taken possession of by the life tenant as such and that she invested those assets in realty. This created a resulting, not a constructive, trust in the realty so purchased, in favor of the remaindermen. The life tenant was powerless to destroy, by any act of hers, the rights of the cestuis que trust to the corpus, not consumed in the using, of the trust estate, and the investment of it in realty clothed the remaindermen with the right to elect to take the realty, whether enhanced in value or not since the purchase, in lieu of the funds so invested, provided the rights of innocent purchasers for value and without notice have not intervened. *M. v. Le Clair*, 11 Wall. 217, 236, 20 L. 292; *1 Perry on Trusts*, § 127-8; *Tham v. Bert*, 61 Ala. 340, 346; *Tilford v. T*, Ala. 120.

In the original bill, after a version by Mrs. Cooner of fur R. H. Cooner in which she only, which conversion was is alleged, by the purchaser estate, it appears that, "no deeds were so taken in own name, the said S. recognized that the said land with assets of the said Cooner were trust will of the said Cooner insufficient below purchases—"completed in 1887, the ed until Mr.

acquiesced in the condition of such title, the ownership and control of such lands, to the filing of the bill (February, 1907). Wherefore, it is averred, the complainant is barred in the premises, first, by the statute of limitations of 10 years; second, by the age and staleness of her demand. It is also averred in the bill that Mrs. Cooner, executor of the will of R. H. Cooner, deceased, never made any inventory of the estate of R. H. Cooner, deceased, nor had any final settlement or administration of that estate, and that at the time of the death of R. H. Cooner the complainant and Mary E. Le Sage were young girls, without advice and without knowledge of the trust for them in the will of Sarah M. Cooner.

Bass v. Bass, 38 Ala. 408, 7 S. 271. The court would be a decision in immediate for at least two facts, absent it and present in this, viz.: First, Bass it was not averred that theatrix had made settlement of her tion, thus warranting, as was 1 sumption, after more than 20 ye settlement had been had, and atratrix had been charged as fo for the conversion, by inve funds in land, taking title i the life tenant (administratr so converted; second, that th v. Bass no allegation of re trust character, for the bene dermen, in which the life lands. These are, in our qualifying Bass v. Bass as present appeal. A carefu that opinion convinces tha controlled by those facts notwithstanding the obse Bass v. Bass does affirm of the conclusion, that not postponed in right t bought with converted funds, to the falling in that such right accru upon the act of c

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counsel remarked, in the presence of the jury, that he would have been satisfied by the jury.

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(Supreme Court of Arkansas, Jan. 20, 1909.)
1. CRIMINAL LAW § 101.—The purpose of Ju-
Loc. Acts 1907, p. 283, abolishing the coun-
ty court of Lee county, and creating the county
law and equity court, creating the Lee county
cases "pending" court, creating the Lee county
equity court, in the same manner that all
equity are created in the same manner that all
proceedings in which a warrant for the arrest of
a person had been issued, but not served, at the
time of such transfer.

[Ed. Note.—For other cases, see Criminal
Law, Dec. Dig. § 101.
For other definitions, see Words and Phrases,
vol. 8, pp. 527-528; vol. 5, p. 113.]
2. CRIMINAL LAW § 101.—COMMENCEMENT
OF PROSECUTION.—LITIGATION.—SERVICE OF
WRIT.

Code 1898, § 5074, provides that a prosecu-
tion may be commenced within the meaning of
the chapter, by the finding of an indictment, the
issuing of a warrant, or the arrest of the of-
fender. Held, that such commencement stops
limitations and invokes the jurisdiction of the
court over the subject-matter, the offense, though
jurisdiction of the person is not obtained by
service of the writ.

[Ed. Note.—For other cases, see Criminal
Law, Cent. Dig. § 282; Dec. Dig. § 151.]
3. CRIMINAL LAW § 101.—JURISDICTION.
Loc. Acts 1907, p. 283, abolishing the Lee
county court, and Gen. Acts 1907, p. 283, creat-
ing the Lee county law and equity court, de-
clares, in section 8, that the trial of misdemean-
ors returned by Justices of the peace on appeal
from Justices or other courts shall be on com-
plaint of the solicitor. Held, that a case trans-
ferred by the solicitor from the county court to the
law and equity court was not within such trans-
fer, and that the solicitor was not required to
file a complaint therein.

[Ed. Note.—For other cases, see Criminal
Law, Dec. Dig. § 101.]
4. CRIMINAL LAW § 101.—JURISDICTION.
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petit larceny may be sustained under a complaint charging such an offense, though the proof shows that the value of the property stolen is sufficient to make the offense grand larceny.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 623; Dec. Dig. § 192.*]

Appeal from Law and Equity Court, Lee County; A. E. Barnett, Judge.

Joe Will Bryant was convicted of petit larceny, and he appeals. Affirmed.

B. T. Phillips, for appellant. Alexander M. Garber, Atty. Gen., for the State.

McCLELLAN, J. On February 20, 1906, a warrant was regularly issued, on affidavit charging defendant with petit larceny, out of the county court of Lee county, and was, of course, returnable thereto. It was executed on March 8, 1908. On July 1, 1907, the Lee county law and equity court came into legal existence. Acts Reg. Sess. 1907, p. 263. By act approved February 28, 1907 (Loc. Acts 1907, p. 289), the county court of Lee county was abolished, and it was provided that "all cases pending in said county court of Lee county are hereby transferred to the Lee county court of law and equity." The denial of jurisdiction of the law and equity court to try this defendant is predicated upon the idea that the transfer of pending causes thereto did not embrace prosecutions instituted in the county court, process in connection with which had not been executed. The word "pending" cannot be given the restricted meaning ascribed to it by the appellant. The intended meaning of the term "pending" was that all undecided cases in the county court should pass to the law and equity court. That is the common acceptance of it, as here employed. The prosecution of offenders the statute (Code 1896, § 5074) provides "may be commenced, within the meaning of this chapter, by finding an indictment, the issuing of a warrant, or by binding over the offender." As indicated, such commencement of the prosecution stops the running of the statutes of limitation in the premises, and manifestly invokes the jurisdiction of the court of the subject-matter, the offense, notwithstanding jurisdiction of the person is not obtained by service of the writ. And we know of no statute compelling the return within any period of the unserved writ. Clearly a prosecution circumstanced as this one was in suspense in the county court, was undetermined there, and was subject to the provision for transfer of all pending cases to the law and equity court. Any other construction of the act would, in effect, declare its intention to have been to nullify prosecutions in which a fleeing defendant had not been arrested. No such premium on flight is created by the act.

Section 8 of the act creating the law and equity court requires the trial of misdemeanors "returned by justices of the peace, or appeals from justices or other courts," to be

"tried upon complaint of the solicitor." This case, transferred by the act abolishing the county court, does not belong to either of the classes enumerated or stated in section 8; and hence the solicitor was not required to file a complaint.

The proof on the trial showed without conflict that the property lost by Thornton was \$10 or \$12 in money. Under the larceny statute the taking of property of that value is grand larceny. The defendant insists that he could not, under this state of proof, be convicted of petit larceny as charged in the affidavit. The contention cannot be sustained as the statute now stands. The result would have probably been different, had the statute been as in the Code of 1896. See *Stone's Case*, 115 Ala. 121, 22 South. 275. But Code 1896, §§ 5049, 5050 wrought such a change as that a conviction of petit larceny could be had under a charge of grand larceny, thus eliminating the indivisible effect, in respect of these crimes, as upon the statute. Code 1886, § 3789; *Storr's Case*, 129 Ala. 101, 29 South. 778.

Such being the case, the conviction of the defendant of petit larceny under the later statute (Code 1896), notwithstanding the proof showed a value sufficient to make the offense larceny, affected to bar a prosecution for grand larceny for the same act. In consequence, the defendant is unharmed by, and cannot complain of, a conviction of a lesser grade of offense than that the value taken would have sustained. The testimony tended to show that Thornton, whose money was alleged to have been taken by defendant, told defendant that he had found out who got his money, and the further testimony tending to show that defendant left defendant's wagon and disappeared was clearly admissible, in connection with other testimony tending to show flight and as evidencing a noninnocent motive for such flight, if the jury so contemplated his sudden departure.

The affirmative charge for defendant was well refused. The question of defendant's guilt was for the jury. The trial was without prejudicial error, and the judgment is affirmed.

Affirmed.

TYSON, C. J., and DOWDELL and ANDERSON, JJ., concur.

(158 Ala. 496)

K. B. KOOSA & CO. v. WARTEN.

(Supreme Court of Alabama. Jan. 14, 1909.)

1. TRIAL (§ 114*)—REMARK OF COUNSEL.

The statement of counsel, at the trial on execution of the writ of inquiry to assess damages on a default judgment, that this was an unusual case, was true, and could do no injury.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 114.*]

2. LANDLORD AND TENANT (§ 169*)—INJURY TO GOODS—DAMAGES.

The measure of damages for injury to goods of a tenant from water through negligence of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the landlord is the difference between the market value of the goods just before and just after the flooding.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 666; Dec. Dig. § 169.*]

3. LANDLORD AND TENANT (§ 169*)—ACTIONS FOR INJURIES—EVIDENCE.

Testimony sought by the question to a qualified witness, "State in bulk the reasonable market value of the injured goods prior to their injury," is competent, material, and relevant on the issue of damages to goods of a tenant from water escaping through negligence of the landlord.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 169.*]

4. APPEAL AND ERROR (§ 232*)—SCOPE OF REVIEW—OBJECTIONS MADE BELOW.

No other ground of objection to evidence than that specifically made in the objection to the question to witness, which was overruled, can be considered on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1430; Dec. Dig. § 232.*]

5. EVIDENCE (§ 472*)—OPINIONS—INVADING PROVINCE OF JURY.

The question of injury not being involved, but having been adjudicated against defendant by the default judgment, the question, on proceedings to assess damages, "State in bulk the reasonable market value of the injured goods prior to their injury," does not invade the province of the jury.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2187; Dec. Dig. § 472.*]

6. TRIAL (§ 307*)—TAKING DEPOSITION TO JURY ROOM.

It is in the discretion of the court to refuse to allow depositions to be taken out by the jury.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 732-737; Dec. Dig. § 307.*]

7. TRIAL (§ 307*)—TAKING MEMORANDUM TO JURY ROOM.

The jury should have been allowed to take out an itemized list, admitted in evidence as an exhibit to a deposition, of the reasonable values before and after their injury of 42 items of goods.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 732-737; Dec. Dig. § 307.*]

8. TRIAL (§ 246*)—INSTRUCTIONS.

A charge, being at most only misleading in its first sentence, can be remedied by an explanatory charge.

[Ed. Note.—For other cases, see *Trial*, Dec. Dig. § 246.*]

9. LANDLORD AND TENANT (§ 169*)—ASSESSMENT—INSTRUCTIONS.

The charges, on a proceeding to assess damages from water leaking on the goods of a tenant through the negligence of the landlord, that the jury can assess as damages only such an amount as they are reasonably satisfied plaintiff suffered, and that the burden of proof is on him, and that he is entitled to recover only such damages as he has proved to their satisfaction, are unobjectionable, and properly given.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 169.*]

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

Action by K. B. Koosa & Co. against Henry Warten for damages. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

The bill of exceptions contains the following: "During the progress of the trial de-

fendant's counsel remarked, in the presence and hearing of the jury, that he would have to pay any judgment assessed by the jury. Objection was sustained to this statement by the court, and the counsel remarked that this was a very unusual case, the contest upon hearing to assess damages upon a default judgment. Objection to this remark was made by plaintiffs' counsel, and the court was asked to withdraw same from the jury. Objection was overruled, and exception was duly taken and noted. The witness Craig testified that he had been employed in the dry goods business for six or seven years, had been city salesman for the Steele-Smith Dry Goods Company, and had made periodical visits to the plaintiffs' store immediately before the alleged damage and injury, and had at plaintiffs' request visited the store and examined the goods injured immediately after the injury." Plaintiffs' counsel requested the court to allow the jury to take out with them an itemized list, admitted in evidence as Exhibit 1 to deposition of witness J. B. Koosa, and identified by said witness as being in his handwriting and containing a true and correct statement setting out the reasonable market value of each of 42 items of various kinds of dry goods, both before and after their injury. The following charges were given for defendant: "(2) You can assess as damages in this case only such an amount as you are reasonably satisfied the plaintiffs suffered in fact; and the burden of proof is on the plaintiffs. (3) The plaintiffs are entitled to recover only such damages as the plaintiffs have proven to your reasonable satisfaction."

Francis M. Lowe and Charles J. Dougherty, for appellant. Tillman, Grubb, Bradley & Morrow, for appellees.

DENSON, J. This action by tenants against their landlord to recover damages resulting from water leaking or escaping from water pipes in an upper story and flooding plaintiffs' goods located in the lower story. The complaint counts on negligence on the part of the landlord in the use of defective and unsound pipes. There was a judgment by default against the defendant, with a writ of inquiry. On the execution of the writ before the jury, questions were reserved to the rulings of the court on the admissibility of evidence and to the giving of charges for the defendant. These rulings and charges are by the plaintiffs now assigned as error.

The bill of exceptions contains these recitals: "Counsel for defendants said that this was a very unusual case, the contest upon hearing to assess damages upon a default judgment. Objection to said remark was made by counsel for the plaintiff, and the court was asked to withdraw the same from the jury. Objection was overruled, and ex-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ception was duly taken and noted." Passing by the indefiniteness of the manner in which the plaintiffs seek to present the question by the bill of exceptions, it occurs to the court that the statement, if of a fact, instead of a mere expression of opinion, is founded in truth, and that for this reason the court cannot be put in error on account of the ruling made. Moreover, we fail to see that any injury to the plaintiffs could have resulted from the statement.

The rule for the admeasurement of damages in this cause is the difference between the market value of the goods injured just prior to, and such value just after, the flooding. Witness J. W. Craig qualified himself to give testimony in regard to the value of the goods. He was asked by plaintiffs' counsel to "state in bulk the reasonable market value of the injured goods prior to their injury." The testimony sought by the question was competent, material, and relevant. These were the specific objections made to the question; and we can look to no other ground of objection, even if any exists. It is argued, however, that the question "involves" the province of the jury, and the case of *Central of Georgia Railway Co. v. Barnett*, 151 Ala. 407, 44 South. 392, is cited as authority to support the argument. But that case is not in point. Here the fact of injury is not contested. That question was adjudicated against the defendant in the judgment by default. Furthermore, the question of injury is not presented by the objections. The court should have overruled the objections to the question, and it committed reversible error in not so doing.

In not allowing the depositions of Koosa to be taken out by the jury the court committed no error. This was a matter which rested in the discretion of the court. *Smith's Case*, 142 Ala. 14, 27, 39 South. 329.

In refusing to permit Exhibit 1 to the deposition of Koosa to be taken by the jury as a memorandum the court committed reversible error. *Foster v. Smith*, 104 Ala. 248, 252, 16 South. 61.

Koosa's testimony not being set out in the bill of exceptions, this court cannot say that the trial court erred in giving charge 1 requested by the defendant. Furthermore, the charge is, at most, only misleading in its first sentence; and this infirmity could have been remedied by an explanatory charge.

Charges 2 and 3 are unobjectionable, and were properly given.

For the errors pointed out, the judgment of the trial court in respect to the assessment of damages is reversed, and the cause is remanded for another trial to determine the plaintiffs' damages.

Reversed and remanded.

DOWDELL, SIMPSON, and ANDERSON, JJ., concur.

(153 Ala. 470)

**BIRMINGHAM RY., LIGHT & POWER CO.
v. HINTON.**

(Supreme Court of Alabama. Nov. 19, 1908.
Rehearing Denied Feb. 5, 1909.)

1. INSANE PERSONS (§ 73*)—CONTRACTS—VALIDITY.

The contract of one permanently insane is void, and not merely voidable.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. § 125; Dec. Dig. § 73.*]

2. CONTRACTS (§ 92*)—VALIDITY OF ASSENT—MENTAL CAPACITY.

Where the mental incapacity to contract is merely temporary, as when the party is under the influence of opiates, the contract is merely voidable, and hence may be ratified or disaffirmed on the cessation of the temporary incapacity.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 411-414; Dec. Dig. § 92.*]

3. CONTRACTS (§ 266*)—DISAFFIRMANCE—RETURN OF CONSIDERATION—VOIDABLE CONTRACTS.

A contract made while under the influence of opiates being merely voidable, to disaffirm it, on the cessation of the disability, the consideration received thereunder must be returned.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 266.*]

4. APPEAL AND ERROR (§ 719*)—ASSIGNMENTS OF ERROR—RULINGS ON PLEADINGS.

Error in overruling demurrers will not be considered on appeal, where the record contains no assignment of error on the ruling.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2973; Dec. Dig. § 719.*]

5. APPEAL AND ERROR (§ 843*)—REVIEW—QUESTIONS CONSIDERED.

Assignments relating to the selection of the jury under the statute need not be considered on appeal, where upon another trial the jury will be selected under a different statute.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3331-3341; Dec. Dig. § 843.*]

6. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In an action for the death of intestate in a building claimed to have been ignited by sparks from defendant's locomotive, a charge that if intestate's child was placed in a safe place from the fire, and afterwards, through her negligence, was allowed to enter the burning building, and she was burned in attempting to rescue it, defendant was not liable, was properly refused as being abstract, where there was no evidence that intestate's negligence caused the child to go into the building.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

7. NEGLIGENCE (§ 56*)—PROXIMATE CAUSE—CONTRIBUTING CAUSE.

Though intestate's death was directly caused by blood poisoning resulting from her miscarriage if the miscarriage resulted from defendant's negligence, he was liable.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 69, 70; Dec. Dig. § 56.*]

8. RAILROADS (§ 490*)—FIRES—PRESUMPTIONS—CAUSE OF FIRE.

The recent passing of a train, and the discovery of fire in a building near the track shortly thereafter, raises no presumption of law that the fire was started by the train.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1713; Dec. Dig. § 490.*]

9. RAILROADS (§ 485*)—FIRES—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where the evidence showed that a passing train emitted large quantities of sparks, it

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

could not be said that a requested instruction that the recent passing of a train, and discovery of fire thereafter, raised no presumption that the fire was started by the train, was free from misleading tendency.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 485.*]

10. TRIAL (§ 253*)—INSTRUCTIONS—IGNORING EVIDENCE.

In an action for intestate's death by being burned in a building claimed to have been fired from defendant's locomotive, while she was attempting to rescue her child therefrom, requested instructions which ignored evidence that she was burned while attempting to rescue her child were properly refused.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

Appeal from City Court of Bessemer; William Jackson, Judge.

Action by Francis E. Hinton, administrator, against the Birmingham Railway, Light & Power Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The action is for damages of the plaintiff's intestate, who was burned, in the destruction of a house by fire, to an extent that it was claimed to have resulted in her death, and that the fire was set out by sparks from the defendant's locomotive engine. The evidence tended to show the burning of the house and that the fire was set out by sparks from defendant's locomotive. It also tended to show that all the persons who occupied the house got out of the house in safety, but that some of them were burned in an endeavor to rescue the furniture, when one of the little children followed their grown-up sister back into the house, when the mother, plaintiff's intestate, returned to the burning room in order to rescue the child that had returned to the burning house, and was burned. Defendant's evidence tended to show that the death resulted from other causes than the burn, and that the causes were not present when the burn was inflicted, as her death happened 13 months after the burn. The pleadings are sufficiently set out in the opinion.

The following charges were refused to the defendant: "(3) If the jury believe from the evidence that the child Clyde was, before the intestate was injured, placed in a place of safety from the fire, and afterwards through the negligence of the intestate, Mrs. Hinton, allowed to re-enter the burning house, and if the jury believe from the evidence that the intestate was burned in an attempt to rescue this child after it returned to the burning house, then the jury must find for the defendant." "(8) No presumption of law arises, from the recent passing of a train and the discovery of the fire shortly after in a building near the track, that the fire was set out by the train." "(10) If the jury believe from the evidence that the intestate voluntarily returned into the house after she had discovered the child, and after she had reached

a place of safety from the fire, and would not have been burned but for such fact, the jury must find for the defendant. (11) If the jury believe from the evidence that plaintiff's intestate would not have been burned but for the fact that she voluntarily returned to the burning house after having reached a place of safety, they must find for the defendant." "(15) If the jury believe from the evidence that the intestate and the other inmates of the house had ample time and opportunity after their discovery of the child to have escaped from the burning house by the exercise of reasonable diligence, they must find for the defendant."

Tillman, Grubb, Bradley & Morrow, for appellant. Estes, Jones & Welch, for appellee.

DOWDELL, J. This is an action to recover damages for personal injuries received by plaintiff's intestate through the alleged negligence of the defendant, and which said injuries it is averred resulted in the death of said intestate. In answer to the complaint the defendant pleaded the general issue and four special pleas. By the third special plea the defendant pleaded a release in writing, which said release is set out in *hæc verba* in the plea. To this plea the plaintiff filed a number of replications, to which demurrers were interposed by the defendant. The demurrers were overruled as to replications 3, 9, and 10, and sustained as to the others. The overruling by the court of the demurrers to replications above numbered is here assigned as error, and insisted on as such. Replication 3 was as follows: "For replication to the third plea, the plaintiff says that if the defendant has a release, as averred in said plea, it was given at a time when plaintiff's intestate was under the influence of drugs and opiates to such a degree that she was mentally incompetent and incapacitated to contract; hence said release is void and furnishes no defense in this action." The question raised by the demurrer to this replication is whether or not, on the facts stated, the contract of release is void, or only voidable, and, if only voidable, whether such defense is available without first returning or offering to return the money paid and received in consideration of the release.

This question is common to each of the replications to the third plea, to which demurrers were interposed and overruled. We think there can be no distinction in principle, where mental incapacity to contract is set up in avoidance of the contract, whether it is produced by intoxication from strong drink or by the administration of drugs or opiates. In either case the mental incapacity is of a temporary character. The courts, however, in respect to contracts, have taken a clear distinction where the incapacity is the result of permanent insanity, and where it is the result of intoxication, and hence only tempo-

rary. In the former case the contract is void, while in the latter it is merely voidable. In the case of *Oakley v. Shelley*, 129 Ala. 467, 29 South. 385, it was said by this court: "Unlike general and permanent insanity and idiocy, drunkenness does not create such legal incapacity as will alone render a contract wholly void. Though it may furnish the party suffering from it ground for rescission, yet, being voidable only, the contract may be affirmed and made binding on him after he becomes sober." *Wright v. Waller*, 127 Ala. 557, 29 South. 57, 54 L. R. A. 440, wherein authorities are collated relating to mental incapacity to contract produced by drunkenness. The contract in the case before us being voidable, and not void, was open to affirmance or disaffirmance on the termination of the temporary incapacity produced by the drugs and opiates. If disaffirmed, the duty rested upon the party to return the money received. A party may not repudiate a contract, and at the same time hold onto and enjoy the benefits received under it. *Harrison v. Ala. Mid. Ry.*, 144 Ala. 246, 40 South. 394, and authorities there cited. In the case of *Western Ry. v. Arnett*, 137 Ala. 414, 34 South. 997, cited by counsel for appellee, it was held that a return of the money received was not necessary, where the replication alleged that it was made as a gift. Such is not the case before us. The replications in the present case, on the facts stated, disclosing a contract voidable merely, and failing to allege a return of the money received, or some sufficient excuse in law for not doing so, were rendered by such omission subject to the demurrers.

It is argued by counsel for appellant that error was committed in overruling the demurrers to the second replication of the plaintiff to the defendant's second plea. There is no assignment of error in the record on this ruling of the court below, and we will not, therefore, consider it.

There is no necessity for a discussion of the question raised upon the selection of the jury, since upon another trial of the cause the jury will be selected under a different statute.

The next question insisted on, presented by the twelfth assignment of error, is a refusal to give written charge 3 requested by the defendant. We fail to find any evidence in the record tending to show that plaintiff's intestate was guilty of negligence in respect to the child Clyde going back into the burning building after having been carried to a place of safety. The charge was abstract, and for this reason, if no other, properly refused.

Charge 6, refused to the defendant, hypothesizes a fact not shown in the evidence; that is, that plaintiff's intestate "came through the miscarriage all right." The evidence, as well as all of its tendencies, were without dispute that she did not come through the miscarriage all right. This charge ignores the evidence which tended to show

that the injuries received by said intestate were a contributing cause to her miscarriage, and, even if the blood poisoning which followed was the direct and immediate cause of her death, it was in the chain of causations originating in the injuries inflicted by the burns received.

Charge 8 asserted a correct proposition of law, but we are not prepared to say that it was free from misleading tendency. The undisputed evidence showed that in the present case the passing train threw out large quantities of sparks.

The tenth, eleventh and fifteenth charges were properly refused. Each of these charges ignored the evidence showing that the intestate went back into the building to save her little child, and that it was while in the effort to rescue her child that she was herself injured.

For the errors pointed out, the judgment is reversed, and the cause remanded.

Reversed and remanded.

TYSON, C. J., and ANDERSON and McCLELLAN, JJ., concur.

(158 Ala. 149)

DICKERSON v. FINLEY.

(Supreme Court of Alabama. Nov. 28, 1908.
Rehearing Denied Feb. 5, 1909.)

1. DAMAGES (§ 23*)—BREACH—CONTRACTS.

In an action for breach of contract, plaintiff is entitled to such damages as may be fairly considered as arising in the usual course of things from a breach of the contract itself, and also to such as may reasonably be supposed to have been in the contemplation of both parties, when they made the contract, as the probable result of the breach.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 58; Dec. Dig. § 23.*]

2. DAMAGES (§ 23*)—PROBABLE CONSEQUENCES.

In order to charge a party breaching a contract with damages arising from special circumstances, which impart to the subject of the contract a value and importance its appearance does not indicate, the party sought to be charged must have had notice of such special circumstances when he entered into the contract.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 58; Dec. Dig. § 23.*]

3. DAMAGES (§ 40*)—REMOTE DAMAGES—"REMOTE PROFITS."

In an action for breach of contract, "profits" are usually considered too "remote," when not the immediate fruits of the principal contract, but dependent on collateral engagements and enterprises not brought to the notice of the contracting parties.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 72, 74-76; Dec. Dig. § 40.*]

4. DAMAGES (§ 40*)—CERTAINTY—"UNCERTAIN PROFITS."

In an action for breach of contract, "profits" are considered "uncertain" which are purely speculative in their nature, and dependent on so many incalculable contingencies as to make it impracticable to determine them by any trustworthy mode of computation.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 72, 74-76; Dec. Dig. § 40.*]

5. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—RULINGS ON PLEADINGS.

Though the proper remedy, when objection is made to part of a count, is by motion to

strike, the sustaining of a demurrer to the count is not prejudicial to the party pleading it, when nothing material other than that alleged in the objectionable part is claimed therein.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1040.*]

6. APPEAL AND ERROR (§ 1042*)—HARMLESS ERROR—RULINGS ON PLEADINGS.

In an action for breach of a contract by which defendant agreed to furnish to a sawmill all his standing timber and the use of certain teams, etc., in consideration that plaintiff would cut the timber and manufacture the lumber, said timber to be the property of plaintiff and defendant in equal shares, plaintiff was not prejudiced by the striking from his complaint of an allegation that defendant "refused to furnish sufficient feed to keep the teams," as it was too indefinite to raise a material issue, where no injury to the plaintiff by reason of the failure was alleged, and where the gravamen of the entire count was that defendant refused to allow his teams to be used at all.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1042.*]

7. PLEADING (§ 11*)—MATTERS OF EVIDENCE—ITEMIZING DAMAGES.

In an action for breach of contract, it is not necessary that the complaint itemize each matter of expense claimed by plaintiff as damages; this being matter of evidence.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 31; Dec. Dig. § 11.*]

8. DAMAGES (§ 182*)—DUTY OF PLAINTIFF TO MINIMIZE—EVIDENCE.

In an action for breach of contract, evidence that plaintiff could have minimized the damages, after ascertaining that defendant was not going to comply with his contract, is admissible in rebuttal of plaintiff's evidence as to damages sustained.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 500; Dec. Dig. § 182.*]

Appeal from Circuit Court, Limestone County; D. W. Speake, Judge.

Action by George W. Dickerson against John G. Finley for breach of contract. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Count 3: "Plaintiff claims of defendant the sum of \$10,000 as damages, for this: That, whereas, on, to wit, the 27th of May, 1906, defendant, under and by the name of J. G. Finley, entered into a contract with plaintiff in words and figures as follows: 'State of Alabama, County of Limestone. This agreement, entered into by and between J. G. Finley, of Decatur, Ala., and George W. Dickerson, of Florence, Ala., witnesseseth: That the said Finley, being the owner of the island in the Tennessee river below Decatur, Ala., known as "Finley's Island," and the owner of the standing timber thereon, and of a sawmill now on said island run by steam, and also the owner of cattle, mules, and horses, teams thereon, herewith agrees to furnish to said Dickerson all his standing timber, and free use of his sawmill, and the free use of two yoke of oxen, together with log wagons, chains, and all other tools necessary for logging of said timber; also the free use of two mule teams, together with log wagon and tools. The said Finley

agrees to furnish the necessary oil for mill, and to keep mill in repair, and to feed for cattle and mules. In consideration of the above, said Dickerson agrees to cut the timber, furnish the drivers for the teams, all labor in the sawmill, and the stacking of all merchantable lumber sawed at said mill, free of all expense to said Finley. Said Dickerson also agrees to manufacture all lumber in a workmanlike manner. No logs to be hauled or sawed that will not make merchantable lumber. Any logs cut that said Dickerson does not consider merchantable are to remain the property of said Finley and Dickerson in equal shares. Said Dickerson further agrees to purchase said Finley's half the lumber, and pay for same, net cash, at the rate of \$9 per 1,000 feet, payments to be made to said Finley when lumber is loaded on barge. Said Dickerson agrees to use proper care in handling said Finley's property. Said Dickerson agrees to pay and does pay \$250 upon the signing of this contract. This money is to be applied on lumber bought of said Finley as provided in this contract. Said Dickerson agrees to run said sawmill and cut at the rate of 40,000 feet a month or more, barring accidents. Said Finley agrees to give said Dickerson to January 1, 1908, in which to complete this contract. This same is not to include bank timber, and not to interfere with land that is cut over. [Signed] J. G. Finley.' And plaintiff avers that at the time of making said contract defendant knew that plaintiff was making said contract for the purpose of manufacturing said timber into lumber and selling same at a profit. That plaintiff, with full knowledge on the part of said defendant, and relying upon the aforesaid contract, of which said defendant was fully informed, did contract and agree to sell all of the merchantable lumber manufactured from said timber cut by him, the said plaintiff, on said island, at and for a profit of, to wit, \$5.50 per 1,000 feet. That said plaintiff, in accordance with the terms of said contract above set forth, entered upon the performance of said contract, and did perform a part thereof. That the defendant, notwithstanding the performance and discharge by this plaintiff of all the conditions required by said contract to be performed by him, breached said contract on his part, in this: (1) He proceeded to cut from off said island a large amount of standing timber which could have been made into merchantable lumber, and none of which timber thus cut was bank timber, to wit, 40,000 feet, and upon this plaintiff objecting thereto the defendant asserted that he (defendant) intended to continue such cutting. (2) He refused to furnish to plaintiff the teams as provided under and by the terms of said contract. (3) He refused to permit the teams of mules contracted to be furnished by him to do all such work as was required to be done in the

usual method of logging. (4) He refused to furnish sufficient feed to keep the teams furnished by him under said contract in such physical condition as that the same were able to do the work necessary to carry out said terms of the contract above set forth. (5) He constantly interfered with the hands employed by this plaintiff, who did the work required under said contract, and hindered them from doing all their work essential to the carrying out of the said contract. (6) He so interfered with the sawyer of plaintiff that said sawyer refused to proceed further with the work and left the island and plaintiff's employment. (7) He so interfered with the driver employed by plaintiff that he caused him to leave the service of plaintiff. The plaintiff avers that he offered to hire or purchase other teams with which to do the work required under said contract, if the said defendant would pay the hire of same, and that said defendant refused to permit this plaintiff to hire or purchase other teams, and refused to pay a reasonable hire therefor. Plaintiff further avers that said defendant, although plaintiff was always, from the time of the making of said contract until such refusal and wrongful discharge by the defendant, as hereinbefore set forth, and thence hitherto, ready and willing to execute, perform, and fulfill the said contract in all things on his part to be performed and fulfilled, whereof the said defendant had been often told; and though said defendant, in pursuance and part performance on his part has furnished some of the teams mentioned in said contract, and has accepted and retained the sum of \$250 paid to him by defendant in accordance with the terms of said contract, nevertheless this defendant afterwards, as set forth above, wrongfully prevented, and discharged by such prevention, and injuriously and wrongfully hindered, this plaintiff from the further execution and performance of said contract on his (plaintiff's) part, whereby plaintiff has lost all the property by said transaction of sale of merchantable lumber to have been manufactured out of said timber, said lumber amounting to, to wit, 2,000,000 feet, all to his damage in the said sum."

Count 4 is similar to the first down through the contract, with the added allegations that there was omitted from the draft of said contract an agreement that defendant was to permit plaintiff to have the use of houses on the island for his hands and employes, and that shortly after the signing of the contract plaintiff called defendant's attention to this omission, and it was agreed between them that the same should constitute a part of said contract. Then follows the allegation as to plaintiff's sale of lumber, etc., as in count 3. The allegations of breach are as follows: "(1) He caused plaintiff's hands to stop working for him, to wit, his driver and sawyer. (2) He refused to permit plaintiff to use all of said houses for his

hands. (3) He notified plaintiff that he must move his hands out of the only house he permitted plaintiff to use as agreed on. (4) He cut of said standing timber, from which merchantable lumber could be cut, and none of which was bank timber, mentioned in the aforesaid contract, from, to wit, 30,000 to 40,000 feet, and informed plaintiff he was going to continue to cut lumber on said island. (5) He refused to furnish plaintiff the teams as provided under and by the terms of said contract. (6) He refused to permit the teams of mules contracted to be furnished by him to do such work as is required to be done in the usual method of logging. (7) He refused to furnish sufficient feed to keep the teams furnished by him under said contract in such physical condition as that the same was able to do the work necessary to carry out the terms of the contract. (8) He constantly interfered with the hands employed by plaintiff to do the work required under said contract, and hindered them from doing the work essential to carry out the said contract." Then follows the allegation that the defendant thus prevented and hindered the plaintiff in the due performance of his part of the contract, and by so doing discharged plaintiff from further performance. Then follows the averment that defendant knew that plaintiff was making the contract for the purpose of manufacturing the timber into lumber and selling same at a profit, etc., as in 3.

Count 5: Same as 4 down to and including the contract, with the following allegation: "That plaintiff, with full knowledge of defendant, went to large expense in providing drivers for teams for laborers in the sawmill and for the stacking of the merchantable lumber, to carry out plaintiff's part of the contract, and, with full knowledge of said defendant, plaintiff, by and through the acts of defendant as hereinafter set forth, was compelled to keep at large expense hands and laborers, who were forced to remain idle by and through the acts of said defendant. That this plaintiff, by and through the acts of defendant as hereinafter set forth, was caused to use much of his own time and labor in attempting to carry out his part of the contract, which time and labor was very valuable. That plaintiff, in accordance with the terms of said contract above set forth, entered upon the performance of said contract. That defendant, notwithstanding the performance and discharge by plaintiff of all the conditions required by said contract to be performed by him, breached his said contract on his part in this: [Here follows the breach as set out under count 4 down to and including the fifth breach, with the added breach that he interfered with and hindered and prevented plaintiff from carrying out and executing his contract in full.] Plaintiff avers that said defendant, although this plaintiff was always, from the time of making the said contract until

such refusal to, prevention, hinderance, and wrongful discharge by defendant as hereinbefore set forth, and thence hitherto, ready and willing to execute, perform, and fulfill the said contract in all things on his part to be performed, whereof the defendant had often been told, and although said defendant, in pursuance of and part performance of said contract, had furnished some of the teams mentioned in said contract, and has accepted and retained the sum of \$250, which this plaintiff paid him under and by the terms of said contract, nevertheless the said defendant afterwards, as above set forth, wrongfully prevented, and discharged by such prevention, and injuriously and wrongfully hindered, this plaintiff from the further execution and performance of said contract on his part, whereby plaintiff has been put to large costs and expenses in providing hands and maintaining them in readiness, and in maintaining himself in readiness for the complete execution of said contract, and has lost much valuable time of himself, and has lost the value of his own service, all to his damage," etc.

Count 6: Same as 3 down to and including the contract. Same allegation as in count 4 with reference to the furnishing of houses, etc. Same allegation of breach as in count 4. Same allegation of readiness and willingness to perform on part of plaintiff, and the prevention and hinderance on part of defendant, together with the acceptance and retention of money paid under the contract as in count 5, and the same allegation as to loss of time and service, etc., as in count 5.

W. R. Walker, for appellant. W. T. Sanders, for appellee.

SIMPSON, J. This is a suit by the appellant against the appellee for breach of a contract by which the defendant agreed to furnish a sawmill, all of his standing timber, and the use of certain teams, wagons, etc., in consideration that plaintiff would cut the timber, furnish drivers, labor, etc., and manufacture the lumber in a workmanlike manner—said lumber to be the property of plaintiff and defendant in equal shares, and the plaintiff to purchase defendant's part thereof at \$9 per 1,000 feet. The plaintiff claims that, relying upon the provisions of said contract, he had made certain contracts for the sale of the lumber at certain prices, and that by the breach of the contract by the defendant the plaintiff has been deprived of the profits which he would otherwise have made on said contracts.

The first point of contention is as to the measure of damages in this case. While this subject has been prolific of a great deal of litigation, and volumes have been written upon it, in various jurisdictions, ever since the decision in the leading case of *Hadley v. Baxendale*, 9 Exch. 341, our own court has had much to say on the subject,

and we think its decisions clearly mark out the rules governing such cases, and that they are in accordance with the leading case and with the great weight of authority. In this, as in other matters, the great aim of the law, in interpreting contracts, is to put one's self in the position of the contracting parties and ascertain what was their intention—what rights the one party intended to secure, and what the other intended to confer or to guarantee. Hence the rule in the *Hadley-Baxendale* Case, that the plaintiff is entitled to "(1) such damages as may fairly and substantially be considered as arising naturally—i. e., according to the usual course of things—from the breach of the contract itself, or (2) such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach."

While our court has followed the *Hadley-Baxendale* Case, yet the writer of one of our decisions criticises the wording of it, because he thinks that, as men are not supposed to contemplate breaking their contracts, it is not correct to speak of the damages which are within their contemplation when the contract is made. The very object of making contracts and reducing them to writing is to bind the parties to their performance and to provide against their breach; and when parties make them, however honest they may be, they necessarily project their minds forward, and each party considers, "What rights am I securing, and against what loss am I agreeing to hold the other party harmless?" and this necessarily carries with it the question, "What are my liabilities if, for any cause, I fail to carry out my part?" It is no impeachment of a man's integrity to think of the possible damages, but is only good business judgment to do so.

However, the meaning of the expression is merely, "What were the matters intended to be provided for and against when the contract was made?" Hence, as every person is presumed to intend the natural and usual consequences of his act, the rule is reasonable that he should be liable for "such damages as may fairly and substantially be considered as arising naturally—i. e., according to the usual course of things—from the breach of the contract"; and, as all contracts are made in the light of surrounding circumstances, if the contract is made for a specific purpose, which is known to both parties, or, as expressed by our own court, if "there be special circumstances, which impart to the subject or services a value and importance their appearance does not indicate, this is outside of the usual course of things, and falls within *Baron Alderson's* second rule, which requires that the party sought to be charged shall have had notice of such special circumstances when he entered into the contract." *Daught-*

ery v. Am. Tel. Co., 75 Ala. 168, 176, 51 Am. Rep. 435.

In the case cited a seeming exception is ingrafted upon the rule; but it is not really an exception, and is based upon the principle that the telegraph is a peculiar instrumentality, resorted to only in particular emergencies, and public policy fixes upon such company the responsibility of expedition as to all messages, because the very fact of using it is notice to the company that expedition is required for some special reason, which it is not necessary to communicate to the company.

In the case of Ramey v. Holcombe, 21 Ala. 567, the contract was made for the specific purpose of enabling the party to run a stage line, but really no damages on account of profits lost were claimed; the only question being whether the plaintiff was entitled to recover the full amount which he was to have been paid for feeding the teams, or that amount reduced by what it would cost him, to provide the feed. The Peck-Hammond Case, 136 Ala. 473, 33 South. 807, 96 Am. St. Rep. 36, the case of Bonifay v. Hassell, 100 Ala. 269, 14 South. 46, and the case of Falls & Mills v. McRee, 36 Ala. 61, are upon the same principle, as is also the case of Robinson v. Bullock, 66 Ala. 548; and the cases are merely cited as a reason for excluding certain testimony in the case of Mason v. Ala. Iron Co., 73 Ala. 270.

In the case of Bell v. Reynolds & Lee, 78 Ala. 511, 56 Am. Rep. 52, the contract was made for the sale of fertilizer, "with notice that it was intended for use on defendant's cotton crop" on a certain place. The fertilizer could not be purchased elsewhere, and the difference between that portion of the crop on which the fertilizer was used and that on which it was not was plainly visible and easily estimated. The rule above referred to is recognized, and the additional one, which is in accordance with the best-considered cases, and followed in the cases hereafter cited, that in any event profits which are remote and uncertain are never recoverable, and that "those profits are usually considered too remote, among others, which are not the immediate fruits of the principal contract, but are dependent on collateral engagements and enterprises, not brought to the notice of the contracting parties, and not, therefore, brought within their contemplation, or that of the law. Those are considered uncertain which are purely speculative in their nature and depend upon so many incalculable contingencies as to make it impracticable to determine them definitely by any trustworthy mode of computation."

The cases of Danforth & Armstrong v. Tenn. & C. R. R., 93 Ala. 614, 11 South. 60, and 99 Ala. 331, 13 South. 51, and Worthington v. Gwin, 119 Ala. 44, 24 South. 739, 43 L. R. A. 382, do not contravene the general

rule, but relate to profits to be realized out of the immediate business, the subject of the contract.

These salutary rules are followed in a long line of decisions by our own court, and are in accordance with the views of our best text-writers. *Western U. Tel. Co. v. Way*, 83 Ala. 542, 557, 4 South. 844; *Young & Co. v. Cureton*, 87 Ala. 727, 6 South. 352; *Swift & Co. v. Eastern Warehouse Co.*, 86 Ala. 294, 5 South. 505; *Am. Union Tel. Co. v. Daughtery*, 89 Ala. 191, 7 South. 660; *Burton v. Henry*, 90 Ala. 282, 288, 7 South. 925; *Reed Lumber Co. v. Lewis*, 94 Ala. 626, 627, 628, 10 South. 333; *Moulthrop & Stevens v. Hyett & Smith*, 105 Ala. 493, 494, 17 South. 32, 53 Am. St. Rep. 139; *Raisin Fertilizer Co. v. Barrow*, 97 Ala. 694, 12 South. 388; *Watson v. Kirby & Sons*, 112 Ala. 439, 446, 20 South. 624; *Baxley v. Tallassee & Montgomery R. R.*, 128 Ala. 183, 190, 191, 29 South. 451; *Nichols v. Rasch*, 138 Ala. 372, 377, 35 South. 409; *Ala. Chemical Co. v. Geiss*, 143 Ala. 591, 39 South. 255; *So. Ry. Co. v. Coleman (Ala.)* 44 South. 837, 838; *Byrne Mill Co. v. Robertson*, 149 Ala. 274, 285, 42 South. 1008.

In *Metzger v. Brincat (Ala.)* 45 South. 633, "the contract shows that the matter in contemplation of the parties was that the business of the appellee should not be injured by renting a portion of the house to another party, and the evidence shows that the damages were ascertainable with reasonable certainty." 45 South. 634.

The case of *Nichols v. Rasch*, supra, which is vigorously assailed by the brief of appellant's counsel, is not contrary to the other decisions. The opinion states that, while "there are averments to show that the fact that plaintiff was under these contracts was known to the defendant," yet "whether he had such knowledge when he made the contract with plaintiff is not averred." 138 Ala. 376, 35 South. 411. It also states that the stopping of the mill, etc., was not stated as the basis of a claim for damages, and goes on to announce the recognized doctrine that such damages must not be merely speculative. 138 Ala. 377, 35 South. 411. See, also, *Sutherland on Damages* (3d Ed.) pp. 164-168, §§ 45, 52; *Id.* pp. 186, 187, § 59.

The allegations in the third and fourth counts of the amended complaint fall short of the requirements of the rule, in not alleging that the contracts which plaintiff claims to have made were made before or at the time of the making of the contract sued on, with full knowledge of the defendant, or that the same were within the contemplation of the parties in making the contract sued on. They are also defective in not making specific averments as to said contracts, from which the court could judge whether the damages were sufficiently certain and easily ascertainable within the rule. Consequently there was no error in striking said portions of said counts.

As to the sustaining of the demurrer to said counts, while it is true that, when the objection is to a part of a count, the proper remedy is a motion to strike (*Bessemer Sav. Bank v. Rosenbaum Groc. Co.*, 137 Ala. 530, 534, 34 South. 609; *McCleskey & Whitman v. Howell Cotton Co.*, 147 Ala. 574, 579, 42 South. 67; *Byrne Mill Co. v. Robertson*, 149 Ala. 274, 286, 42 South. 1008), yet, as nothing else material was claimed in said counts, no injury could occur to the plaintiff by the sustaining of the demurrer.

No injury could accrue to the plaintiff by striking from the complaint the words, "He refused to furnish sufficient feed to keep the teams." Taken as a separate breach, it is too indefinite to raise a material issue, as it does not allege any injury to the plaintiff by reason of the failure. A man might not furnish sufficient feed for his own teams for their welfare, and still they might be able to do the work which he had contracted for them to do; and it would, at any rate, be but an argumentative inference that they were not. Viewed in connection with the entire count, the gravamen of the count is that he refused to allow the teams to be used at all, and, if so, it was immaterial to the plaintiff whether the defendant did or did not furnish his own teams with a sufficiency of food.

The court erred in sustaining the demurrer to counts 5 and 6 of the amended complaint. The damages therein claimed are legitimate, and it was not necessary to itemize each matter of expense. This was matter of evidence, which would come up in the trial. *Danforth & Armstrong v. T. & C. R. R. Co.*, 93 Ala. 614, 11 South. 60; *Worthington v. Gwin*, 119 Ala. 44, 24 South. 739, 43 L. R. A. 382; *Watson v. Kirby & Sons*, 112 Ala. 436, 20 South. 624; *U. S. v. Behan*, 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168.

If plaintiff could have minimized the damages, by employing his hands and himself, after ascertaining that defendant was not going to comply with his contract, that was matter in rebuttal, which might have been brought out in evidence.

The judgment of nonsuit is set aside, and the cause remanded.

TYSON, C. J., and HARALSON and DENSON, JJ., concur.

(158 Ala. 539)

WESTERN UNION TELEGRAPH CO. v. NORTHCUTT.

(Supreme Court of Alabama. Dec. 17, 1908. Rehearing Denied Feb. 5, 1909.)

1. PRINCIPAL AND AGENT (§ 183*) — UNDISCLOSED PRINCIPAL—RIGHT OF ACTION.

An undisclosed principal may sue on a contract made by his agent with a telegraph company.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 692; Dec. Dig. § 183.*]

2. TELEGRAPHS AND TELEPHONES (§ 67*)—ACTIONS—DAMAGES—KNOWLEDGE OF NECESSITY OF SPEED.

Because of the peculiar duties of a telegraph company, the mere sending of a telegram is notice to it that expedition is required, so that it is unnecessary, in order to recover for delay in delivery, that the circumstances requiring promptness be brought to the company's knowledge, or even that the message be intelligible on its face.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 65; Dec. Dig. § 67.*]

3. TELEGRAPHS AND TELEPHONES (§ 68*)—ACTIONS—DAMAGES—MENTAL SUFFERING.

Mental suffering, caused by the absence of one whose presence would be consoling in time of grief, is a subject of recovery in an action for delay in delivering a telegram, where a right of action exists independent of the mental suffering; but the parties must be closely related, and the delayed telegram must have announced such an event as sickness or death.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 69, 70; Dec. Dig. § 68.*]

4. TELEGRAPHS AND TELEPHONES (§ 68*)—ACTIONS—DAMAGES—MENTAL SUFFERING.

Where plaintiff's relation to the contract was not disclosed to the company and did not appear from the telegram, it being sent by another as her undisclosed agent, she could not recover for mental anguish resulting from delay in delivering it, caused by the failure of relatives to attend a funeral.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 69, 70; Dec. Dig. § 68.*]

5. TELEGRAPHS AND TELEPHONES (§ 68*)—ACTIONS—ADMISSIBILITY OF EVIDENCE—MENTAL SUFFERING.

In an action for delay in delivering a telegram announcing the death of plaintiff's husband, by which her relatives were prevented from attending his funeral, direct evidence by plaintiff as to her mental suffering caused by their nonattendance was inadmissible.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 62; Dec. Dig. § 66.*]

6. TELEGRAPHS AND TELEPHONES (§ 68*)—ACTIONS—DAMAGES FOR MENTAL SUFFERING.

Damages for mental suffering by the sender of a telegram, resulting from delay in delivery by which her relatives were prevented from attending her husband's funeral, could only be recovered for the time between which her relatives could have arrived at the place of burial, if the telegram had been delivered promptly, and the time when they actually arrived, so that evidence of mental suffering from the time her husband was killed was inadmissible.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 69, 70; Dec. Dig. § 68.*]

7. WITNESSES (§ 323*)—IMPEACHMENT—IMPEACHING OWN WITNESS.

Plaintiff could not ask her own witness a question for the purpose of impeaching his credit, where his testimony contradicted her own.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1096; Dec. Dig. § 323.*]

8. TRIAL (§ 76*)—RECEPTION OF EVIDENCE—TIME OF OBJECTING.

An objection to a question was properly overruled, where it was not made until the question was answered.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 185; Dec. Dig. § 76.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

9. EVIDENCE (§ 382*)—DOCUMENTS—DETERMINATION OF ADMISSIBILITY.

In an action for delay in delivering a telegram, the delivery sheet, showing when the telegram was delivered, was admissible after proof was made of the genuineness of the signature thereto, though the evidence as to its genuineness was conflicting, so as to make that a jury question.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 382.*]

10. TELEGRAPHS AND TELEPHONES (§ 73*) — ACTIONS—JURY QUESTION.

If, in an action for delay in delivering a telegram, there was evidence contradicting the genuineness of the signature to the delivery sheet which was put in evidence, it was a jury question whether the telegram was received at the time therein specified.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 73.*]

11. TELEGRAPHS AND TELEPHONES (§ 66*) — ACTIONS — ADMISSIBILITY OF EVIDENCE — TELEGRAM RECEIVED.

In an action by the sender for delay in delivering a telegram, the telegram received by the sendee was admissible; the meaning of the letters and figures thereon and by whom they were placed on it, as well as the question whether the person delivering it was the company's agent, being open to proof, if uncertain or disputed.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 66.*]

12. TRIAL (§ 29*)—CONDUCT OF COURT—REMARKS.

In an action for delay in delivering a telegram, it was error for the court to remark to defendant's counsel, after the message received by the sendee had been admitted, defendant denying its delivery, "You are responsible for it."

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 29.*]

13. PRINCIPAL AND AGENT (§ 1*)—THE RELATION.

The minds of both the principal and agent must meet in order to create an agency.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 1; Dec. Dig. § 1.*]

14. TRIAL (§ 240*)—ARGUMENTATIVE INSTRUCTIONS.

In an action for delay in delivering a telegram claimed to have been sent by plaintiff's agent, an instruction that it was possible that plaintiff understood that the alleged agent was acting for her when he went to send the message, but the evidence must show that he also agreed to act as her agent, was properly refused as argumentative.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 561; Dec. Dig. § 240.*]

15. TRIAL (§ 242*) — MISLEADING INSTRUCTIONS.

An instruction, which required the jury to determine what the negligence charged in the complaint was, was misleading.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 569-570; Dec. Dig. § 242.*]

16. TRIAL (§ 194*)—INSTRUCTIONS—PROVINCE OF JURY.

In an action for delay in delivering a telegram, by which plaintiff's father and brother were prevented from attending her husband's funeral, requested charges that there was no evidence that her brother could have reached the place of burial by passenger train before the funeral if the message had been delivered when received, that when the message was delivered for sending the passenger train by which her brother might have made connections for the

place of the funeral had already passed, that plaintiff could not recover damages for mental suffering for her father's absence except during the period beginning with the time he could have reached the place of burial had he gone by a certain route on a certain train and ending with the time he would have reached the place of burial by taking a certain train by a certain route, and that there was no evidence that defendant left the message claimed to have been delivered with a certain person, were all properly refused as invading the province of the jury.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 194.*]

17. TELEGRAPHS AND TELEPHONES (§ 74*) — ACTIONS—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In an action for delay in delivering a telegram, by which plaintiff's father was prevented from attending her husband's funeral, an instruction that if the telegram was delivered to her father "before a train passed his station from the time the telegram was delivered to the company at" the place it was sent, plaintiff could not recover, was properly refused, since a train might have passed just after her father received the telegram, when he did not have time to reach the depot.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 74.*]

18. TELEGRAPHS AND TELEPHONES (§ 68*) — ACTIONS—DAMAGES—MENTAL ANGUISH.

If plaintiff could recover for mental anguish caused by delay in delivering a telegram, by which her father was prevented from attending her husband's funeral, she could recover for anguish suffered only from the time he would have reached her, had the telegram been delivered promptly, up to the time he actually reached her, and not up to the time he could have reached her after receiving the message.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 70; Dec. Dig. § 68.*]

19. PRINCIPAL AND AGENT (§ 25*)—THE RELATION.

Though plaintiff requested another to send a telegram, if the latter sent it on his own account, and not as her agent, the relation of principal and agent was not established, so as to entitle her to recover for delay in delivery.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 25.*]

Simpson, J., dissenting.

Appeal from Law and Equity Court, Walker County; T. L. Sowell, Judge.

Action by Avie Northcutt against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The first assignment of error is that the court erred in refusing to sustain defendant's motion to strike the following averments of the complaint: (1) "The said Jack Van Horn and Sallie Van Horn, her mother, could have reached plaintiff's home before her husband, Harry Northcutt, was buried, and could have comforted and consoled plaintiff in her sore affliction; and plaintiff avers that on account of plaintiff's negligence and carelessness in delivering said message plaintiff was prevented from having the comfort and consolation in her affliction which her mother and father could have and would have rendered her, had

they been present while her husband was lying a corpse and also at the burial." (2) Also the words, "and Sallie Van Horn, her mother," and the words, "and her mother," where the same appear in the first and second counts of the complaint.

The second assignment of error is that the court erred in refusing to strike from the complaint those words set out in the first assignment of error, numbered 1 and 2, and the following: "Plaintiff's said father, Jack Van Horn, and Sallie Van Horn, her mother, could have reached the place where plaintiff's husband, Harry Northcutt, was lying dead, in time to have been with plaintiff and consoled and comforted her before and at the time of her husband's burial, and during the time of her bereavement." And "the plaintiff was prevented from having the presence, consolation and comfort of said father and mother before and at the time of her husband's burial, and during her bereavement." And defendant further moves to strike from said second count the entire averment of damages as therein set forth.

The third assignment of error is that the court erred in refusing to strike those certain averments by which plaintiff claimed damages by reason of the alleged fact that she lost the consolation and comfort which she would have received from her father, Jack Van Horn, as contained in said complaint.

The fourth and fifth assignments of error allege error in overruling demurrers to the first and second counts of the complaint, which necessitates the setting out of the complaint, which is as follows:

Count 1: "Plaintiff claims of defendant the sum of \$1,800 as damages for the breach of a contract made by plaintiff through her agent, A. D. Northcutt, and defendant, on or about the 1st day of October, 1906, by the terms of which defendant undertook to transmit from Nauvoo, Ala., to Dora, Ala., the following message: 'Nauvoo, Alabama, 10/1. Jack Van Horn, Dora, Alabama. Harris killed at mines. Notify Jack at once at Empire, A. D. Northcutt.' And plaintiff avers that at the time of making said contract the defendant was engaged in the business of transmitting and delivering telegraphic messages for hire, and that she paid to defendant the charges for sending such message from Nauvoo, Ala., and delivering the same at Dora, Ala. And plaintiff avers that defendant broke said contract, in this: That it was negligent and careless in delivering said message to said Van Horn at Dora, Ala.; and plaintiff avers that, had the message been delivered to her father, Jack Van Horn, within a reasonable time, her father, the said Jack Van Horn, and Sallie Van Horn, her mother, could have reached plaintiff's home before her husband, Harris Northcutt, was buried, and could have consoled and comforted plaintiff in her sore affliction; and plaintiff further avers that on account of plaintiff's negligence and carelessness in delivering said message plaintiff was

prevented from having the comfort and consolation in her affliction which her father and mother could have and would have rendered to her, had they been present with her while her husband was lying a corpse, and also at his burial, on account of which plaintiff suffered great injury to her feelings and mental anguish, to her damage," etc.

Count 2: Same as count 1 down to and including the message, with the following averment: "And defendant contracted and undertook for a certain sum of money, which plaintiff's agent then and there paid to defendant, to deliver said message to plaintiff's father, Jack Van Horn, at Dora, Ala. Plaintiff avers that defendant was engaged in the business of transmitting telegraphic messages for hire between two said places; and plaintiff avers that defendant broke said contract, in this: That it was negligent and careless in delivering said message to said Jack Van Horn at Dora, Ala.; that, had said message been delivered to plaintiff's father, the said Jack Van Horn, within a reasonable time, plaintiff's said father, Jack Van Horn, and Sallie Van Horn, her mother, could have reached the place where plaintiff's husband, Harris Northcutt, was lying dead, in time to have been with plaintiff and consoled and comforted her before and at the time of her husband's burial and during her bereavement; and that by reason of defendant's negligence and carelessness in delivering said message to the said Jack Van Horn at Dora, Ala., plaintiff was prevented from having the presence, consolation, and comfort before and at the time of her husband's burial, and during her bereavement, on account of which plaintiff suffered great injury to her feelings and mental anguish," etc.

The following demurrers were interposed to the counts separately: "(1) It does not appear that defendant was informed of the alleged agency of A. D. Northcutt. (2) It does not appear that plaintiff suffered in person or estate by the alleged failure to deliver said telegram. (3) The facts alleged do not show that A. D. Northcutt was an agent of plaintiff in sending the telegram set out herein. (4) The facts alleged therein show no right of recovery by plaintiff in this action. (5) The facts alleged therein fail to show that plaintiff sustained any damages by reason of the alleged failure of defendant to deliver the telegram therein described. (6) The damages therein claimed are remote, and are not recoverable on the facts alleged. (7) It is not shown in what respect defendant violated its said duty or contract. (8) It is not shown that the alleged damages followed as a proximate result of defendant's alleged wrong. (9) Said count is insufficient and indefinite, in that it is not made to appear wherein defendant was in default in the premises. (10) No damages to the person or estate of plaintiff are claimed in and by said count."

The sixth assignment of error is that the court erred in allowing plaintiff to be asked,

over the objection of defendant, this question: "After the telegram was sent to your father at Dora, notifying him of the death of your husband, did your father come to Nauvoo?" And the next assignment is as to her answer, "Not until after the funeral."

The seventh assignment of error is to permitting the question to plaintiff, concerning the time from the sending of the telegram to the burial, "Now, during that time was your father, Jack Van Horn, with you?" and the next to the answer, "He wasn't there during the funeral."

Assignments of error 8 and 8½ are to the question, "You had no relatives there?" and the answer, "No, sir."

The ninth assignment is to the following question: "I will withdraw that question, and ask you if, on account of the absence of your father, you suffered any mental affliction or suffering?" and assignment 9½ to the answer to the same, which is not put down in the transcript.

Assignments 10 and 10½ are to the question, "I will ask you if, on account of the absence of your father from the time your husband was killed and after you sent the telegram, and up to the time he was buried, up to the time he came there, and on account of that absence, you suffered any injury to your feelings and mental anguish?" and the plaintiff's answer, "Yes, sir."

Assignments 19, 20, and 21 are as follows:

"(19) In sustaining plaintiff's objection to the question propounded to Shepherd, the operator, 'Did Mr. Northcutt state to you that he was sending the message as agent for plaintiff in this case?'"

"(20) Separately erred in sustaining plaintiff's objection to the following questions propounded by defendant to Shepherd: (a) 'Did any one give you any notice of any kind whatever that plaintiff in this case was the real sender of the message, and that Mr. Northcutt was simply sending it as an agent?' (b) 'State whether or not you had any information that plaintiff in this case was the sender of the message, and that A. D. Northcutt was acting merely as an agent.' (c) 'I will ask you whether or not you knew that she had anything to do with the message, or was in any way connected with it.'"

"(21) The court erred in its oral charge as follows: 'So, then, gentlemen, if you believe from the evidence that Mr. A. D. Northcutt was the agent of plaintiff, and that defendant was negligent in and about its delivery, and that on account of that negligence plaintiff's father was prevented from coming to her relief and administering to her consolation and comfort during her grief, then, gentlemen, it will be your duty to find for plaintiff.'"

Assignment 22 has reference to the following refused charges requested by defendant:

(1) General affirmative charge.

(2 and 3) Affirmative charges as to the first and second counts.

(4) "If you believe the evidence, you cannot award any damages to plaintiff by reason of any mental pain and anguish that plaintiff may have suffered by reason of the absence of Jack Van Horn before the time of burial."

(5) "I charge you that there is no evidence in this case on which you are authorized to base a verdict awarding damages for mental pain and anguish or injury to feelings."

(6) "I charge you that if you believe the evidence plaintiff cannot recover more than 25 cents."

(8) "I charge you that there is no evidence in this case that defendant or its agents had notice, at the time of the message sued on was sent, that A. D. Northcutt was acting as agent for plaintiff."

(9) "I charge you that, unless defendant had notice of the fact that A. D. Northcutt was sending the message in question as agent of plaintiff, then plaintiff cannot recover for mental distress by reason of the absence of Jack Van Horn as alleged."

(9½) "I charge you that, unless the defendant had notice of the fact that A. D. Northcutt was sending the message in question as the agent of plaintiff, then plaintiff cannot recover for any damage to her feelings or for mental anguish caused by reason of the failure to deliver the message with reasonable promptness."

(10) "I charge you that, unless the defendant had notice of the fact that A. D. Northcutt was sending the message in question as the agent of the plaintiff, then plaintiff cannot recover for any damage to her feelings or for mental anguish caused by reason of the failure to deliver said message with reasonable promptness, except in the same respect in which the said A. D. Northcutt would have been entitled to recover such damages, had he in fact been the principal."

(11) "I charge you that, where telegraph companies have no notice of the fact that a person sending a message is acting as the agent for an undisclosed principal, such undisclosed principal has no right to claim damages for breach of the contract of delivery on account of mental pain and anguish."

(12) "I charge you that, where telegraph companies have no notice of the fact that a person sending a message is acting as the agent of an undisclosed principal, such undisclosed principal has no right to claim damages for a breach of the contract of delivery on the ground of mental pain and anguish, unless the agent in whose name the contract was made himself could have recovered damages for mental pain and anguish in the event that said message should not be delivered on account of negligence of defendant."

(17) "I charge you that, while an undisclosed principal may sue upon a contract made by its agent in the latter's name, yet the principal cannot recover any damages which are peculiar to the principal and would

not ordinarily flow from a breach of the contract, if entered into by the agent or on his own behalf, unless the parties sought to be charged with the breach had notice that the agent in fact was acting as the agent of some other person than himself."

(25) "I charge you that you can award no damages to plaintiff in this cause on account of the alleged fact that she was deprived of the comfort and consolation of her father's presence, unless the defendant's agent, at the time of receiving for transmission and delivery the message sued on, had notice that the purpose, or one of the purposes, for which the message was sent, was to enable plaintiff in this case to have the comfort and solace of her father's presence under the circumstances averred in the complaint."

(26) "I charge you that under the law it is established in this state that defendant telegraph company was charged with notice of the fact, if it were a fact, that the sendee of the message and the person mentioned therein as Jack had any interest in knowing of the fact that Harris Northcutt had died, and that they would suffer mental pain and anguish if they were not apprised of this fact in time to attend the funeral; but I charge you that the terms of the message sued on, of themselves alone, do not charge defendant with notice that A. D. Northcutt was acting as the agent of plaintiff in sending said message, and that plaintiff sought by the sending thereof to have the comfort and solace of her father's presence, and that she would suffer mental pain and anguish at not having said comfort and solace from her said father, if the latter were prevented from coming to her by the nondelivery or delay in delivery of the message in question."

(27) "I charge you that the law does not authorize a recovery of damages by any person who may experience mental distress by reason of the delay in the delivery of the telegram. Only parties to the contract of transmission and delivery can recover such damages, and where the person who claims to be a principal in such a contract of transmission and delivery entered into with a telegraph company is not a party to the message, nor mentioned therein, and no notice of the fact that such person is in fact a principal is acquired by the telegraph company, then the telegraph company will not be liable to such undisclosed principal for mental pain and anguish that may have been suffered by the principal, and not to be foreseen and anticipated from the terms of the message, and the parties connected therewith as known to defendant."

(28) "I charge you that, while it is the law that a person who sends a telegram may recover damages for the loss of solace and comfort by reason of the negligent failure of the telegraph company to deliver a message to the person whose solace and comfort is desired, yet I charge you that damages of this nature cannot be recovered, unless the

terms of the message itself are sufficient to put the telegraph company upon notice that such solace and comfort is expected by the sender, or unless notice of that fact is brought home to the telegraph company from some other source than the message itself."

(29) "I charge you that the message in this case is not sufficient in its terms to charge the defendant with notice of the fact that the comfort and solace of the sendee was expected by the sender or by plaintiff, and, unless you believe that notice of such a fact was brought home to defendant in some other way at the time said message was sent, then you cannot award plaintiff any damages on account of the alleged fact that she was deprived of the solace and comfort that her father would have rendered her had he been present before the funeral."

(30) "I charge you that there is no evidence in this case that Jack Van Horn could have reached Nauvoo by passenger train before the funeral, even if the message had been delivered to him the instant it was received by the agent at Nauvoo."

(31) "I charge you that at the time the message in question was delivered to defendant's agent at Nauvoo the passenger train running from Dora to Jasper, where connection might have been made with the passenger train from Jasper to Nauvoo, had already passed Dora on its way to Jasper, and that the defendant is in no sense liable to plaintiff, or to any other person, for the failure to notify Van Horn in time for him to catch that train."

(32) "I charge you that, if the telegram in question was delivered to Jack Van Horn at Dora, Ala., before any passenger train passed that place from the time the telegram was delivered at Nauvoo, then your verdict must be for the defendant."

(c) "I charge you that it is possible that plaintiff understood that A. D. Northcutt was acting as plaintiff's agent when he left to send the alleged message; but the evidence must go further before you can sign for the plaintiff, and establish to your reasonable satisfaction that A. D. Northcutt also understood and agreed so to act."

(d) "I charge you that, unless you are able to distinguish the grief of plaintiff which would have been relieved by the presence of her father from the grief she was otherwise suffering by reason of the husband's death, and which would not have been removed or lessened by the presence of her father, then you cannot find any damages for plaintiff based on the theory of mental pain and anguish."

(e) "I charge you that if you believe the evidence in this case you cannot find any damages for plaintiff for mental suffering caused by reason of the absence of her father from Nauvoo, except during the period beginning with the time he would have reached Nauvoo, had he gone by way of Carbon Hill on the 5 o'clock train on October 1st and

driven from there to Nauvoo, and ending with the time he would have reached Nauvoo, had he taken the morning train to Carbon Hill, and driven from thence to Nauvoo on October 2d."

(g) "I charge you that there is no evidence in this case that defendant, or its agents, in the line and scope of their duty, left the alleged message in question, after its transmission to Dora, with the lady who is said to have lived near Van Horn."

The following charges were given for the plaintiff:

(1) "I charge you, gentlemen, that if plaintiff's father was prevented from going to the relief of plaintiff by reason of the negligence of defendant, the fact of the agency of A. D. Northcutt being established to your reasonable satisfaction as claimed, she would be entitled to recover for the anguish she may have suffered on account of his absence up to the time he could have gotten to her after receiving her message, even if the jury could believe he could have gotten to her before he did after he received her message."

(2) "The court charges the jury that if they believe, from all the evidence, that Mrs. Northcutt instructed A. D. Northcutt to go and send the telegram to her father at Dora, and A. D. Northcutt did send the telegram mentioned in the complaint to her father, Jack Van Horn, this would make A. D. Northcutt the agent of plaintiff in sending said telegram."

Campbell & Johnson, for appellant. G. O. Chenault, for appellee.

SIMPSON, J. This action was brought by the appellee for damages for delay in delivering a telegram. The action is on the contract, and alleges that plaintiff's husband was killed accidentally; that her brother-in-law (Northcutt), as her agent, sent from Nauvoo, Ala., to her father (Van Horn) at Dora, Ala., a telegram in these words: "Harris killed in mines. Notify Jack at once at Empire. [Signed] A. D. Northcutt." "Harris" was plaintiff's husband, and "Jack" was a brother of his. There is some conflict in the evidence as to the agency of Northcutt in sending the message; but, according to the plaintiff's statement, she requested him to send the telegram to her father, and he added the request to notify his brother.

Plaintiff claims that, by reason of the delay in the delivery, her father could not and did not reach Nauvoo until after her husband was buried, so that her principal claim for damages is for mental anguish for the day during which the arrangements were being made and the funeral was conducted, on account of being deprived of the consolation of having her father with her. Upon the general subject of recovery for mental anguish in such cases, the authorities in other states are in hopeless conflict; but our own court has carefully gone into the matter,

and has arrived at certain definite conclusions which it may be well to state in the outset, for it is not deemed wise, at this day, to go behind our decisions and open up this wide field of controversy for a new alignment of principles.

First. An undisclosed principal may sue on a contract made by his agent. *W. U. Tel. Co. v. Millsap*, 135 Ala. 415, 33 South. 160, and cases cited; *Manker v. W. U. Tel. Co.*, 137 Ala. 292, 34 South. 839; *Western U. Tel. Co. v. Manker*, 145 Ala. 418, 41 South. 850.

Second. Where there is a right of recovery of anything else on the contract, a recovery may be had in addition for mental anguish. *W. U. Tel. Co. v. Krichbaum*, 132 Ala. 535, 31 South. 607; *W. U. Tel. Co. v. Henderson*, 89 Ala. 510, 518, 519, 7 South. 419, 18 Am. St. Rep. 148.

Third. While there has been some criticism of the rule laid down in the leading case of *Hadley v. Baxendale*, 9 Exch. 341, to wit, that the damages for the breach of a contract "should be such as may fairly and reasonably be considered either arising naturally—I. e., according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of the parties, at the time they made the contract, as the probable result of the breach of it," yet that criticism was only verbal, to the extent that it would be more accurate to say that any special facts which magnify the transaction and entitle the party to special damages should be brought within the contemplation of the parties. *Daughtery v. Am. Union Tel. Co.*, 75 Ala. 168, 176, 177, 51 Am. Rep. 435. This and other cases adhere to the rule in said leading case, but hold that, by reason of the peculiar nature of the telegraph company and the duties it undertakes to the public, the very fact of a communication being sent by telegraph gives notice that expedition is the main object in view; so that it is not necessary to bring to its attention the circumstances which call for sending the message without delay, or even to couch the message in language which may be understood. *W. U. Tel. Co. v. Way*, 83 Ala. 542, 557, 558, 4 South. 844.

It must be acknowledged that this element of damage is very vague and uncertain; that it is very difficult, if not impossible, for a jury to ascertain how much mental anguish a person endures, and to translate it into dollars and cents; and also that, if this principle should be applied to contracts generally, it would be very far-reaching, and possibly ruinous to many commercial transactions. Consequently our court has said that it is to be allowed only in case of messages between persons occupying close degrees of relationship, relating to exceptional events such as sickness or death, and that "to extend as a natural result the allowance on other occasions 'would * * * tend to promote and encourage a species of litigation

more or less speculative in its nature, and unjust and oppressive in its results." W. U. Tel. Co. v. Westmoreland, 151 Ala. 319, 44 South. 382, 383; W. U. Tel. Co. v. Ayers, 131 Ala. 391, 394, 81 South. 78, 90 Am. St. Rep. 92.

It is contended by the appellant that, according to the overwhelming weight of authority, no recovery can be had for mental suffering where the connection of the plaintiff with the message is not brought home to the telegraph company. The cases referred to in appellant's brief do not seem to rest upon any peculiarity in regard to mental suffering as an element of damage, but rather upon the general principle, held by some courts, in construing the Hadley-Baxendale Case, which we have seen does not obtain in this state in cases against telegraph companies, to wit, that the company is not liable unless informed of the circumstances which would cause the loss or suffering. Thus the principal case relied on (*Helms v. W. U. Tel. Co.*, 143 N. C. 386, 55 S. E. 831, 8 L. R. A. (N. S.) 249, 118 Am. St. Rep. 811) argues upon the general principle, while the case of *Primrose v. W. U. Tel. Co.*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883, involved a cipher message about a commercial transaction. The case of *W. U. Tel. Co. v. Luck*, 91 Tex. 178, 41 S. W. 469, 66 Am. St. Rep. 869, and *Same v. Kirkpatrick*, 76 Tex. 217, 13 S. W. 70, 18 Am. St. Rep. 37, and others which it is unnecessary to cite, rest upon the same general principle.

For these reasons it is the opinion of the writer that, without overruling or modifying our previous decisions, this contention cannot be sustained; but the majority of the court (consisting of TYSON, C. J., and DOWDELL, DENSON, and ANDERSON, JJ.) hold that, the plaintiff's relation to the contract not having been disclosed to the telegraph company, and it not appearing in the telegram, she is not entitled to recover for mental pain and anguish, and in support of that proposition they cite *Helms v. W. U. Tel. Co.*, 143 N. C. 386, 55 S. E. 831, 8 L. R. A. (N. S.) 249, 118 Am. St. Rep. 811, and note; *Poteet v. W. U. Tel. Co.*, 74 S. C. 492, 55 S. E. 113; *W. U. Tel. Co. v. Kirkpatrick*, 76 Tex. 217, 13 S. W. 70, 18 Am. St. Rep. 37; *Squire v. W. U. Tel. Co.*, 98 Mass. 237, 93 Am. Dec. 157; *W. U. Tel. Co. v. Procter*, 6 Tex. Civ. App. 300, 25 S. W. 813; *Railroad Co. v. Seals* (Tex. Civ. App.) 41 S. W. 841; *Elliott v. Telegraph Co.*, 75 Tex. 18, 12 S. W. 954, 16 Am. St. Rep. 872; *W. U. Tel. Co. v. Brown*, 71 Tex. 723, 10 S. W. 323, 2 L. R. A. 766; *S. W. Tel. Co. v. Gotcher*, 93 Tex. 114, 53 S. W. 686; *Davidson v. W. U. Tel. Co.*, 54 S. W. 830, 21 Ky. Law Rep. 1292; *Morrow v. W. U. Tel. Co.*, 107 Ky. 517, 54 S. W. 853; *Rogers v. W. U. Tel. Co.*, 72 S. C. 290, 51 S. E. 773; *Cranford v. W. U. Tel. Co.*, 138 N. C. 162, 50 S. E. 585; *W. U. Tel. Co. v. Kerr*, 4 Tex. Civ. App. 280, 23 S. W. 264; *W. U. Tel. Co. v. Carter*, 85 Tex. 580,

22 S. W. 961, 34 Am. St. Rep. 826; *W. U. Tel. Co. v. Weniski*, 84 Ark. 457, 106 S. W. 486.

Mental suffering, resulting from the absence of some one whose presence would be consoling in the time of grief, is recognized as a proper subject of damage. *Jones on Telegraph and Telephone Companies*, § 543, p. 519. From what has been said, it results, from the opinion of the majority of the court, that the averments of the complaint in regard to mental suffering should have been stricken on motion, and that the charges requested by the defendant on the ground of mental suffering should have been given.

The plaintiff, when on the stand as a witness, was asked this question, to wit: "I will ask you if, on account of the absence of your father from the time your husband was killed, and after you sent the telegram, and up to the time he was buried, up to the time he came there, and on account of that absence, you suffered any injury to your feelings and mental anguish." This question was objected to, and the answer (which was "Yes") was moved to be excluded, and the motion overruled. This was error. In an attachment case, in which it was sought to recover for wounded feelings, this court held that it was improper to permit the plaintiff to testify that he was "much distressed, and harassed in body and mind"—that he "was almost crazy." The court, speaking through *Stone, J.*, said: "Such testimony as this can be legal, only on the theory that for wrongs, identical in nature and degree, the man of delicate organism and acute sensibilities is entitled to greater damages than one of more stoical nature. * * * But such suffering is not the subject of direct proof. It is an inference to be drawn by the jury from the manner and causelessness of the wrong." *City National Bank v. Jeffries*, 73 Ala. 183, 192-193. In the case of *Roberts v. W. U. Tel. Co.*, 73 S. C. 520, 53 S. E. 985, there was no objection to the testimony; but, in discussing a charge, the court merely remarks that "the plaintiff * * * may testify to the fact that he suffered, after the circumstances from which the suffering might arise have been brought out; but he cannot testify as to his peculiar apprehensions, fears, and conclusions, because these might be due to individual temperament."

Another reason why this testimony should be excluded is that it relates to her mental suffering from the time her husband was killed; whereas, if the defendant was liable at all, it could only be for the time between the hour when the father could have gotten there, if the telegram had been promptly delivered, and the time when he did get there.

It was error to allow the plaintiff to ask her own witness—Northcutt—if he was not very much distressed at the time and hardly knew what he was doing. The evident purpose of this was to discredit plaintiff's

own witness, who had testified in certain matters differently from what the plaintiff had testified. This could not be done. *Winston v. Moseley*, 2 Stew. 137, 139; *So. Bell Tel. & Tel. Co. v. Mayo*, 134 Ala. 641, 33 South. 16; *Dundas v. Lansing*, 75 Mich. 499, 42 N. W. 1011, 5 L. R. A. 143, 13 Am. St. Rep. 457; *Bullard v. Pearsall*, 53 N. Y. 230.

The objection to the question to the witness Northcutt as to his age and the age of Jack Northcutt was not made until after it was answered, and the objection was properly overruled for this, if for no other, reason.

The court erred in refusing to admit the delivery sheet, after proof of the genuineness of the signature. If there was evidence contradicting the genuineness of the signature, it was a question for the jury to determine whether the telegram was received at the time therein specified. 2 *Wigmore on Ev.* § 1261; 3 *Wigmore on Ev.* § 2134.

There was no error in admitting the telegram received by Van Horn. The matter of the letters and figures thereon was open to proof as to their meaning, and as to when and by whom they were placed on it, as was also the matter as to whether the person who delivered it was the agent of the defendant. *Collins v. W. U. Tel. Co.*, 145 Ala. 412, 41 South. 160.

The court was in error, after this paper had been introduced, in remarking to counsel for defendant, who denied the delivery of the said message, "you are responsible for it."

The court erred in refusing to give charges 13, 15, 16, "o," and "p," requested by the defendant. The plaintiff could recover only on the theory that Northcutt, in sending the telegram, sent it as her agent. In order to constitute an agency, it requires the con-

currence of the minds of both the principal and the agent. *W. U. Tel. Co. v. Adams* (Ala.) 46 South. 228; *Heathcoat v. W. U. Tel. Co.* (Ala.) 47 South. 139; *W. U. Tel. Co. v. Heathcoat* (Ala.) 43 South. 117; *W. U. Tel. Co. v. Adair*, 115 Ala. 441, 22 South. 73.

Charge "c," requested by the defendant, was an argument, and was properly refused; and charge "f" was misleading and faulty, for referring to the jury to determine what the negligence charged in the complaint was.

Charges 30, 31, "e," and "g" invaded the province of the jury and were properly refused. *So. C. & G. Co. v. Swinney*, 149 Ala. 406, 42 South. 808.

Charge 32 was properly refused, as a passenger train might have passed just after he received the telegram, not leaving sufficient time for him to have reached the depot.

Charge 1, given at the request of the plaintiff, should have been refused. If she was entitled to recover for mental anguish on account of his absence, it would not be "up to the time he could have gotten to her after he received the message," but from the time he could and would have reached, up to the time he actually did reach, her.

Charge 2, given at the request of the plaintiff, should have been refused. Although plaintiff may have requested Northcutt to send the telegram to her father, yet if, as a matter of fact, he did not send it as her agent, but on his own account, he was not acting as her agent.

The judgment of the court is reversed, and the cause remanded.

TYSON, C. J., and DOWDELL, ANDERSON, and DENSON, JJ., concur. SIMPSON, J., dissents.

(94 Miss. 759)

ILLINOIS CENT. R. CO. et al. v. STATE ex rel. DISTRICT ATTORNEY. (No. 13,569.) (Supreme Court of Mississippi. March 1, 1909.)

1. APPEAL AND ERROR (§ 750*)—ASSIGNMENTS OF ERROR.

Where a case is disposed of by a peremptory instruction, an assignment that the court erred in giving it brings the entire case up for review, and permits arguments for and against such exception to be made for the first time on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3077-3079; Dec. Dig. § 750.*]

2. MUNICIPAL CORPORATIONS (§ 649*)—LAYING OUT STREETS—VIEWERS—STATUTES—APPLICATION.

Code 1906, § 4400, provides that any person who shall desire to have a public road laid out, altered, or changed may present a petition to the board of supervisors stating certain facts, on which the board shall hear the parties, and if it determines that the prayer ought to be granted it shall appoint a committee to view the contemplated road, etc. *Held*, that such section was applicable to county highways only, and could not be availed of by municipalities to lay out or change public streets.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1423; Dec. Dig. § 649.*]

3. EMINENT DOMAIN (§ 47*)—STREETS—EXTENSION—RAILROAD PROPERTY—CONDEMNATION.

Under Const. 1890, art. 3, § 17, providing that private property shall not be taken or damaged for public use, except on due compensation first made to the owner, a city had no power to lay out a street over a railroad's right of way, condemning a crossing and paying damages therefor, in the manner prescribed by Code 1906, § 3337, conferring on municipalities power to exercise the right of eminent domain in laying out streets.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 111-113; Dec. Dig. § 47.*]

4. RAILROADS (§ 99*)—VIADUCTS—DUTY TO CONSTRUCT.

Where a street had not been legally laid out over a railroad's right of way, the municipality could not compel the railroad company, by ordinance or otherwise, to construct a viaduct to carry the street over the right of way.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 293; Dec. Dig. § 99.*]

5. EMINENT DOMAIN (§ 81*)—"PROPERTY"—"VALUE."

The term "property," as used in Const. 1890, art. 3, § 17, providing that the property of an individual shall not be taken or damaged for public use, except on due compensation being first made, includes every species of value, right, or interest. The term "value," as applied to property, is the price deemed or accepted as equivalent to the utility of anything—compensation which is regarded as an equivalent. The law infers value from the term "property," and, if no value is shown, the inference will be that the value is nominal.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 215; Dec. Dig. § 81.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5693-5728; vol. 8, pp. 7768-7770; 7275-7280, 7826.]

Appeal from Circuit Court, Lincoln County; M. H. Wilkinson, Judge.

"To be officially reported."

Mandamus by the State, on relation, etc., against the Illinois Central Railroad Company and others. Judgment for relator, and respondents appeal. Reversed and remanded.

Mayes & Longstreet, for appellants. H. Cassedy, for appellee.

MAYES, J. This is a proceeding by mandamus to compel the railroad company to construct a bridge across its right of way in the town of Bogue Chitto, beginning at the foot of Yellow Pine street. The facts on which it is sought to sustain this petition are about as follows, viz.: The petition is filed by the district attorney, in behalf of the state, and recites that a large majority of the citizens of the town filed a petition with the mayor and board of aldermen thereof, praying that Yellow Pine street be opened and extended across the right of way of the railroad company and that a bridge or viaduct be built across same. At the next regular meeting of the mayor and board of aldermen succeeding the one at which the citizens' petition was received, the following ordinance was passed, viz.:

"Section 1. Be it ordained by the mayor and board of aldermen of the town of Bogue Chitto, Mississippi, that the Illinois Central Railroad Company and the St. Louis & New Orleans Railroad Company be and they are hereby required to erect, establish, and maintain across their tracks, where Yellow Pine street crosses same, a substantial bridge or viaduct, to be erected and completed within three months from the time this ordinance becomes operative or effective, and thereafter keep the same in good repair.

"Sec. 2. Be it further ordained that this ordinance take effect and be in force from and after thirty days after its passage."

This ordinance was passed some time in March, 1907, and, the railroad company refusing to obey the ordinance and build the bridge, this proceeding was instituted to compel them to do so. It is admitted that no notice was given to the railroad company of the proposition of the municipality to open up Yellow Pine street across the right of way of the company; but it is claimed that a copy of the above ordinance was served on the company before its passage. It clearly appears that in opening up this street a part of the railroad right of way is taken for street use. In truth, the railroad company seems the only property owner concerned in so far as property is to be taken for street use. The railroad company answered, denying every allegation contained in the petition, and considerable testimony was taken; but we do not deem it necessary to advert to it, since it is our view that very little of the testimony has any relevancy to the real question in issue. No condemnation proceedings were instituted by the municipality, and

no private agreement was had with the company as to any damage that might be done it by the taking of its right of way for other uses. At the conclusion of the case a peremptory instruction was given for the municipality, and the railroad company ordered to build the bridge. On the motion for a new trial the granting of the peremptory instruction was assigned as error, and on appeal it is again assigned here. The case having been disposed of by the court by a peremptory instruction, this assignment of error brings into review the entire case, and this answers the contention of appellee that certain arguments are made here for the first time.

We do not consider the question of notice to the railroad company. Since the municipality proceeded in an unauthorized way, no amount of notice could possibly affect any of the rights of the company. It would seem that the mayor and board of aldermen were proceeding to open up Yellow Pine street under section 4400, Code of 1906; but this section has no application to municipalities, and the procedure there outlined cannot be availed of by municipalities in laying out or changing public roads. Since no other provision for any kind of eminent domain proceedings on the part of counties is to be found in the law save that provided for by section 4400, this section has application to counties only, and is a substitute for eminent domain proceedings required to be resorted to by all other persons or corporations having the right to condemn private property for public use. This is made clear by referring to section 1854, Code of 1906, which provides that "any person or corporation having the right to condemn private property for public use shall exercise that right as provided in this chapter, and not otherwise, except as specified in the chapters on 'Landings,' 'Mills and Milldams,' and 'Roads, Ferries and Bridges.'" Municipalities are not among the class excepted from the operation of the above statute; but, on the contrary, section 3337 gives a municipality the power to exercise the right of eminent domain in the laying out of streets, and, when a municipality undertakes to lay out a new street requiring the taking or damaging of property, it must proceed under the provisions of the chapter on eminent domain, "and not otherwise," as is expressly provided in section 1854.

We are not concerned with the reason why the Legislature has made sections 4400, 4401, and 4402, Code of 1906, apply to county roads only; but it is manifest that the above sections do only so apply. Many good reasons might be given why the Legislature so enacted the law for application of the statute. Since the proceedings of the municipality opening and extending the street were a nullity, it follows that the ordinance requiring the building of the bridge was also a nullity, since section 4053 of the Code of 1906 confers no arbitrary power on counties or

municipalities to require the building of bridges by railroad companies without reference to where they shall be built; but the bridges can be required to be built only at highway crossings, and there can be no highway crossing until a highway has been lawfully established. It is undeniably true that property devoted to one public use may be taken and used for another, subject to limitations not necessary to be here specified; but, because property may be devoted to a quasi public use and affected with a public interest so to speak, such property cannot for that reason be taken from its owners, or damaged, for another public use, except upon due compensation being made to the owners thereof. We know of no case in this state that has ever held contrary to this. Section 17, art. 3, of the Constitution of 1890 stands as a sentinel, guarding the right of the private owner of property not to have same taken or damaged for public use, except upon due compensation being first made to the owner, however small may be the value of that taken, or slight may be the damage; and this is true, whether the taking or damage is at the instance of a municipality, county, or other person or corporation possessing eminent domain powers.

The importance of this section of the Constitution as affecting the welfare of the citizenry of the state cannot be too strongly emphasized. The case of *Illinois Central R. Co. v. Commissioners of Highways of Town of Mattoon*, 161 Ill. 247, 43 N. E. 1100, is a case almost identical with the case here. In the case just cited it was held that the laying out of a highway across a railroad right of way was the taking of private property for public use, entitling the railroad company to compensation therefor; and the court said, on page 251 of 161 Ill., page 1101 of 43 N. E.: "It is the mandate, both of the Constitution and of the statute, that appellant should be paid just compensation for its property taken. Property is the right and interest which one has in lands and chattels to the exclusion of others. The term 'property' includes every species of valuable right and interest. Value is the price deemed or accepted as equivalent to the utility of anything, and compensation is that which constitutes or is regarded as an equivalent. It is impossible to conceive of such a thing as property wholly separated from the element of value. From the very term 'property' the law infers some value; and, if no value is shown, the inference will be that it is the nominal sum of one cent, one penny, or one dollar. Just compensation to the extent of that value was an absolute and constitutional condition precedent to the exercise of the right to take property from the owner under the right of eminent domain." As to what is the measure of damage in such a case the court further said, on page 252 of 161 Ill., page 1102 of 43 N. E.: "The measure of compensation is the amount of decrease in the value

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defendant a complete and valid title to said property, but that he has refused to accept the title or to pay the purchase price thereof; and that plaintiff is entitled to have said defendant specially perform his said contract to buy said lots and to pay the purchase price.

Wherefore plaintiff prayed that defendant be ordered to comply with his contract to purchase the property described in the petition, and to pay the sum of \$3,000, the purchase price thereof.

After pleading the general issue, the defendant for further answer admitted that he agreed to purchase the property described in the petition for the price therein stated, and also that the plaintiff had tendered a title thereto as alleged, but denied that the title so tendered was good, valid, or sufficient, or such a title as the defendant was compelled to take under his contract with the plaintiff. For further answer the defendant set forth alleged defects in the chain of title and prayed to be dismissed, with costs.

The case was tried, and there was judgment in favor of the plaintiff, ordering the defendant to comply with his contract to purchase the lots described in the petition, and against the defendant in the sum of \$3,000, upon delivery of the property "by clear and unincumbered title."

Defendant has appealed, and the cause has been submitted to us on the face of the record.

On November 20, 1906, the defendant paid to the plaintiff \$1,000 on account of purchase price of 13 vacant lots of ground situated in square 262 in the city of New Orleans and fronting on Monroe, Cohn, Spruce, and Eagle streets; the balance of \$2,000 to be paid on terms of credit. The receipt stipulated that, in case satisfactory, legal, and valid titles are not delivered to the defendant, the deposit of \$1,000 was to be returned.

On January 4, 1908, the parties executed a written instrument, which, after referring to the prior agreement, recited that it was necessary to institute judicial proceedings to perfect the title, and that, in consideration of the \$1,000 already paid and an advance of the further sum of \$2,000, the plaintiff agreed to transfer the property to defendant for \$3,000, provided the titles were good and sufficient, and approved by a judgment of the court. It was further stipulated that, if the titles were not good and sufficient, the \$3,000 was to be returned to the defendant, with 8 per cent. interest thereon from January 4, 1908, and that the defendant was to receive 4 per cent. interest on \$1,000 from November 20, 1906, to January 4, 1908.

It was further stipulated that the titles were to be perfected within 30 days from the date of the agreement. This suit was filed a month later.

The lots described in the petition belonged

to one Charles Satchell, and were correctly identified in his titles by reference to numbers as per original plan of the subdivision of the square, and also by particular description.

When the said square was incorporated as a part of the city of New Orleans, the board of assessors altered the description without reference to the original plan, and the lots thus misdescribed were assessed and sold for taxes. The purchaser at the tax sale sold by the same misdescription to the Western Land & Immigration Company, which sold to the trustees of the Land Trust of Indianapolis, which in September, 1898, sold by proper description to the Prudential Building & Mortgage Security Company, which in June, 1900, sold by proper description to the plaintiff.

The lots were assessed, advertised, and sold as fronting on other streets, and without reference to any plan whatever. It is evident that lots 80 feet front on Cohn street by a depth of 120 feet are different from lots of the same dimensions fronting on Monroe street. If the tax assessments and sales had been made by reference to a certain map or plan, the result might be different; but as it is the lots described in the petition are not identified with the lots sold at tax sale.

The issue of title raised by the pleadings was not disposed of by the judgment below, which leaves the parties practically in the same position they occupied before the suit was instituted.

Under the very terms of the written agreement of January 4, 1908, defendant was not bound to take the property until the titles were perfected by a judgment of court, and this was to be done within 30 days.

It is therefore ordered that the judgment appealed from be reversed, and it is further ordered that plaintiff's suit be dismissed, with costs in both courts.

(123 La. 5)

No. 17,069.

JOSEPHSON v. POWERS et al.

(Supreme Court of Louisiana. Jan. 18, 1909.
Rehearing Denied March 1, 1909.)

HUSBAND AND WIFE (§ 171*)—MORTGAGE OF WIFE'S PROPERTY—RIGHTS OF HOLDER OF NOTE.

Where a married woman, authorized by her husband, presents, to a competent court a sworn petition alleging that she desires to borrow money for her separate benefit and to mortgage her property to secure the debt, and, being examined by the judge out of the presence of her husband, is authorized to contract the debt and execute the mortgage, the holder of the mortgage note, made by her pursuant to such authority, who acquires the same in good faith, for value, before maturity, and with no information as to the actual use to be made of the money furnished by him, is entitled to full protection.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 171.*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Walter Byers Sommerville, Judge.

Action between Pauline Josephson and Caroline Powers and Ira Powers. From the judgment, Caroline Powers appeals. Affirmed.

See, also, 121 La. 28, 46 South. 44, 121 La. 190, 46 South. 206.

Thomas Bulwer Walker and Benjamin Yehil Wolf, for appellant. Benjamin Ory and Solomon Wolff, for appellee.

MONROE, J. Defendant, having enjoined the execution of a writ of seizure and sale, has appealed from a judgment dissolving the injunction and dismissing her suit.

The facts are that, being a married woman, she on June 5, 1906, with the authorization of her husband, presented to the civil district court a sworn petition, alleging that she desired to borrow \$3,500 for her separate benefit, and to secure the same by mortgaging her paraphernal property, and that, being thereafter examined by the judge apart from her husband, she was authorized to contract the debt and execute the mortgage, the judge certifying that he had, "by her declaration, made on oath, ascertained to my [his] satisfaction that the sum of \$3,500, which the said Mistress Caroline Powers desires to borrow, is not for her husband's debt, or his separate advantage, or the benefit of his separate estate, or for the community, but that the same is solely for her separate advantage," etc.

Armed with this certificate and authorization, she executed a note for \$3,500, secured by mortgage, payable to her own order, and by her indorsed in blank, which a day or two later was sold to the plaintiff (whom the defendant had never met, and who does not appear to have had any knowledge whatever of the purpose for which it was executed) for \$3,250 cash. Thereafter some payments were made on account, leaving due, on February 1, 1907, a balance of \$3,150, principal and interest, for which the writ of seizure and sale has issued.

In view of these facts, plaintiff, as holder and owner of the note and mortgage, is entitled to full protection, and her rights cannot be prejudiced, even though the money furnished by her was used in payment of a debt due by defendant's husband. Civ. Code, art. 128; *Feltus v. Blanchin & Giraud*, 26 La. Ann. 401; *Mrs. Mary B. Locke, Wife, etc., v. Lafitte, Dufilho & Co.*, 28 La. Ann. 232; *Mrs. Mason Pilcher v. Pugh & Schwartz*, 28 La. Ann. 494; *Mrs. Sarah A. Blake v. S. O. & T. A. Nelson*, 29 La. Ann. 245; *Mrs. F. G. Henry v. J. R. A. Gauthreaux*, 32 La. Ann. 1103; *McLennan v. Dane*, 32 La. Ann. 1197; *Mrs. C. Dougherty v. Hibernia Ins. Co.*, 35 La. Ann. 629; *Darling v. Lehman, Abraham & Co.*, 35 La. Ann. 1186; *Gibson v. Hitchcock et al.*, 37 La. Ann. 209; *Johnson*

v. Pessou, 49 La. Ann. 109, 21 South. 177; *Berwick, Wife, v. Sheriff*, 49 La. Ann. 201, 21 South. 692; *Saufley v. Joubert*, 51 La. Ann. 1048, 25 South. 934.

The judgment appealed from is accordingly affirmed.

(123 La. 7)

No. 17,256.

BALL v. VICKSBURG, S. & P. RY. CO.

(Supreme Court of Louisiana. Feb. 1, 1909. Rehearing Denied March 1, 1909.)

1. MASTER AND SERVANT (§§ 206, 224*)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

The master is not liable in damages for injuries received by the servant when the latter is assuming an unnecessary risk and is not engaged in the discharge of any duty assigned to him by, or that he owes to, the master; nor is he liable for injuries resulting from risks incidental to the service for which the servant was employed, which the servant may reasonably be held to have assumed.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 550, 654; Dec. Dig. §§ 206, 224.*]

2. MASTER AND SERVANT (§ 224*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

When an employé in a railroad car and repair shop, having with an assistant undertaken to lace together the ends of a belt driving the counter shaft from which a lathe operated by him receives its motive power, has finished such lacing and is merely idling with the belt, instead of putting it in its place on the pulley of the main shaft, the employer is not liable for an accident resulting from the "taking" of the belt by the revolving shaft and the entanglement of the employé therein.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 224.*]

3. MASTER AND SERVANT (§ 218*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

An apprentice 19 years old, of more than average intelligence, who has worked for 2 years and 7 months in a railroad car and repair shop, and who has frequently discharged that function, must be held to have assumed the risk incidental to the putting of a light belt on a main and counter shaft while the former is in motion.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 601-609; Dec. Dig. § 218.*]

(Syllabus by the Court.)

Appeal from Sixth Judicial District Court, Parish of Ouachita; James Pemberton Madison, Judge.

Action by Mary E. Ball against the Vicksburg, Shreveport & Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Reversed, and suit dismissed.

Stubbs, Russell & Theus, for appellant. John Merritt Munholland, for appellee.

Statement of the Case.

MONROE, J. Plaintiff seeks to recover damages for the loss of her minor son, whose death she imputes to the fault of the defendant, by whom he was employed. Defendant denies the fault imputed to it, and

alleges that the death of the minor was the result of his own negligence and of a risk assumed by him from the nature of his employment. The facts, as we find them from the evidence in the transcript, are as follows: The minor, who was about 19 years old and of more than average intelligence, had for 2 years and 7 months prior to his death, with his mother's consent, been working as an apprentice in defendant's car and repair shop, for the purpose of learning the trade of machinist and iron worker, and just before he was killed was engaged in the discharge of a duty which required him to operate a lathe that received its motive power through a counter shaft which was connected with the main shaft by means of two leather belts; the one ("straight") driving the machine forward, and the other ("crossed") driving it backward. The crossed belt broke, and it became necessary to repair it by cutting the ends squarely off and lacing them together, and, as the job required two persons, the minor, Ball, requested Endom, a fellow workman, who was operating a machine near by, to assist him. Endom was, however, interested in his own work and declined to leave it. Ball thereupon applied to Courtney, the foreman, and the latter assigned Copeland (another apprentice, 20 years old, and who had been working in the shop about 18 months) to the duty. The main shaft runs from east to west the whole length of the shop, at an elevation of 18½ feet above the floor, and the counter shaft, about 10 feet long, runs parallel to it, at a distance of 21 feet to the south and 2 feet lower; there being some timbers upon which a person can make his way from one to the other, and access to the main shaft being obtained by means of a ladder, reaching from the floor to a platform, two planks (2x12) wide, which runs along 2 feet 9 inches below the shaft and projects 16 or 17 inches on the north, and say 8 inches on the south, side. Before lacing the ends of the belt together, it was, of course, necessary that it should be put over both shafts, and, while Ball was (probably) looking for a knife with which to square the ends, Copeland took the belt up on the platform and put it over the main shaft, after which, when Ball joined him and held it, he carried an end across and put it over the counter shaft and brought it back, and then held the two ends while Ball laced them together, holding the belt, at the same time, in such a way as to prevent its "taking" the revolving main shaft. There is no doubt that the lacing had been completed when the accident occurred, as the two ends, laced together, were cut from the belt after the accident, and are brought up as part of the transcript, and Copeland so testifies, without contradiction. As to other matters immediately connected with the accident, there were but three eyewitnesses, and we make the following excerpts from their testimony, to wit:

McCranie, who was operating a machine about 50 or 60 feet to the westward, or south-westward, of a point immediately beneath the place of the accident (called on behalf of plaintiff), says:

"I was running a planer at the time, and he [Ball] came to me to borrow a knife, and I didn't have a knife, and he left me and went up the aisle, and I saw him going up the ladder, and I didn't think any more about it, and the next time I looked he was in the loft. I was on a hard job, and didn't pay particular attention to them; just glanced up my eyes at them three times, and the second time I looked they were at work up in the loft, and the next time I looked he [Ball] was standing up, and the moment I looked he went right over the shaft. * * * The shaft was turning from him, and he was standing with his right side to it. * * * It [his face] was almost toward it. It was inclined to be not exactly at right angles to the shaft. Q. You saw him stand up, and then instantly went over? A. Yes, sir."

On his cross-examination he says that he saw Ball going up to the platform, and that Copeland was already there, and that he saw them mending the belt.

"They were both sitting astride the two planks [constituting the platform], facing each other. * * * Ball had his back to me and * * * Copeland held it [the belt], and Ball laced it. * * * Q. At the time you saw him [Ball] standing there, in what position was Copeland? A. Sitting still facing me."

On his redirect examination he says:

"I presume he [Copeland] was about the center of the two pulleys. * * * He was east of the pulley [to which the cross belt was to be adjusted]. Q. Where was Ball? A. He was west. Q. The pulley was between them? A. Yes, sir; about even with their heads, while sitting down. Q. Which way was Copeland facing? A. Facing west. Q. Was he astride of the plank? A. Yes, sir. Q. And Ball was facing east? A. Yes, sir."

Being asked how much time elapsed between the moment when Ball asked him for the knife and the moment of the accident, he says (as a guess):

"It was about 15 minutes."

Copeland (called for defendant) testifies in part as follows:

"We were sent up there to mend a belt, up there in the loft. After the job was done, we were sitting there talking, and the belt caught his hand and killed him. * * * Q. At the time he was caught, had you finished mending the belt? A. Yes, sir. Q. What were you doing at the time he was caught? A. Talking. Q. What else? A. He had the belt, holding it in his hand. Q. In which hand? A. In his left hand. * * * Q. What was he doing with the other hand? A. He was patting it on top of the shaft. * * * Q. Was the shaft still revolving? A. Revolving. * * * about 125 revolutions to the minute. * * * Q. Was he doing anything, at the time he was caught, towards mending the belt? A. No, sir. Q. Had the job been completed? A. Yes, sir. Q. What, if anything, was he doing at that time towards putting it on the pulley? A. Nothing at all. Q. What, if anything, was said by you to the deceased, Willie Ball, or by Willie Ball to you, as to the danger of doing as he was? A. I told him he had better leave it alone; that's all. Q. What did he say? A. Nothing; just kept talking. * * * Q. How long had he been up there before the acci-

dent and since you had finished mending the belt? A. We had been up there about 20 minutes, at the time he was killed. * * * Q. How long, after you had finished mending the belt, was it before the accident? A. I guess 10 or 15 minutes. * * * Q. How long did it take you to fix the belt? A. About 5 minutes. * * * Q. In what position were you while Willie laced the belt? A. Standing up while he laced the belt. Q. How about when the accident occurred? A. We were sitting down. Q. Both of you? A. Yes, sir. * * * Q. Were you to the north, south, east, or west of him? A. West of him. Q. Which way were you facing? A. South. Q. Which way was Ball facing? A. South. Q. Were you astride of the plank or sitting on the side? A. On the side. Q. With your feet hanging down? A. Yes, sir. Q. Was Ball sitting in the same way? A. Yes, sir. * * * Q. Mr. Copeland, why didn't you go down, after you had finished lacing the belt? A. We were sitting there killing time. * * * Q. Mr. Copeland, where were you and where was Mr. Ball sitting, with reference to the pulley, on which side of it, east or west? A. West. Q. Both of you? A. Yes, sir. Q. Mr. Ball between you and the pulley? A. Yes, sir."

Endom (called for plaintiff), who was operating a lathe about 25 feet to the southward of a point immediately beneath the place where the accident occurred, testifies as follows:

"Q. Did you see the boys while they were up there? A. I did. * * * Q. When they went up there, what did they do; that is, at the time that you saw them? A. At the time that I saw them, Copeland was sitting down and Ball was lacing the belt. Then I saw Copeland falling out of the loft, or, rather, sliding down the air hoist. Q. It was some little time between the time you saw Copeland sitting and Ball lacing the belt and the time you saw Copeland sliding down the air hoist? A. Yes, sir; I guess, five minutes; it might have been more. Q. About how long were they up there, altogether? A. Fifteen or 20 minutes. * * * Q. When you last saw them, which way was Copeland facing? A. Facing south. Q. Which way was Ball facing? A. Same position. He was standing up and Copeland was sitting down. Q. Was Ball east or west of Copeland? A. East of Copeland. * * * Q. Standing up? A. Yes, sir. Q. Copeland at his right, sitting down? A. Yes, sir. Q. Could you be mistaken about their position? A. No, sir; I couldn't. Q. What about the position of Ball and Copeland, in regard to the pulley on which the belt ran, as to whether they were east or west of it? A. They were north of it; Copeland was west of it, and Ball was just in front of it—you could call it east."

It otherwise appears that, either because Ball patted, or holding both plies in his hand, pulled the belt down, the main shaft seized upon the belt, and, wrapping, so shortened it that the shaft itself, the counter shaft, or the belt was obliged to give way, with the result that the belt broke; the unfortunate lad being, in the meanwhile and afterwards, wrapped against, and carried around by, the shaft, and instantly killed. The belt in question was $2\frac{1}{4}$ inches wide, and, though it had been used for some time and mended on several occasions, it is not shown to have been insufficient for the purpose for which it was used. It appears from the testimony of several witnesses, whom

there has been no attempt to contradict, that it has been for years the practice and understood rule in defendant's shop for each operator to mend the belt driving the machine operated by him, where such repairs become necessary, and it is shown to be the general, if not universal, custom to make such repairs to belts, as light as that here in question, whilst the main shaft is in motion; the weight of such a belt not being sufficient of itself, to enable the shaft to take hold of it, and the stopping of the main shaft usually involving a practical shutting down of the entire plant. It also appears that the danger incurred in lacing and adjusting such a belt, under such conditions, is not greater than that incurred in operating one of the machines (it being necessary, in any event, to put the shaft in motion in order to adjust the belt to the pulley); that it is one of those things that a machinist learns, as part of his trade; that all of defendant's apprentices, during the last 15 or 20 years, have learned it; that the deceased had done it frequently; and that no accident had ever before happened, in the doing of it, in defendant's shop; and several experienced machinists testify that they never heard of such an accident elsewhere. It further appears that, after the accident here in question, the relatives of some of the other apprentices became uneasy on their account, and that defendant's master mechanic, having charge of its shop, partly for that reason and partly because he found it expedient in a business way, assigned a workman to the duty of looking after the belts during the dinner hour, and of making such repairs as he could then make; and, if the belt of a particular machine breaks during the working hours, the workman so assigned and the operator of the machine together repair it. The workman assigned to the duty in question, at the date of the trial, we understand, was an apprentice.

Plaintiff introduced a witness named Downes, who testified that he met Copeland, some months after the accident, and (to quote):

"We were talking, and it happened to come up about Willie Ball, and we said, 'How bad it was,' because the boy was a bright fellow, with bright prospects. I said that, and then he says: 'I seen it all, and, if there was any money in it, I could testify either way and let either side win the case,' and then he said: 'What would you do?' And I said: 'I don't know about that. I might be pretty poor; but I don't never want no money that way.' And that was all he said about it."

Plaintiff herself testified that Copeland came to see her, about 10 or 12 days after the accident, and (to quote):

"I asked him exactly how my son came to his death, and he said, 'In putting on the belt his hand was caught, and he was killed,' and he said, 'The last words he spoke were "Oh, God!"'"

With regard to the alleged conversation with Downes, Copeland testifies that he remembers saying:

"I would like to see Mrs. Ball get something out of this." But I did not say the other" (referring to the question, "Didn't you tell him that you would like to see the Widow Ball get something out of this, but that you could testify in favor of the one that had the most money for you?").

He admits that he had a conversation with plaintiff, but denies that he told her that the accident occurred while her son was putting on the belt, and says:

"I told her that the belt caught him, but he was not putting on the belt at the time."

There was a verdict for plaintiff, which was made the judgment of the court, and defendant has appealed.

Opinion.

It is evident that McCranie and Endom did not see Ball at the same time, since Endom saw him, five minutes or more before the accident, standing, whereas McCranie saw him first when he was going up to the platform, and then when he was seated, lacing the belt, and lastly, for an instant, standing, and in the same instant going over the shaft. The two witnesses, it will be observed, disagree as to the relative positions of Ball and Copeland; McCranie placing Ball to the westward and Copeland to the eastward, about the center of the pulleys, with the pulley to which the belt was to be adjusted between them, whilst Endom, with equal positiveness, places Copeland to the westward and Ball to the eastward, just in front of the pulley. "You could call it" (he says) "east" of the pulley. Endom was much nearer the scene of the tragedy than McCranie, and, as to which of the two young men was to the westward and which to the eastward, he is corroborated by Copeland, though he differs with the latter, in that Copeland says that he and Ball both were seated when the belt was being laced, whilst Endom says that Ball was standing when he saw him, and was lacing the belt, and that Copeland was seated. The difference is, however, easily explained, as they may have finished lacing the belt at the moment, and Copeland may have taken his seat, leaving Ball still standing; for Endom, be it noted, upon being asked how long it was, after he saw Ball standing, before the accident occurred, replied, "I guess, five minutes; it might have been more," and, as he elsewhere says that "he was busy, running a lathe," it is quite possible that considerably more than five minutes may have elapsed. We are inclined to think, too, that there are certain physical facts which tend to corroborate the testimony of Endom and Copeland, to the effect that the latter was to the westward of the former and of the pulley; for, if he had been where McCranie places him, he would have had the two pulleys

(which are alongside of each other) between him and the south side of the platform, and yet it is an undisputed fact that, when Ball's body was carried around the shaft, it broke one of the planks of the platform and displaced the other, and that Copeland fell, or jumped, several feet and grasped the "air hoist" (which appears to be to the south of the platform and to the westward of the pulley) and slid down it to the floor. We may say, here, that, beyond the statements of Downes and the plaintiff, there was no attempt to discredit Copeland or to impeach his character for veracity, and we think it quite possible that he may have been misunderstood by those witnesses. At all events, we should not be disposed to infer, even if it should be conceded that Copeland made the discreditable remark attributed to him by Downes, that he would, at the pinch, commit deliberate perjury, and we find nothing in his testimony as given to warrant the conclusion that he has done so. He says that he and Ball finished their job in about five minutes, and there are several witnesses who testify that it ought to have been finished within that time. He testified that about 20 minutes elapsed between the time when they reached the platform and the moment of the accident, and McCranie "guesses" that it was 15 minutes, and Endom says that it was 15 or 20 minutes. He says that after they finished lacing the belt they sat down, with their feet hanging over the edge of the platform, to talk and kill time. We find nothing improbable in that, and McCranie says that he saw them both sitting down. He says that, while they were thus seated, Ball holding the two piles of the belt in his hand, with the shaft (within a few inches of—in fact, almost against—him) running through the loop between them, Ball employed his idle hand, as he talked, in patting the belt against the shaft, and we can imagine that he might have done so without realizing that a slight fold or kink in the light, flexible belt might enable the shaft to take hold of it and whirl him into eternity. All things considered, the story that he tells on the stand seems to us to be consistent and well supported, and we are forced to the conclusion that Ball met his death while assuming an unnecessary risk, and while not engaged in the discharge of any duty assigned to him by, or that he owed to, the defendant. But, even if it were otherwise, the most that can be said is, not that he was killed whilst lacing the belt about a revolving shaft which might have been stopped, but that he was killed whilst adjusting the belt to a revolving pulley, which might have been stopped. The uncontradicted evidence, however, is that the belt can be put on, or adjusted to, the pulley only when the latter is in motion; that the mending and putting on of a belt, under such conditions, is an ordinary incident in the everyday work of a machinist, and is as

necessary to the education of an apprentice as anything else that he is required to learn; and that it had frequently been done by Ball, during the 2 years and 7 months that he had worked in defendant's shop.

We are therefore of opinion that he must be presumed to have known and to have assumed the incidental risk, and upon the whole we find no sufficient basis upon which to hold the defendant liable.

It is therefore ordered, adjudged, and decreed that the verdict and judgment appealed from be annulled and set aside, and it is further decreed that plaintiff's demand be rejected, and this suit dismissed, at her cost.

(123 La. 17)

No. 17,307.

CRAIG v. WEGMANN et al.

(Supreme Court of Louisiana. Feb. 15, 1909.)

APPEAL AND ERROR (§ 773*) — DISMISSAL — ABANDONMENT OF APPEAL.

In proceedings under the judgment of the district court in this matter appellant became the adjudicatee of certain property at public auction by the sheriff. He failed to comply with his bid, though ordered so to do on a rule taken against him for that purpose. Thereafter the sheriff was ordered to sell the property à la folle enchère, at appellant's risk. He appealed suspensively to the Supreme Court from that order, and executed an appeal bond. The transcript of appeal was filed in court in due time, and the appeal was fixed for hearing in this court. On that day the appellee moved to have the appeal struck from the record, or that he might be granted such relief as the court might hold he was entitled to under the circumstances, on the ground that the appeal had been dismissed in the district court for the reason of the failure of the surety on the bond of appeal to qualify as being solvent, and appellant acquiesced in the dismissal. Appellant had made no appearance and filed no brief in the matter of the appeal. The appeal is considered by the court as abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Fred. Durleve King, Judge.

Action by Robert E. Craig, Jr., against Catherine Wegmann and others. From an order to readvertise property formerly sold to J. Vic Le Clerc, he appeals. Dismissed.

Robert John Maloney, for appellant. Joseph Wheadon Carroll, for appellee.

NICHOLLS, J. Under an order of the civil district court of date February 10, 1908, the civil sheriff for the parish of Orleans was directed to "seize and sell to the highest bidder without appraisements, after all legal delays and advertisement, all according to law," certain property described in said order, and to make return as to what he should do in the premises to said court.

Acting under said order, the said sheriff on

the same day (February 10, 1908) seized the property described, and advertised the same for sale at public auction, the sale to be made on the 19th day of March, 1908, and on that day the property secondly described in said order (Nos. 612 and 616 Felicity road or street) was adjudicated for \$2,350 to J. Vic Le Clerc. The said adjudicatee (Le Clerc) having failed to comply with the adjudication made to him, after written demand, the judgment on rule against him on August 18, 1908, and signed on August 27, 1908, the sheriff was ordered to readvertise said second property for sale à la folle enchère at the risk and for account of the said J. Vic Le Clerc. In compliance with the said judgment, said property was by the sheriff advertised on the 4th of September, 1908, for sale, said sale to take place on the 8th of October, 1908.

The sale of said property and further proceedings under the writ were stayed by a suspensive appeal by said Le Clerc from a judgment ordering the resale of said property à la folle enchère.

The order for said suspensive appeal was granted to Le Clerc on the 4th September, 1908, returnable on the first Monday of October, 1908, upon his furnishing bond with good and solvent security in the sum of \$1,500.

On the same day (4th of September, 1908) appeal bond for a suspensive appeal was filed in the civil district court, signed by Le Clerc (through Robert J. Maloney as his attorney) as principal and George E. Duclaux as his security.

On October 1, 1908, the transcript of appeal was filed in this court. On January 25, 1909, a petition was filed in this court by Robert E. Craig, Jr., the plaintiff and appellee herein, in which he alleged that the appeal so taken by Le Clerc had been set aside and dismissed by a final judgment of Hon. Fred. D. King, Judge of division B of the civil district court for the parish of Orleans, rendered November 13, 1908, and signed November 19, 1908, because of the failure of the surety on the bond of appeal to qualify as being solvent, as would appear by a duly certified copy of said final judgment and a duly certified copy of the rule of mover against said Le Clerc, upon which said judgment was rendered, both filed with his petition; that he was entitled to have the purported appeal of said J. Vic Le Clerc declared to be null and void and of no effect, and to have the same stricken from the docket of this court, or such other relief as the court may deem proper in the premises.

In view of the premises he moved the court to declare null and void and of no effect, and to strike from the docket of the court, the purported appeal of said Le Clerc, appellant, and to grant mover such other relief as the court may deem proper in the premises.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Attached to this petition and motion were the certified copies of the rule and of the judgment referred to. From these it appears: That on October 28, 1908, the plaintiff applied for and obtained in division B of the civil district court a rule on J. Vic Le Clerc to show cause on Friday, October 30, 1908, why his appeal from the judgment rendered on August 18, 1908, and signed on August 27, 1908, should not be set aside and dismissed upon the ground that the surety by him furnished on the bond for said appeal was not good and solvent. That on November 13, 1908, that rule came on for trial. Plaintiff was represented by counsel. Defendant was absent and unrepresented. After hearing the pleadings and counsel, the court, considering the law and for reasons orally assigned, made the rule absolute and accordingly decreed the dismissal of the appeal taken by Le Clerc from the judgment of the 27th of August, 1908. On the day fixed for trial in this court of the appeal plaintiff submitted by motion for the action of the court his application for the striking of the appeal from the docket. The case, being called, was submitted by the plaintiff, on which appellant made no appearance, either by counsel or by brief. Under such conditions we consider appellant as having acquiesced in the judgment of dismissal and abandoned his appeal.

The appeal is considered by the court as abandoned. It is therefore dismissed.

(123 La. 20)

No. 17,190.

QUAKER REALTY CO. v. BRADBURY et al.
(Supreme Court of Louisiana. Feb. 15, 1909.)

1. REAL ACTIONS (§ 7*)—PETITORY ACTIONS—POSSESSOR IN BAD FAITH.

A possessor of real estate, who knows that he has no title to the property, is necessarily in bad faith.

[Ed. Note.—For other cases, see Real Actions, Cent. Dig. § 23; Dec. Dig. § 7.*]

2. REAL ACTIONS (§ 8*)—PETITORY ACTIONS—IMPROVEMENTS.

In a petitory action, the defendant possessor in bad faith cannot recover the value of improvements in their nature inseparable from the soil, except by way of set-off to the plaintiff's demand for fruits and revenues.

[Ed. Note.—For other cases, see Real Actions, Cent. Dig. § 35; Dec. Dig. § 8.*]

3. REAL ACTIONS (§ 8*)—PETITORY ACTIONS—SEPARABLE IMPROVEMENTS.

In a petitory action, the defendant possessor in bad faith cannot recover the value of buildings and constructions separable from the soil, unless the plaintiff should elect to keep them.

[Ed. Note.—For other cases, see Real Actions, Cent. Dig. § 35; Dec. Dig. § 8.*]

4. REAL ACTIONS (§ 8*)—PETITORY ACTIONS—TAXES—REPAIRS.

In a petitory action, the defendant possessor in bad faith may recover necessary expenses incurred in the preservation of the property,

such as taxes, and repairs on constructions and works belonging to the owner.

[Ed. Note.—For other cases, see Real Actions, Cent. Dig. § 34; Dec. Dig. § 8.*]

5. REAL ACTIONS (§ 8*)—PETITORY ACTIONS—RENTAL VALUE.

In a petitory action, where the plaintiff does not elect to keep the buildings and constructions separable from the soil, the revenues should be measured by the rental value of the property without such improvements.

[Ed. Note.—For other cases, see Real Actions, Cent. Dig. § 34; Dec. Dig. § 8.*]

6. REAL ACTIONS (§ 8*)—PETITORY ACTIONS—FRUITS AND REVENUES.

In a petitory action, the plaintiff can recover fruits and revenues only from the date of his acquisition of the title, where the rights of his authors to the same have not been specially transferred to him.

[Ed. Note.—For other cases, see Real Actions, Cent. Dig. § 34; Dec. Dig. § 8.*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Thomas C. W. Ellis, Judge.

Petitory action by the Quaker Realty Company against Louis Stephen Bradbury and Charles A. Salzer. Judgment for plaintiff for possession, with judgment for defendants for the value of certain improvements, and plaintiff appeals. Judgment affirmed in part, and reversed in part.

Hall & Monroe, for appellant. Woodville & Woodville, for appellees.

LAND, J. This is a petitory action to recover a certain square of ground in the city of New Orleans, with rents at the rate of \$200 per annum from April 1, 1903, coupled with a demand for \$500 as damages for an alleged conspiracy between the defendants to deprive plaintiff of its property. According to the allegations of the petition, plaintiff acquired its title in the year 1906 from the heirs of Laurent Millaudon, and the defendants have been in possession of the premises since April 1, 1903. The prayer is for judgment recognizing the plaintiff as owner of the property and ordering the defendants to deliver possession of the same, and condemning them to pay \$500 damages for the illegal registry of the contract between them, and to pay rents as claimed until the final surrender of possession to the plaintiff.

Defendants pleaded the general issue, alleged possession in good faith, and reconvened for taxes and the value of useful improvements.

There was judgment in favor of the plaintiff, decreeing it to be the owner of an undivided $\frac{1}{8}$ interest in the square sued for, and decreeing that plaintiff as owner was entitled to the possession of said property, including the improvements, and also recover \$316.66 rents, and further recover \$16.66 per month from date of the judgment until final delivery, and for costs against de-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

defendant Charles A. Salzer, with right to eject said defendant on tendering and paying to him the difference between said rents, accrued and to accrue, with costs of suit, and the sum of \$411.20, adjudged to said defendant for useful improvements on the premises. Plaintiff's demands otherwise against Bradbury, and the latter's demands against the plaintiff, were dismissed. Plaintiff has appealed.

The square in question was acquired by Laurent Millaudon in the year 1842. From 1870 to 1902, inclusive, the property was assessed to "unknown owner," but no taxes were paid thereon.

In 1903 the defendant Bradbury was in possession of the square of ground, and sold his rights of possession, with the improvements made by him on the premises, to the defendant Salzer, who owned a part of an adjoining square.

Salzer took possession of the premises, and erected buildings and made other improvements thereon. The only information that Salzer could get about the title was that the property was assessed as belonging to an unknown owner. The property was assessed to Salzer for four years, and he paid taxes thereon.

In the year 1906 the plaintiff purchased the title to this and other property from the heirs of Millaudon, and in October of that year notified the defendants to vacate the premises.

The only real questions in controversy are as to rents, improvements, and taxes. As to rents, the sole evidence is the testimony of plaintiff's vice president that about \$20 per month is a fair rental value of the property. As to the buildings and other improvements, we have the testimony of the defendant Salzer that "about" certain amounts represent the cost of material and workmanship, and that certain work was worth "about" a certain sum.

The judge found no evidence to sustain the alleged conspiracy antedating the title of the plaintiff more than three years. We concur in this view. Plaintiff purchased in the face of an actual adverse possession, and has been compelled to vindicate its title by a petitory action. Damages for attorney's fees are not recoverable in such a case under an allegation of conspiracy.

We agree with plaintiff's contention that the defendants were possessors in bad faith, because they knew that they had no title to the land. The square was claimed by no one, and for more than 20 years had been assessed as the property of an unknown owner. Nevertheless, the possession of the defendants, being without color of title, was unlawful *ab initio*. The defendants were squatters on the premises, and never possessed as owners.

Plaintiff contends that it has the right to compel the defendant to take away or demolish his improvements under the terms of

article 508 of the Civil Code, which reads in part as follows:

"When plantations, constructions and works have been made by a third person, and with such person's materials, the owner of the soil has the right to keep them or to compel this person to take away or demolish the same.

"If the owner requires the demolition of such works, they shall be demolished at the expense of the person who erected them, without any compensation. * * *

"If the owner keeps the works, he owes to the owner of the materials nothing but the reimbursement of their value and of the price of the workmanship, without any regard to the greater or less value which the soil may have acquired thereby."

Compensation for improvements cannot be claimed by a possessor in bad faith until the owner elects to retain them, and the possessor owes no rents for his improvements until they are paid for. *Citizens' Bank v. Maureau*, 37 La. Ann. 861; *Kibbe v. Campbell*, 34 La. Ann. 1163.

In *Woods v. Nicholls*, 33 La. Ann. 744, it was held that the possessor in bad faith is entitled: (1) To reimbursement of expenses and repairs necessary for the preservation of the property under the express terms of Civ. Code, art. 2314; (2) to the value of material and workmanship of constructions and works which the owner has elected to keep; but (3) is not entitled to compensation for improvements in their nature inseparable from the soil, such as ditches, wells, etc. The court also held that, as the plaintiffs claimed only an undivided half interest in the lands, they were not authorized to require the removal or demolition of the improvements against the will of their co-owners, and must, therefore, pay for the useful improvements. The judgment on the rehearing seems to have left open the question of improvements inseparable from the soil. *Id.* 752, 753.

In *Scott v. Scott*, 42 La. Ann. 766, 7 South. 716, the plaintiffs also sued to recover an undivided half interest in certain real estate, and the dictum in *Woods v. Nicholls* was followed.

In *Sigur v. Burguleres*, 111 La. 711, 35 South. 823, the court allowed a trespasser the cost of clearing land.

In *Volers v. Atkins Bros.*, 113 La. 303, 36 South. 974, the whole subject was elaborately discussed, and the court held: (1) That in no case can the possessor in bad faith recover for improvements in their nature inseparable from the soil, such as clearing, ditching, etc; (2) that the possessor in bad faith may recover for repairs and other expenses necessary for the preservation of the property; and (3) that the possessor in bad faith may recover the value of buildings and other improvements separable from the soil which the owner may elect to keep. The court on rehearing recognized the doctrine that the possessor in bad faith may offset the claim for fruits and revenues by a claim for enhanced value resulting from land

clearing and other improvements inseparable from the soil, citing *McDade v. Levee Board*, 109 La. 625, 33 South. 628, and *Wilson v. Benjamin*, 26 La. Ann. 588. The right of the owner to elect prevents the application of this rule to improvements, such as buildings and fences, which may be removed. Both in the *Volers* and *McDade* Cases the cause was remanded for the purpose of allowing the owner to elect whether he could take the buildings, etc., or order their removal.

If the buildings and other improvements add to the rental value of the property, it is clear that this fact must be considered in fixing the rents, if the owner does not elect to keep them.

In the *McDade* Case, *supra*, it was held that the owner could not recover rents anterior to his acquisition of the title. This is well settled, as such rents belong to the prior owner, and do not pass to the vendee unless specially assigned.

In the case at bar, the evidence is meager, and we cannot tell whether the solitary witness for the plaintiff is testifying to the rental value of the square with or without the improvements thereon. We may also add that the value of the improvements might be shown with greater certainty.

It is therefore ordered that the judgment, in so far as it decrees the ownership of the plaintiff, be affirmed, and that in all other respects said judgment be reversed, and that this cause be remanded for further proceedings in conformity with the views expressed in the foregoing opinion and according to law; the defendants to pay the costs of appeal.

(123 La. 26)

No. 16,941.

CARNES v. ATKINS BROS. CO.

(Supreme Court of Louisiana. Feb. 1, 1909.
Rehearing Denied March 1, 1909.)

1. LIMITATION OF ACTIONS (§ 55*)—ACCRUAL OF CAUSE OF ACTION—MALICIOUS PROSECUTION.

Where plaintiff combines, in the same action, a claim for damages for the bringing of an alleged malicious civil suit with a claim for damages for an alleged libel, contained in the pleadings in such suit, the rule that no legal injury results, and hence that no cause and no right of action arises until the determination of such suit, applies equally to both claims, and the prescription of one year begins to run as to both, only when the alleged malicious suit is determined.

[Ed. Note.—For other cases, see *Limitation of Actions*, Dec. Dig. § 55.*]

2. MALICIOUS PROSECUTION (§ 64*) — EVIDENCE—BURDEN OF PROOF.

In an action in damages for the bringing of an alleged malicious civil suit and for an alleged libel, contained in the pleadings therein, the burden of proof rests on the plaintiff to prove want of probable cause and malice, and, where the pertinency and materiality, to the issues to be decided in the alleged malicious suit, of the language complained of as libelous, de-

pends on a fact, dehors the record, the testimony adduced on behalf of plaintiff must be strong enough to overcome that adduced on behalf of defendant, otherwise there can be no recovery.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Dec. Dig. § 64.*]

(Syllabus by the Court.)

Appeal from Eleventh Judicial District Court, Parish of Red River; Samuel Jamison Henry, Judge.

Action by John W. Carnes against the Atkins Bros. Company. Judgment for defendant, and plaintiff appeals. Affirmed.

William Hampton Scheen, for appellant.
William Augustus Wilkinson, for appellee.

Statement of the Case.

MONROE, J. This is an action in damages for an alleged malicious suit, and for libelous matter said to have been contained in the pleadings therein.

Plaintiff alleges: That he brought suit against A. M. & C. C. Elder for rent, and caused a writ to be issued under which five mules and two horses were seized. That defendant (a corporation) intervened and alleged that, some time during the month of September, 1905, it and its representatives informed the said John W. Carnes of its absolute ownership of—

"said live stock, and that it had advanced to the said A. M. & C. C. Elder under an express agreement that all the cotton produced by them * * * should be ginned in its gin at Lake End, La., and, on the promise made then and there by the said J. W. Carnes that the cotton raised by the said A. M. & C. C. Elder should and would be by him first imputed to the payment of the rent claimed by him against the said Elders, it agreed and did release the said Elders from ginning their cotton at Lake End, and permitted the live stock belonging to it to remain in the possession of the said Elders and on the leased premises described in plaintiff's petition."

That defendant further alleged in its said intervention:

"That, in order to deprive him (it) of his (its) property, the said J. W. Carnes and the said A. M. & C. C. Elder colluded together and imputed the proceeds of the cotton aforesaid to some imaginary claim or debt for supplies, the doing of which was a legal fraud on the rights of your petitioner (intervener). That, in carrying out the conspiracy aforesaid to defraud your petitioner and deprive him (it) of his (its) property, the writs of provisional seizure were sent out, the same being with the consent of the said Elders. That the said Elders do not owe the said Carnes anything for rent. That the said A. M. & C. C. Elder are notoriously insolvent, and this is an attempt on their part, with the sanction and consent of the said J. W. Carnes, to pay some debt they might owe with petitioner's property."

Plaintiff further alleges that said intervention was read in open court, in the presence of many people, and has become part of the public records of the parish. That all of said allegations were false and without

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

probable cause, to the knowledge of defendant; were made by it deliberately and maliciously, and were calculated, and tended, to injure plaintiff's good name and standing, and that he has thereby been damaged to the extent of \$5,000—

"by the said libel and slander and malicious suit, by the insult and affront to his good name and business reputation, and by the vexation, humiliation, annoyance, and outrage to his feelings," etc.

Defendant, after interposing an exception of "no cause of action," answered, averring, in substance, that the allegations contained in its intervention, and here complained of, were pertinent and necessary in the proper presentation of the claim set up by it. That they were made by advice of counsel, in good faith, with probable cause, with no intent to injure or defame the plaintiff, and that they were, and are, privileged.

"That said allegations, in the opinion of defendant, were true, and that, according to its understanding and firm and honest belief, the contract set up in said petition of intervention, relative to said live stock and the cotton and the account of the said Elders, is the true agreement had with the said Carnes by it and its officers, and that he violated the same."

It further alleges that the district court found that said allegations were made in good faith, with probable cause, and were pertinent to the issues presented; that its finding was not, in that respect, disturbed by the Court of Appeal; and that the judgments of said courts constitute *res judicata* as to plaintiff's present demands. It further pleads the prescription of one year.

It appears from the evidence adduced that the Elders were tenants of plaintiff; that they were indebted to him for rent, and, on open account, for advances; and that they were under obligations to turn over their crop (of cotton) to him in payment of their debt. It also appears, however, that they had entered into a contract with defendant, whereby they had agreed, in consideration of advances to be made, to turn over their crop to it, to be ginned and sold, and whereby also they had apparently sold to it the live stock referred to in the intervention which has given rise to this suit.

That being the situation, a disagreement occurred between C. C. Elder and defendant's president, which, with perhaps other matters, led the latter to become somewhat concerned about the debt due to his company and about the mules and horses, for which defendant held a bill of sale but which were in the possession of the Elders, on the land rented by them from plaintiff, and he (the president) called on plaintiff and had quite an extended conversation with him, in which plaintiff learned, to his surprise, that his tenants were indebted to defendant for advances and had agreed to sell all their cotton to its gin, and as a result of which defendant's president, who at first appeared excited and suspicious, went away apparently

satisfied. It is shown by the testimony or admissions on both sides that defendant's president had some papers with him, and that he either read them to plaintiff or stated their contents to him, as showing the relations between defendant and the Elders, and plaintiff admits that he reassured him by telling him that he thought the Elders would pay all they owed, and that he (plaintiff) would keep nothing hid from him (the president). The president testifies that he told plaintiff that defendant owned the live stock, and that plaintiff gave him to understand that he would apply the proceeds of the cotton that he might get from the Elders, first, to the payment of his rent, thereby pro tanto releasing the live stock from his lessor's privilege, and, in effect, that he would see that defendant was protected with respect to its claim against the Elders. This is flatly denied by plaintiff, who says that the president did not mention the stock, and that there was no such understanding. The conversation took place in plaintiff's store, and was heard in part by C. H. Terry, a business associate and relative of plaintiff, who says that he heard nothing of the live stock or the understanding. He admits, however, that he probably waited on several customers while the conversation was going on, and that he did not hear all of it, so that his testimony amounts to nothing in the way of corroboration, and the court is left, as were the district court and the Court of Appeals (in the suit in which the intervention was filed), to decide as between the conflicting statements of the two parties mainly interested. Leaving that matter as it stands, and proceeding with the statement of the facts leading to the present litigation, defendant's president parted with plaintiff with his feelings soothed and his suspicions quieted, and nothing happened until the Elders had about made their crop, when plaintiff, learning that they (or C. C. Elder) had delivered five bales of their cotton (picked from a detached tract of the rented land) to defendant, instituted suit against them and caused the live stock in question, with other property, to be seized, and thereupon defendant intervened and made the allegations of which plaintiff now complains. The case thus made up was decided by the district court in favor of plaintiff, and the judgment so rendered was affirmed by the Court of Appeals, both courts holding that the bill of sale of the mules and horses, held by defendant, was intended to operate as a security, and that defendant was not, therefore, the owner of the animals. The present suit was instituted some 19 months after the filing of the intervention containing the language complained of, and within the year after the decision of the case on appeal. A single witness testified upon the subject of damages, and he tells us that plaintiff is a man of excellent business standing, so far as he knows, and of means; that charges such as those contained

in defendant's intervention would "injure almost any one, under ordinary circumstances," but that he never heard of the charges here in question until they were read to him in court, and, in substance, that he knew of no one who had heard of them. It is shown that defendant's president explained to its counsel the situation about as it had been stated here, giving, of course, his version of the conversation between plaintiff and himself, and that the framing of the intervention was left to the counsel. Both the president and the counsel deny that they were actuated by malice, and the counsel testifies that he included the allegations complained of only because, having obtained the information of which they are predicated from his client, who exhibited no malice towards plaintiff, he believed them to be pertinent to the issues involved and necessary to the maintenance of his suit.

Opinion.

Dealing, first, with defendant's plea of prescription: It is the generally accepted rule that, in order to maintain an action of this kind, plaintiff must prove, among other things, that he has been prosecuted by defendant, either criminally or in a civil proceeding, and that the prosecution has been determined favorably to him. *Murphy v. Redler*, 16 La. Ann. 1; *Davis v. Stuart*, 47 La. Ann. 378, 16 South. 871; 26 Cyc. pp. 55, 56.

The reason of the rule, in so far as it applies to actions in damages for alleged malicious criminal prosecutions, or alleged malicious civil proceedings in which the element of libel is lacking, is that, until the prosecution is determined by the court having jurisdiction thereof, it cannot be known that such court will not sustain it, and in so doing hold, not only that there was probable, but that there was sufficient, cause, and, as such ruling would relate back to the institution of the prosecution or proceeding, it would necessarily follow that during the interval there could have been, in contemplation of law, no injury, and hence no cause or right of action. It is evident, however, that whether it be true of a criminal prosecution or not, a civil suit may be malicious and without probable cause without being libelous, and, where the libel complained of is contained in the pleadings in such suit, the claim for damages may survive, even though the suit be determined adversely to the defendant, as, for instance, if one be sued on a promissory note, and falsely, maliciously, impertinently, and without probable cause, characterized in the petition as a thief and ex-convict, he may properly be condemned for the amount represented by the note, but we know of no reason why he should thereby be precluded from recovering damages for the libel.

In the instant case, plaintiff combines a claim for damages for the bringing of an alleged malicious civil proceeding with a

claim for damages for libelous and injurious language used in the pleadings therein, and the question is presented whether both claims are governed by the same rule, particularly as to the matter of prescription.

We have seen that, quoad the claim for damages merely for the bringing of the alleged malicious suit, there is no legal injury until the suit is determined by the court vested with jurisdiction, hence the prescription of the action does not begin to run until that time. The Civil Code provides:

"Art. 3536. The following actions are also prescribed by one year: That for injurious words, whether verbal or written," etc. "That for the delivery of merchandise. * * *

"Art. 3537. The prescription mentioned in the preceding article runs, with respect to the merchandise * * * from the day of the arrival of the vessel, or that on which she ought to have arrived. And, in other cases, from that on which the injurious words, disturbances, or damages were sustained."

As the law makes no distinction as to the manner in which the injurious words, in case of libel, are published, it might be argued that where, as in this case, they are used in pleadings filed in court, the prescription of the action for damages runs from the date of the filing. If, however, the court in which the pleadings have been filed eventually holds that the words are pertinent and material to the issue to be decided, or were used with probable cause, we have the same situation as when an alleged malicious prosecution is sustained—the decision relates back to the date at which the words were used, and, in effect, holds that they were lawfully used, and that the damage resulting therefrom is *damnum absque injuria*, from which it follows that, during the interval, the question, whether the words are, in legal contemplation, injurious, is held in abeyance, and it is only when, by the judgment in the case in which the matter can be determined, it is ascertained that the words are injurious, that the prescription of the action for damages begins to run, since that prescription relates to actions for "injurious words."

The plea of prescription is therefore overruled.

On the merits of the case: If the understanding, testified to by defendant's president, and upon the basis of which, as stated by that officer and by defendant's counsel, the latter filed the petition of intervention here complained of, really existed, or if defendant's president had reasonable ground for believing that it existed, plaintiff has not made out his case, since, if plaintiff had given the president to understand that he would collect his rent from the proceeds of his tenants' cotton, and thereby release the live stock of which defendant held a bill of sale, and on account of which it had unquestionably advanced money, and had further given him to understand that he would keep him advised of what was going on, or would keep nothing hid from him, then, when with-

out notice to defendant he sued his tenants and seized the live stock, as well as the crop, for his rent, and the tenants practically acquiesced in the seizure, defendant's intervention was authorized, and the allegations that plaintiff had violated his agreement and was acting in collusion with his tenants were pertinent and material; in fact, they were about the only allegations upon which the claim asserted in the intervention could have been sustained.

Plaintiff's testimony, to the effect that there was no such understanding as that relied on by defendant, is met by that of defendant's president, who testifies, positively and circumstantially, that there was such an understanding. The testimony of Terry, in our opinion, is as corroborative of the president's as of the plaintiff's, for, whilst he says that he did not hear the live stock referred to, it is quite evident that there was a great deal of the conversation that he did not hear, and both he and plaintiff testify that the president came to the store for the purpose of discussing with plaintiff the relations between plaintiff, defendant, and the Elders, that they were engaged in that discussion for nearly, or quite, an hour, and that during the discussion, the president exhibited certain papers which, as the witness thinks, were either read by plaintiff or read to him. As otherwise appears, about the only papers in the president's possession which relate to the subject of the conversation were the contract whereby the Elders had agreed to send their cotton to defendant's gin in consideration of advances to be made to them, and the bill of sale of the mules and horses, and it is admitted that plaintiff either read or was told the substance of the contract. Why, under the circumstances, he should not have been informed of defendant's real or supposed relation to the mules and horses, does not appear. He testifies that he was not so informed, and we do not undertake to hold that he was. On the other hand, defendant's president testifies that plaintiff was so informed, and we find nothing in the surrounding circumstances to justify us in holding that this testimony is not as worthy belief as that of plaintiff. All parties agree that, whereas the president came to plaintiff's store, apparently excited, and suspicious of plaintiff, he went away apparently soothed and satisfied.

The burden of proof to show that defendant acted without real or probable cause rests upon the plaintiff.

In *Barton v. Kavanaugh*, 12 La. Ann. 333 (being an action in damages for malicious arrest), the court said that the following requested charge should have been given, to wit:

"That the plaintiff must not only prove malice, but must also show that there was no probable cause for the prosecution, and that the defendant is not bound to prove probable cause

until the plaintiff has shown the absence of it; and that, if plaintiff shows malice and not the want of probable cause, defendant cannot be condemned, as it is just as necessary to show the want of probable cause as it is malice, before a recovery can be made."

In the case at bar, there has been no attempt to show actual malice, which has been disclaimed under oath, and the burden resting on plaintiff to prove want of probable cause has not been discharged.

Judgment affirmed.

(123 La. 36)

No. 17,017.

TRENCHARD v. NEW ORLEANS RY. & LIGHT CO. et al.

(Supreme Court of Louisiana. April 13, 1908. On the Merits, Feb. 1, 1909. Rehearing Denied March 1, 1909.)

1. APPEAL AND ERROR (§ 62*)—JURISDICTION—JURISDICTIONAL AMOUNT.

The right granted by law to a party to appeal to a particular court in the matter of a demand brought against him is not prejudiced by a remittitur made on that demand by the claimant after a verdict therein has been returned by the jury to which it has been submitted; remittitur being considered in the light of "discontinuances," while verdicts of juries quoad the effect of remittiturs upon the right of appeal are assimilated to "judgments of court."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 298-300; Dec. Dig. § 62.*]

(Syllabus by the Court.)

On the Merits.

2. MUNICIPAL CORPORATIONS (§ 705*)—NEGLIGENCE—LEAVING HORSE UNHITCHED.

Where a horse attached to a wagon was left standing unhitched in a public street and ran away and collided with a street car, whereby plaintiff was injured the owner of the horse was liable for damage caused, under Civ. Code, art. 2321.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1516; Dec. Dig. § 705.*]

3. CARRIERS (§ 318*)—NEGLIGENCE OF MOTOR-MAN—EVIDENCE.

A motorman held not negligent for failing to bring his car to a full stop on seeing a wagon on the side of the street without a driver, where the horse takes fright and collides with the street car, and a person, an employé, thereon is injured.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 318.*]

Appeal from Civil District Court, Parish of Orleans; Thomas C. W. Ellis, Judge.

Action by Mary Lozano Trenchard against the New Orleans Railway & Light Company and Robert Powell. Judgment for plaintiff, and defendants appeal. Reversed, and suit dismissed as to railway company, and affirmed as to Powell.

Dart & Kernan, for appellant New Orleans Ry. & Light Co. Benjamin Rice Forman, for appellant Robert Powell. Woodville & Woodville, for appellee Trenchard.

On Motion to Dismiss.

NICHOLLS, J. Plaintiff sued the defendants to recover a judgment in solido from them in the sum of \$30,000 for damages for the death of her husband, alleged to have been caused by the fault of the two defendants. The case was tried before a jury, which returned on the 21st day of January, 1908, a verdict for \$5,000 in favor of the plaintiff against the defendants, and on the same day the court rendered judgment for that amount in conformity to the verdict. On the 24th of January, 1908, Robert Powell, one of the defendants, applied to the court for a rule on the plaintiff to show cause why a new trial should not be granted. On February 10th, the court acted upon this motion. It ordered that a new trial should be granted unless the plaintiff should remit the excess of the amount of the verdict over \$2,000.

It granted five days to plaintiff to this end, and declared that upon compliance the verdict would be sustained for \$2,000, and the new trial refused. On the same day the plaintiff, through her counsel, remitted \$3,000 of the verdict, and consented and agreed to have the judgment reduced from \$5,000 to \$2,000. On the same day the court, reciting the fact of such remittitur, reduced the verdict to \$2,000, and refused the new trial.

On the same day, reciting the fact of the verdict and of the first judgment rendered thereon and the ruling of the court on defendants' motion for a new trial and the remittitur of the plaintiff, the court entered judgment against the defendants in solido for the sum of \$2,000, with interest from the date of the judgment, decreeing that this judgment should supersede and take the place of the judgment which had been previously entered on the verdict. On the 20th of February the New Orleans Railway & Light Company applied for and obtained an order for an appeal suspensive or devolutive from the judgment of February 10th, and executed a bond for \$3,500. On March 11th the defendant Robert Powell applied for and obtained an order for a devolutive appeal, the court fixing \$25 as the amount of the bond to be furnished. A bond was subsequently executed under this order.

In this court, the plaintiff moved to dismiss the appeal, on the ground that: First, Robert Powell had not furnished a bond of appeal in accordance with law.

Second. That the Supreme Court was without jurisdiction, for the reason that, while the suit filed by plaintiff and appellee originated in a claim for an amount within its jurisdiction, a judgment was rendered for \$5,000 in favor of plaintiff against the defendants, but under orders of the district court a remittitur of \$3,000 was made, leaving the only amount in dispute a claim of plaintiff in the sum of \$2,000, and consequently the Supreme Court was without jurisdiction.

The motion for a dismissal, grounded on the allegation that the defendant Powell had not executed a bond as required, is not supported by the facts. On the second ground assigned for a dismissal, we find that the trial judge, on the very day the verdict was returned, rendered (though he did sign) a judgment in conformity thereto, but that it was set aside and replaced by a later judgment, which judgment was rendered after plaintiff's remittitur had been made. The remittitur was therefore made after verdict, but before judgment. The plaintiff did not enter this remittitur under reservation of an exception to the right of the district judge to require him to make it under penalty, should it not be made, that a new trial would be granted. She acquiesced in the action of the court and made the remittitur.

Defendants resist the motion to dismiss. They urge that a remittitur, made by a plaintiff after a verdict had been rendered, which reduces the judgment to an amount less than that which would have authorized it to be brought on appeal to the Supreme Court, is without effect when the original demand was for an amount appealable to the Supreme Court.

They cite this court as saying in *State ex rel. Orleans Railroad Co. v. Lazarus*, Judge, 34 La. Ann. 865:

"It is settled beyond the possibility of doubt that although in an appealable case the plaintiff may render the cause unappealable by making a remittitur before judgment, still he cannot do so after judgment. That is no new question." *Wolf v. Munzenheimer*, 14 La. Ann. 114; *Le Blanc v. Pittman*, 16 La. Ann. 430; *State ex rel. Western Tel. Co. v. Judge of Seventh Dist. Court of Parish of Orleans*, 21 La. Ann. 728, and authorities cited in 21 La. Ann.

The remittitur made in that case was after judgment, and the appeal to the Supreme Court was sustained though the remittitur (after judgment) had reduced it to an amount below the appealable jurisdiction of that court.

Defendants refer the court to its action in *Gayden v. Louisville, Nashville, New Orleans & Texas R. R. Co.*, 39 La. Ann. 269, 1 South. 792, in which plaintiffs sued defendant to recover a judgment for \$4,000. The issues were submitted to a jury, which returned a verdict in favor of the plaintiff for \$500.

An offer was then made by plaintiff to enter a remittitur for all demands exceeding \$2,000. To this defendants objected as concerned their right of appeal. The court sustained the objection allowing the motion, however, but without prejudice to the right of appeal. There was judgment for \$500 for plaintiffs, from which defendants appealed to the Supreme Court. The plaintiff also appealed, but failed to protect the appeal. Plaintiff moved to dismiss the appeal.

In disposing of the motion, the court said:

"It is true that party plaintiff has the right to discontinue his suit, but that privilege cannot be exercised under any and all circumstances. The law discriminates."

Where the suit is before the judge alone, the discontinuance can be allowed only when asked before, never after, judgment. Code Prac. art. 491.

Where the suit is before a jury, it must be asked before the case is submitted to the jury until the moment when the jury is about to retire. Code Prac. art. 532. Where there is a reconventional demand, the plaintiff is not permitted to discontinue so as to affect that demand. That doctrine has been announced in several cases (citing them). A remittitur is in the nature of a discontinuance, and is governed by the same rules.

After the defendant had appealed, the plaintiff himself appealed. It is true he did not perfect his appeal, but the fact remains that he considered the case as appealable, otherwise he could not have appealed.

The court concluded that the remittitur entered into did not prejudice the right of the defendant to appeal.

The last case cited by defendant is that of New Orleans-Ft. Jackson R. R. Co. v. McNeely, 47 La. Ann. 1298, 17 South. 798, in which plaintiff sued to expropriate a small triangle of land for which it tendered the sum of \$50. In its answer defendant claimed damages and attorneys' fees in a sum exceeding \$3,000. The case was tried before a jury, which returned a verdict for \$500. After the verdict, defendant abandoned the demand in reconvention for damages and entered a remittitur of \$1, thereby reducing the verdict to \$499, and judgment was rendered for that amount. The plaintiff appealed to the Supreme Court, and a motion was made to dismiss the appeal on the ground that the court was without jurisdiction *ratione materiae*. The appeal was sustained, the court saying:

"With reference to the jurisdiction of this court *ratione materiae*, it is settled that a remittitur after the verdict has no more effect on the rights of the appellant than a remittitur has after judgment in a case not tried by a jury. It is governed by the same rule in so far as relates to appellant's right of appeal."

It will be seen that in the cases cited a distinction was made between remittiturs made after judgment rendered by the court and those made after verdicts of a jury. The court considered remittiturs in the light of discontinuances, and assimilated verdicts of juries to "judgments," and applied the provisions of article 532, Code Prac., to the cases before it, deciding them on the ground that the parties making the remittiturs had no right to make them at the time and under the circumstances they did to the prejudice of the rights of the other party, and therefore the cases were before it—so far as the latter were concerned—precisely as if such remittiturs had not been made. On that theory plaintiff's demand stands quoad the defendant just as it stood originally, though in point of fact the only matter in dispute between the parties which is before us is in

reference to the correctness of a judgment for only \$2,000. The fact that plaintiff may have been to some extent coerced into making a remittitur is not a matter to be urged in his favor, inasmuch as the case would be before us had such remittitur not been made, as a demand for an amount bringing it within the appellate jurisdiction of this court. The effect of the remittitur was not to make the judgment of the district court final. Plaintiff still had a right of appeal left to her—a right of appeal to the Court of Appeal with the right granted to both parties to apply to this court for a writ of review from the action of the Court of Appeal.

The motion to dismiss the appeal is not well grounded; it is refused, and the appeal is maintained.

On the Merits.

PROVOSTY, J. Plaintiff's husband, for whose death the present suit in damages is brought, was standing in the front vestibule of one of the Jackson avenue cars of the defendant company, to the left of the motorman, as the car was going towards the river. He was riding free, as an employé going to his work, and not as an ordinary passenger. The motorman saw in the next block, 100 feet or so ahead, on the dirt road to his right, a covered wagon coming towards him, or in the direction of the lake, at a trot, apparently without a driver. Noticing the absence of a driver, he turned off his current and put on his brake, so as to slacken speed and have his car under control. When the horse and the car got within about 40 feet of each other, the horse started into a gallop. Seeing this, the motorman put on his brake hard to stop the car. When the horse and the car were about to pass each other, the horse suddenly turned towards the car and plunged right into its front vestibule, shattering the glass and wrecking things generally. The shaft of the wagon struck plaintiff's husband and killed him. The motorman was thrown backward into the car through the open door at his back. The car went on 80 or 90 feet further, carrying the horse and the shafts of the wagon on its platform. The wagon was upset, and turned around from facing downtown to facing uptown. The horse was badly injured, and died within a few hours. The owner, who was a grocer, used him for delivering his groceries at the houses of his customers, and would leave him standing unhitched in the street while he went in to deliver the groceries, as the animal was perfectly gentle and not afraid of cars, automobiles, or anything, and was trained to stand unhitched, and was in the habit of doing so. That day the horse had been left unhitched, as usual, in the street, a block from where the accident happened, while the owner went in to transact his business, and had started off. What caused this unusual conduct on his part, and

what caused him to change his gait into a gallop, and what caused him to turn suddenly and jump into the car, no one knows.

This suit is against both the owner of the horse and the railway company. The negligence imputed to the former is in having left the horse unhitched. The negligence imputed to the railway company is in the failure of the motorman to have brought his car to a full stop as soon as he saw the wagon was without a driver. There was judgment below against the defendants in solido for \$2,000.

This judgment we must affirm as against the owner of the horse. Article 2321, Civ. Code, provides that:

"The owner of an animal is answerable for the damage he has caused."

Conceding, for the argument, that this article is not to be taken literally, but merely as establishing a presumption of fault on the part of the owner of the animal, such as he may rebut by proof of entire absence of negligence on his part, the defendant in this case, who left his horse unhitched and unattended in the street, is not entirely blameless, no matter how much the animal may have been accustomed theretofore to stand when left in that way.

We find no negligence on the part of the railway company. The horse was moving along the straight road tamely at a trot. Simply because there was no driver was no reason why the motorman should bring his car to a full stop in the middle of a block. It sufficed for him to bring it under full control for an emergency stop, as he did. What difference it would have made if the horse had been coming at a gallop, we need not say, as the motorman did all he could to bring his car to a full stop the moment he saw the horse break into a gallop. Had the collision occurred at a crossing, it might have been plausibly argued that the motorman should have known that the horse would likely turn at the cross-street and might at that point come upon the track, and that, in prevision of this, he should have stopped his car before reaching that point. But the accident occurred after the horse had passed the cross-street, and before the car had reached it—some 30 feet from the cross-street.

We are not disposed to attach any significance to the circumstance that the car moved some 80 or 90 feet beyond the place of the collision before coming to a full stop. The evidence shows that both the brake and the controller were knocked down, and that in all likelihood the brake was thereby released and the current restored. As a matter of fact, the car stopped only after the conductor, noticing that it was going on, took off his trolley for the purpose of cutting off the power.

Judgment set aside and suit dismissed as to defendant railway company; affirmed as to defendant Robert Powell. Costs of appeal to be paid one-half by plaintiff, and one-half by defendant Robert Powell.

(123 La. 44)

No. 16,825.

CLAVIERIE v. FABACHER.

(Supreme Court of Louisiana. Feb. 1, 1909.
Rehearing Denied March 1, 1909.)

LIBEL AND SLANDER (§ 91*)—GENERAL DENIAL—JUSTIFICATION—TRUTH OF STATEMENT—EVIDENCE.

The plaintiff seeks to recover damages from the defendant for "having made or caused to be published certain newspaper articles" charged to be libelous. The defendant pleaded a general denial. Further answering, he averred that the articles were substantially correct, but he denied that he had procured the publication thereof or that he was actuated by any malicious intent. The case was tried without reference to the pleadings, evidence having been allowed to be introduced by each party without objection. The evidence established that defendant "had not made" nor "caused to be published" the articles referred to. His pleading that "the articles were substantially correct" would not authorize a judgment against him, as he was not brought into court on that pleading as a cause of action. His pleading was not by way of confession and avoidance of any language or action of his own.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 91.*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Thomas C. W. Ellis, Judge.

Action by Dominick Clavierie against Anthony Fabacher. Judgment for defendant, and plaintiff appeals. Amended and affirmed.

Robert John Maloney (Benjamin Rice Forman, of counsel), for appellant. Parkerson & Bruenn, for appellee.

Statement of the Case.

NICHOLLS, J. Plaintiff alleged that he is a member of the police force of the city of New Orleans, and has been for a number of years. That he was a member of the same on Sunday, February 12, 1905, at which time defendant, Anthony Fabacher, made and caused to be made a statement for publication in the Daily Picayune, a daily newspaper published in this city, with a large and influential circulation not only in this city, but also in other cities, as follows, to wit:

"Tony Fabacher Jailed.

"Said He Couldn't Afford to Pay the Police Tariff.

"I was too cheap for the police on this beat, so they picked me out and pulled my place, and let every other saloon in the city run wide open. They wanted money, and didn't mention the amount.

"They got some and handed it back to me, saying that they didn't know I was so ———

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

cheap. Then they laid for me and fixed me. I will put the matter before the police commissioners to-morrow.'

"This is the statement of Tony Fabacher, whose saloon on St. Charles street was selected by the police force on New Orleans, as about the only one to be pulled. Hundreds of other saloons in the city were running wide open, many of them not even taking the trouble to lock their front doors.

"Patrolmen Claverie and Kilroy were the two astute police who managed to find out that it was possible to get a drink on the inside of Fabacher's place. Their work in pulling this place exhausted them for the day, and they were unable to find a dozen other saloons that were open within a block of the one that was closed up.

"Fabacher had his front doors closed and a man on watch outside. The two police followed a crowd into the side door, pushing it open. They arrested the bartender and closed the place up. The two men on the night force also became solicitous about Mr. Fabacher's place being open, and spent a large part of their time last evening hiding behind a sign on the opposite side of the street, waiting for another chance at this saloon. They also were unable to see other places in the same block which were wide open.

"Mr. Fabacher said that he did not know just how much the two policemen wanted, but he understood it was \$5 each. He said that he could not afford to pay this amount to every policeman that passed his place in twenty-four hours, and intended to tell the board of police commissioners so."

"Petitioner further represents that the defendant referred to the petitioner as one of the officers designated in the article published in the Daily Picayune in its issue of Monday, February 13, 1905.

"Petitioner further represents that the said defendant has continued daily to make statements to the effect that petitioner had demanded a bribe from him, had accepted money from him, and had returned the same, all of which was malicious, false, and untrue.

"Petitioner represents that the said defendant caused to be published in the Times Democrat of this city, another daily newspaper of large circulation in this city and elsewhere, an article entitled 'Fabacher Stands Pat,' a copy of which article is hereto attached and made part hereof, and also caused to be published in the said Daily Picayune and Times Democrat and in the Daily News, Daily Item, Daily States, New Orleans Bee, and German Gazette, under dates succeeding February 13, 1905, all daily newspapers of this city and having large circulations in this section and elsewhere, libelous statements against petitioner to the effect that petitioner had demanded a bribe from him and had accepted money from him and had returned the same to him, in order that he, the said defendant, might be permitted to violate what is commonly known as the 'Sunday Law,' being Act No. 18, p. 28, of the Legislature of the state of Louisiana of 1886, prohibiting saloons or other places of business from keeping open on Sundays, and prescribing penalties for the violations thereof. Petitioner further avers that the said defendant was, on the said 12th of February, 1905, conducting a saloon at No. 419 St. Charles street of this city, and was amenable to the provisions of the said act, should the said place be opened on Sunday, and under the law it was the mandatory duty of petitioner, as an officer thereof, to arrest and incarcerate the said defendant, if the said saloon had been opened during the said day, as petitioner was in charge of the district in which the said saloon was located on the said date aforesaid.

"Petitioner represents that in the said articles published by the authority of the defend-

ant in the Times Democrat and Picayune appeared the following statements, to wit:

"Tony Fabacher Jailed. Said He Could Not Afford to Pay the Police Tariff. 'I was too cheap for the police on this beat, so they picked me out and pulled my place, and let every other saloon in the city run wide open.

"'They wanted money and didn't mention the amount. They got some, and handed it back, saying they did not know I was so cheap. They laid for me and fixed me. I will put the matter before the board of police commissioners to-morrow."

"Mr. Fabacher said he did not know just how much the two policemen wanted, but he understood it was \$5 each. He said he could not afford to pay this to every policeman who passed his place in twenty-four hours, and intended to tell the board of police commissioners so."

"Petitioner represents that he was charged with conduct unbecoming an officer and with accepting a bribe by the Hon. John Journee, inspector of police, on Friday, February 17, 1905, and, after due hearing, was acquitted of said charges aforesaid.

"Petitioner represents that, on account of the charges so made against petitioner by defendant, petitioner had been seriously damaged by the newspaper publications aforesaid, made by authority of the said defendant, which continued up to the present trial of the case, before the inspector of police on February 17, 1905, and on several dates succeeding, as will appear from the several publications, which are all made part hereof for greater certainty, and annexed hereto as part of this petition.

"Petitioner represents that the said statements of the defendant concerning petitioner were made with a view of injuring him in his good standing in the community, or destroying his reputation and causing him to lose his position on the police force of this city, and the same have caused him serious damage, for all of which defendant is responsible to him in the sum hereinabove claimed.

"Petitioner represents that he had been damaged as above enumerated in the sum of five thousand dollars, being the damage sustained by him to his reputation and good name, and in the sufferings endured by him to his mortification and anxiety incident to the publications and the trial before the inspector of police as aforesaid; and in the sum of five thousand dollars as punitive and exemplary damages, which the defendant should be compelled to pay by reason of his maliciousness in causing petitioner to be accused of the charges aforesaid, when at the time of the making thereof the defendant knew that the same were not true, but were nevertheless uttered by the defendant with a view of causing petitioner the injuries aforesaid.

"Petitioner avers amicable demand without avail.

"In view of the premises, petitioner prayed that the defendant, Anthony Fabacher, be duly cited to appear and answer this petition, and, after due proceedings had, that there be judgment in favor of petitioner and against the defendant, Anthony Fabacher, in the full sum of ten thousand dollars, with legal interest from date of judgment, and all costs thereof; and for all necessary orders and general relief."

Defendant answered, pleading first the general denial. Further answering, he averred that he is the proprietor of the saloon, No. 419 St. Charles street. That the publications referred to in plaintiff's petition as having appeared in the Daily Picayune, Times Democrat, Daily News, Daily Item, Daily States, New Orleans Bee, and German Gazette are substantially correct, but defendant denied

that he procured the publication thereof in the said papers, or that he was actuated by any malicious intent.

In view of the premises, defendant prayed that plaintiff's demand be rejected at his costs. Further, defendant prayed for all such general and special relief as the nature of the case requires and law and equity grant.

The district court rendered judgment dismissing plaintiff's suit and decreeing that the parties pay the costs which they respectively incurred. Plaintiff has appealed.

Opinion.

Defendant has answered the appeal, praying that the plaintiff be condemned to pay the entire costs.

The plaintiff charges the defendant with having "made and caused to be made for publication" the newspaper articles which are copied in his petition. The case was decided upon testimony taken on the trial admitted without objection.

Instead of bringing his action against the newspapers which published the articles, and the reporters who wrote them, the plaintiff selected defendant as the object of his attack, assuming that in point of fact the defendant had made to the reporters the statements attributed to him.

The defendant appears in no good light before the court, as he concededly gave money to a police officer in order to induce him to violate with impunity what is known as the "Sunday Law." The officer returned the money to the defendant through his (defendant's) manager, and on the next Sunday, accompanied by the plaintiff, he arrested the defendant for keeping his saloon, No. 419 St. Charles street, open on that day. He (Fabacher) was tried, convicted, and fined.

The fact of his arrest attracted a good deal of attention, and was made the occasion of the publication of the newspaper articles referred to. A reporter of the Picayune called upon the defendant to ascertain the circumstances under which the arrest was made. The defendant admits in his testimony that he was called upon by this reporter and that he answered some questions which were propounded to him in regard to the matter, but he denied under oath that he had solicited the interview or that he had made the statements which were attributed to him by the reporters. He testified that he had nothing to do with the publications made in the Picayune or the Times Democrat.

The following questions were propounded to and answers given by the defendant:

"Q. The Picayune reporter interviewed you?

"A. Yes, sir.

"Q. What you stated to him was correct?

"A. Yes, sir.

"Q. You were interviewed by the Times Democrat also?

"A. Yes, sir.

"Q. And what you stated to him was the truth?

"A. Yes, sir.

"Q. Did you state all that was said in the papers?

"A. No, sir."

He specially denied on the stand as a witness that he had stated that Officer Claverie had ever asked for or received any money from him, or that he had ever offered any money to him.

At the opening of his case, plaintiff placed the inspector of police upon the stand, who stated that in reading the articles in the morning dailies he had interviewed Mr. Fabacher relative to the matter, and asked him whether he was the author of the publication; that he answered that he had been interviewed by the reporters, but he had nothing to do with it; he said he did not have any charge to make, and had nothing to say; that the papers sometimes published more than was really said; he (the inspector of police) ordered Capt. Cooper to make the charge from information received.

On the trial of that case, Claverie was acquitted, and he is still on the force.

The plaintiff has failed to establish that defendant "made or caused to be made" the publications complained of. Bayley & Pond v. Fourchy, 32 La. Ann. 186.

In Payson v. McComber, 3 Allen (Mass.) 69, the defendant's answer denied the speaking of the words and justified them by alleging their truth. The plaintiff contended that the two answers were inconsistent with each other, and that an allegation of the truth of the words was an admission that the defendant spoke them.

But the court was of the opinion that these defenses were not inconsistent with each other, for it did not necessarily follow that the defendant spoke the words because they are true, nor was an allegation of their truth on the record an admission that the defendant uttered them verbally; that different consistent defenses might be separately stated in the same answer.

In Farnan v. Childs, 66 Ill. 546, defendant filed the plea of not guilty and several pleas of justification, and, among others, one justifying the speaking of the words, charging plaintiff with having "seduced divers and sundry girls in his office," but there was no evidence in the record that the defendant ever spoke the objectionable words. The court instructed the jury that if defendant had filed pleas justifying the speaking of the words charging plaintiff with having seduced "divers and sundry girls," and made no effort to prove the same, the jury might take that fact in aggravation of damages.

Defendant urged that the instruction was erroneous because they were told:

"If defendant made no effort to prove the truth of his plea, that fact should be taken into consideration in aggravation of damages."

The ground of the objection was:

"Defendant was not bound to prove the truth of his plea until plaintiff had proven that he had spoken the slanderous words."

On the contrary, it is urged that the plea itself was a solemn admission on the record defendant had spoken the words, and plaintiff was not bound to prove that which was admitted by the pleadings. The court said:

"Counsel cites in support of his views *Jackson v. Stetson*, 15 Mass. 48; *Alderman v. French*, 1 Pick. (Mass.) 1, 11 Am. Dec. 114. While those authorities support the position assumed, they are in conflict with the authorities on that question. The rule of practice adopted in those cases was subsequently changed by an act of the Legislature. *Hix v. Drury*, 5 Pick. (Mass.) 298.

"The doctrine uniformly held is that where a party has pleaded (as he may in this state) as many pleas as he may deem necessary for his defense, each plea stands by itself and forms a distinct issue, and it is not an objection that some are inconsistent with each other, for instance, where the general issue is pleaded, and with it a plea in bar of tender or the statute of limitation.

"One plea cannot be given in evidence to sustain another, or to sustain the allegations in declaration, any more than a plea of justification in an action for slander can be made the ground of an independent action for a reiteration of the slanderous words. If the plea is to be considered for any purpose, it must be considered altogether, and then it constitutes a complete defense to the action.

"The rule that seems to be the best supported by reason and authority is that where, in an action for slander, the plea of not guilty is filed notwithstanding the plea of justification, the plaintiff must prove the speaking of the words alleged, and the pleas cannot be used to convict defendant, nor will he be bound to make good his defense until he is proven guilty. *Kirk v. Norvill et al.*, 1 D. & E. 118; *Whitaker v. Freeman*, 12 N. C. 271, Fed. Cas. No. 17-527a; *Cilley v. Jenness*, 2 N. H. 87; *Montgomery v. Richardson et al.*, 5 Car. & Payne, 247; *Harrison v. McMorns*, 5 Tanant, 233."

In *Buhler v. Wentworth*, 17 Barb. (N. Y.) 649, the syllabus of the opinion reads:

"In an action for slander the defendant may deny the speaking of the words, and, as an additional defense, set up by way of justification that the words if spoken were true."

This court has on several occasions declared that in an action of slander the general issue and a plea of justification as pleaded could not stand together. *Skillman v. Downs*, 10 La. 108; *Miller v. Roy*, 10 La. Ann. 231; *Williams v. McManus*, 38 La. Ann. 161, 58 Am. Rep. 171; *Harrison v. Jurglewicz*, 28 La. Ann. 239; *Hawkins v. New Orleans Printing & Publishing Co.*, 29 La. Ann. 134; *Young v. Jackson*, 37 La. Ann. 810.

This case comes before the court under special circumstances. As we have stated before, the case was tried without reference to the pleadings, and evidence was allowed to be introduced by each party in support of its claims and pretensions without objection.

The answer of the defendant is not as carefully worded and guarded as it should be, and is open to some criticism on that score. Defendant evidently did not intend to plead by way of confession and avoidance, and in justification of any language or acts of his own. While truthfully denying "that

he made or caused to be made" the newspaper publications, he, in pleadings in this case, and after the articles had been published, went to the defense of the newspapers and their reporters in criticising and reflecting upon the course pursued by the police force in reference to the enforcement of the Sunday law. What responsibility (if any) he incurred by this course, we are not called on to say, for that particular course is not made the basis of this action.

What plaintiff seeks to recover damages for is the action of the defendant before and at the time of the publications, and not that done by him since. *State ex rel. Phelps v. Judge*, 45 La. Ann. 1258, 14 South. 310, 40 Am. St. Rep. 282; *State ex rel. Duffy v. Civil District Court*, 112 La. 194, 36 South. 315.

The district court erred in throwing part of the costs on the defendant, and its action in that respect must be corrected as prayed for in the answer to the appeal; otherwise the judgment is correct.

For the reasons herein assigned, the judgment appealed from is amended so as to throw the entire costs of the case upon the appellant, and, as so amended, the judgment is affirmed.

(158 Ala. 242)

BLOUNT v. BLOUNT et al.

(Supreme Court of Alabama. Feb. 5, 1909.)

1. WITNESSES (§ 159*)—COMPETENCY—TRANSACTIONS WITH DECEDENTS—"TRANSACTION."

Under Code 1907, § 4007, relating to evidence of transactions with a decedent, a grantor, suing the heirs of the deceased grantee to cancel the deed and expunge it from the record, on the ground that he never executed or acknowledged the deed, may testify that he did not sign or acknowledge the deed, unless it is conclusively shown or conceded that he was a party to the deed or transaction; a "transaction" between two persons implying action, consent, knowledge, or acquiescence on the part of both.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 664, 666-669; Dec. Dig. § 159.*

For other definitions, see *Words and Phrases*, vol. 8, pp. 7060-7062; vol. 8, pp. 7818, 7819.]

2. DEEDS (§ 193*)—EXECUTION—PRESUMPTIONS.

Filing for record a deed and recording it makes the record or a certified copy presumptive evidence of its execution, and is *prima facie* proof, as between the parties thereto, of the recitals therein; but it is open for either party to show that the deed is void for any sufficient reason.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 564; Dec. Dig. § 193.*]

3. WITNESSES (§ 177*)—COMPETENCY—TRANSACTIONS WITH DECEDENTS.

Code 1907, § 4007, relating to evidence of transactions with a decedent, does not render witnesses incompetent to testify generally, but only incompetent to testify on the subjects specified; and a party to a suit is not precluded from denying that he ever had a given transaction with a decedent, whose estate is interested in the result of the suit, which transaction is imputed to him by the adverse party, though,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

where such transaction is shown or conceded, he may not give his version of it, or dispute or contradict or corroborate the evidence of other witnesses to prove what the transaction was, or the effect and extent thereof, unless called thereto by the adverse party.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 718; Dec. Dig. § 177.*]

4. APPEAL AND ERROR (§ 1056*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Where it affirmatively appears that the chancellor excluded evidence of the defeated party which was clearly competent, the court on appeal cannot say that the error was without injury, though the chancellor recites in his opinion that the decree would be the same with the excluded evidence admitted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4192; Dec. Dig. § 1056.*]

McClellan and Simpson, JJ., dissenting.

Appeal from City Court of Gadsden; John H. Disque, Judge.

Suit by Joseph G. Blount against Lily T. Blount and others to cancel and remove a deed as cloud on title. From a judgment for defendants complainant appeals. Reversed and remanded.

The facts made by the case are that Gus Blount, the husband of Lily Blount and the father of the other respondents, filed for record and had recorded in the probate office of Etowah county a deed to himself from Joseph G. Blount, conveying a lot of land to said Gus Blount, reserving a life interest in Joseph G. Blount. Gus Blount died, and Joseph G. Blount filed this bill to cancel said deed and expunge it from the record, alleging that he never executed such a deed or acknowledged the same. The deed appeared to be acknowledged; but the officer before whom the acknowledgment was alleged to have been taken was also dead. The chancellor declined to permit Joseph G. Blount to testify that he had no such transaction with his son, Gus Blount, and that he never executed or acknowledged the deed, on the theory that it was a transaction with a deceased person affecting his estate, and he denied the relief prayed.

Knox, Acker & Blackmon, for appellant. Dortch, Martin & Allen and Boykin & Brindley, for appellees.

MAYFIELD, J. The serious question involved in this appeal is this: There is found on the records of the probate office—which is by law made the registry of deeds—a record of what purports on its face to be a deed by A. to B. This record on its face shows the deed to have been properly signed by A., attested by C., and acknowledged by A. before a notary, E., and filed in the probate office for record four days after it purported to have been executed. That which purported to be the original deed is lost, and the grantee is dead. In a suit between the alleged grantor and the heirs, distributees, and personal rep-

resentatives of B., can A., as a witness for himself, deny that he signed this deed, or that he acknowledged that he signed it, before E., the notary? In such case the grantor is clearly a competent witness, unless he and this evidence fall within the exception of section 4007 (1794) of the Code of 1907, which exception reads as follows:

"4007. Competency of Parties as Affected by Interest.—In civil suits and proceedings, there must be no exclusion of any witness because he is a party, or interested in the issue tried, except that no person having a pecuniary interest in the result of the suit or proceeding shall be allowed to testify against the party to whom his interest is opposed, as to any transaction with, or statement by, the deceased person whose estate is interested in the result of the suit or proceeding," etc.

If the proposed evidence relates to "a transaction with or statement by" B., then it is clearly not admissible. If the evidence does not relate to any such transaction or conversation with B., then it is admissible. So the question must be determined by the fact whether or not the denial by the grantor of the execution of a deed necessarily involves a transaction with the grantee. The writer is of the opinion that it does not. It may or it may not, depending upon the particular circumstances of the case. The grantor may make a deed to the grantee without the knowledge or consent of the grantee, and against his will. The grantor to a deed is a necessary party to its execution, but the grantee is not. The grantee, therefore, cannot, without the aid or consent of the grantor, make him a party to a transaction involving the execution of a deed. If the grantee should forge the name of the grantor to the deed, and forge the attestation and acknowledgment thereto, he cannot make it a transaction with the grantor by filing it for record and having it recorded without the knowledge and consent of the grantor. Nor would the fact that such a deed was thus executed and recorded by third parties, with or without the consent of the grantee, make it a transaction with the purported grantor. A transaction between two parties necessarily implies action, consent, knowledge, or acquiescence on the part of both. Hence, if a grantor never in truth and in fact executed or attempted to execute an alleged deed to a given grantee, he is not and cannot be a party to the transaction, which on its face purports to be the execution by him of a deed to the named grantee.

The grantee, third parties, nor all combined, cannot, without his act, word, deed, knowledge, consent, or acquiescence, make such purported grantor a party to a transaction as to which he had nothing to do and to which he was not a party. He is the only party or individual who can make himself a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

party thereto; and to deny to him the right to testify that he was not a party to the transaction would be to put it within the power of a grantee or third parties to absolutely acquire all his property without his knowledge or consent. We do not believe that this is the law. Of course, if he did, in fact and in truth, execute the deed, and the grantee dies, and in fact there had been a transaction between them, then under the statute he is incompetent to testify as to the transaction involved in the execution of the deed; but if he in fact made no deed at all, and had no knowledge of it, he was not, and could not be made, a party to a transaction which merely on its face imports a transaction between him and a deceased person. It therefore follows that if it be conceded, or conclusively proven, that a grantor did in fact execute a deed to the grantee, and that it constituted a transaction between the two, and the grantee is dead, the grantor is incompetent to testify as to such transaction.

The grantor in this case does not concede that he executed the deed, but denies it, if the court will let him do so; and the evidence does not conclusively prove it. His testimony is therefore competent to determine the question *vel non* as to the transaction between the grantor and grantee. If the court or jury should from all the evidence find that the grantor was a party to the deed or transaction, then he is an incompetent witness; but he is competent until this is conclusively shown, or it is conceded that he was a party to the transaction in question. The other party to the suit cannot render him incompetent, by testifying that he was a party to a transaction with a deceased person through whom they claim, or by showing a chain of circumstances which tend to prove he was a party to such transaction.

Filing for record a paper purporting on its face to be a deed, and recording it, makes such record or a certified copy thereof presumptive evidence of the execution of the alleged or purported deed, and is *prima facie* proof, in such case, as between the alleged parties thereto, of the recitals in such deed. This is a mere *prima facie* presumption, which the statute and the law indulge, and is not a conclusive presumption. It is open and proper for either party to dispute it, or to show that it is a forgery or a fraud, or that it is void for any sufficient reason. It is not like a judgment in a suit between the parties as to that matter. For example, if the purported deed in question here, which was filed for record and recorded, was, as a matter of fact, a forgery by the grantee or any other party, filing and recording it could not make it valid. It may in certain cases make the record, or a certified copy thereof, presumptive evidence of the recitals therein; but it is not conclusive, and does not make a forgery a valid conveyance, though it might aid the court or jury in finding the instrument in question to have been a valid con-

veyance. However, it is not conclusive on judge or jury—at least, not more so than the purported deed itself would be, if its execution were proven.

We are not now writing as to the probative force of such proof of execution, filing, and recording of the deed, but as to the conclusiveness of such matters to show a transaction between the grantor and grantee. We hold that the grantor in such document, no matter what its nature, character, or recitals, is not precluded, by such proof, such filing, and such recording, from showing that his alleged signature thereto and his acknowledgment thereto are forgeries and frauds, perpetrated without his knowledge or consent. If this be not true, one man can acquire, for his estate after his death, all the property of another, without the knowledge or consent of such other, and yet do it by due process of law. We say the law is not, and ought not to be, such as to allow such proceedings or results.

We think the construction we thus place upon this statute is that which was intended by the Legislature when the statute was enacted, and that it is perfectly consistent with all the decisions of this court dealing with its construction. The statute referred to above removes all objections to the competency of witnesses in civil cases, on account of interest or of being parties to the record, except as to transactions or conversations with deceased persons and as to some other matters not necessary here to mention. *Calera, etc., Co. v. Brinkerhoff*, 87 Ala. 422, 6 South. 295. The effect of the exception in the statute referred to is not to render parties or witnesses incompetent to testify generally in the given case, but only incompetent to testify upon the certain subjects specified. *O'Neal v. Reynolds*, 42 Ala. 197. Testimony of a party that he never gave any other note to a deceased person, whose estate is interested in the result of the suit or trial, does not involve a transaction with such deceased person, and is not within the exception of the statute. *Payne v. Long*, 131 Ala. 433, 31 South. 77. In an action by a physician to recover for services rendered a deceased person, declarations of the plaintiff as to the character of the disease which afflicted the deceased, and as to directions given by him for its treatment, made out of the presence or hearing of the deceased, do not involve a transaction had with such deceased person, within the exception of the statute. *McDonald v. Harris*, 131 Ala. 359, 31 South. 548.

A party to a suit is not precluded by the statute from denying that he ever had a given conversation or transaction with a deceased person whose estate is interested in the result of the suit, which is imputed to him by the other party, though, if such conversation be shown conclusively or be conceded by him, he is not allowed to give his version of it, or even to dispute or contradict or corroborate the evidence of other witnesses, or

facts which tend to prove what the conversation or transaction was, or the effect and extent thereof, unless called thereto by the opposing party. Authorities supra, which overrule and limit Frank's Case, 105 Ala. 211, 16 South. 634, to the extent that it held that the party might show what he did say or do in such conversation or transaction, but not to the extent that he could not deny he had such transaction or conversation.

We can see no reason why the rule is not the same in this case as it would be, in a criminal case, as to husband and wife. They are incompetent witnesses for or against each other in criminal cases, except in certain cases involving assaults, etc., by the one upon the other. But certainly a witness would not be rendered incompetent to testify in a criminal case because one of the parties claims that the witness is the husband or wife of the defendant; nor would a marriage license, issued according to law, bearing the names of such defendant and witness, and showing *prima facie* that they were husband and wife, preclude the witness from denying that he or she and the other were husband and wife—that the marriage record was either a mistake or a fraud. If the witness and the defendant should concede, or it was conclusively shown, that they were husband and wife, then the witness would be incompetent; but until this is done such witness is as competent as any other witness.

It affirmatively and conclusively appears that the chancellor or judge excluded and refused to allow evidence of the complaint which was clearly competent; hence we cannot say that it was error without injury. True, the chancellor or judge recites in his opinion that the judgment or decree of the court would and should be the same with this evidence in or out of the case. This we cannot know or affirm.

It therefore follows that the decree appealed from must be reversed and the cause remanded.

Reversed and remanded.

TYSON, C. J., and DOWDELL and DENSON, JJ., concur.

MCCLELLAN, J. (dissenting). The question presented by this appeal involves the competency *vel non* of the complainant to testify as a witness in denial of his execution, both in signature and acknowledgment, of a deed purported to be from the complainant, as grantor, to his son, now deceased, as grantee. The majority of the court hold him to be so competent, not inhibited by the exception in Code 1907, § 4007 (1794), and hence that the proffered testimony is admissible.

Where the competency of a witness to testify, generally or along particular lines, is raised, it is the province and duty of the court alone to determine whether the witness is competent. *Worthington v. Mencer*, 96 Ala. 310, 11 South. 72, 17 L. R. A. 407; *Pierce v.*

State, 124 Ala. 68, 27 South. 269. If he is incompetent, he cannot, of course, testify. In this connection it is not inappropriate to note that the analogy assumed by the majority to exist in cases where the marriage relation affects the competency *vel non* of a witness is refuted in *Pierce v. State*, supra; for, if the question of competency *vel non* is one solely for the court, then the premise on which my Brothers must necessarily ground their conclusion is inherently faulty. That this statement of logical sequence is true may be demonstrated by the application of the ruling, herein made, to a case where the action is on a note purporting to be executed by the defendant to a payee since deceased. The defendant offers to testify that he never executed the note. The administrator (plaintiff) objects that he cannot testify as to a transaction with his intestate. If my Brothers are correct in their conclusion in this case, the objection, though it goes to competency, must be overruled, and the proffered testimony of the defendant admitted in evidence. So the objection fails when addressed to the court. Can it avail otherwise? It cannot, for the obvious reason that the jury's function has never been understood or held to embrace the prerogative to determine the relevancy, materiality, legality, or competency of evidence, or the competency of a witness to testify, on any issue triable by a jury. On this phase of the result of the ruling of my Brothers, I can see no escape from the conclusion that never before doubted principles, fundamental in the law, are overturned.

This statute (Code 1907, § 4007 [1794]) has long been among our laws, has been repeatedly construed and interpreted here, and has several times been readopted, and thus impressed with the meaning and effect ascribed to it by judicial expression; yet, as I view it, the statute is denied application to the case at bar, without reference to what this court has held was its meaning and effect, and which holding was presumptively rewritten in the statute by its readoption. If this be true, a most familiar rule of construction of statutes is ignored. That it is true seems to me to be demonstrable from the fact that the decision of *Miller v. Cannon*, 84 Ala. 59, 63, 4 South. 204, from the mature pen of Stone, C. J., delivered in 1887, containing a summary of all previous announcements by this court, as well as affirmation of the meaning and effect of the statute, is not mentioned in the opinion in this case. From mere silence in this regard it cannot be assumed that *Miller v. Cannon* was intended to be modified, much less overruled, by the ruling in the present case. That the broad, and yet exact, pronouncement made in *Miller v. Cannon*, is inconsistent with the meaning and effect now given the statute in hand, will be shown, I think, by a quotation to be later made therefrom.

The authorities upon which the conclusion of the majority is rested are four in number.

The first is *Calera Land Co. v. Brinkerhoff*, 87 Ala. 422, 6 South. 295. There the question was whether a grantee in a deed was prohibited by the statute under consideration from testifying to the handwriting of a subscribing witness to the deed; the absence of such subscribing witness being accounted for. The ruling was that he was not within the statute. The next is *O'Neal v. Reynolds*, 42 Ala. 197. In that case the inquiry involved was whether the widow of the alleged testator was a party within the provisions of the statute. The want of application of both these decisions to the question in the case at bar is apparent. The next is *Payne v. Long*, 131 Ala. 438, 31 South. 77. *Payne's* administrator sued Long on a note payable to *Payne*. Long was permitted, over objection based on the statute (section 1794), to testify in favorable response to this question: "State whether or not there was ever any other note than the one sued on given by you to any one with a condition attached to it." It will be noted that the question asked the witness did not seek to impeach the note sued on, but in effect confessed its existence by the inquiry with reference to any other note with a condition to it. This would suffice to eliminate *Payne v. Long* as authority for the conclusion of my Brothers in this instance. If Long had been asked if he executed the note sued on, then the question would have been as here. The ruling made on the quoted interrogatory may be sound, for the reason, stated in *Gamble v. Whitehead*, 94 Ala. 335, 11 South. 293, that the question was general and referred to no particular transaction with the deceased; but the cases of *Morrisett v. Wood*, 123 Ala. 384, 26 South. 307, 82 Am. St. Rep. 127, and *Wood v. Brewer*, 73 Ala. 259, do not relate, as will appear from a casual reading of them, to a status even akin to that present in *Payne v. Long*. As an addenda to what has been before said in respect to *Miller v. Cannon*, it is proper to note that *Payne v. Long*, reaffirms that decision.

The last decision is *McDonald v. Harris*, 131 Ala. 359, 31 South. 548. *Harris* sued to recover compensation for medical services rendered the defendant's testator. The defendant offered to show by the widow and son of the deceased certain transactions between the plaintiff and deceased. The holding was that such witnesses were incompetent to testify in that connection. It was further ruled that these witnesses were competent to testify to conversations between the plaintiff, *Harris*, and these witnesses, but "the deceased was not a party to the conversations. * * * The proposed testimony [that last stated] relates to a transaction or a conversation between plaintiff and third persons, and is not within the rule." *Wood v. Brewer*, 73 Ala. 262, supports the ruling quoted. It seems clear to the writer that, so far as *McDonald v. Harris* bears on the question involved in the present appeal,

it negatives the soundness of the conclusion announced by my Brothers.

But we are not without authority, afforded by this court, for a conclusion opposite to that entertained by the majority. On the score of comprehensive construction of the statute *Miller v. Cannon*, supra, is all that is now necessary to note, and, concluding the whole matter, Judge Stone says therein: "We think our former interpretations of the statute we are construing, considered collectively, have established the following propositions: When the case falls expressly within either of the exceptions for which the statute makes provision, neither a party to the record, nor any one else having a vested pecuniary interest in the result of the suit, can testify against the estate of a deceased party, first as to (that is, directly relating to) any transaction with or statement by the deceased, involved in the issue on trial; second, that testimony whose direct office and purpose are to corroborate or weaken, strengthen or rebut, other evidence given of such transaction with or statement by decedent, is equally within the reason and spirit of the prohibition. When, however, the testimony does not relate directly to, nor shed any direct light on some transaction with, or statement by, the deceased adversary, then the prohibition does not apply." On the score of the purpose in the enactment of this statute this succinct statement from *Dismukes v. Tolson*, 67 Ala. 389, is serviceable: "The reason upon which this statute is based seems to be that there shall be no admissibility unless there is mutuality; that, when the lips of one party to a transaction are sealed by death, those of the other must in like manner be sealed by law."

If it is granted that the first of the two conditions defined in *Miller v. Cannon* for application of the statute is not present in this cause, can there be any doubt with respect to the application here of the second condition? Is there any "other evidence" in this record of a transaction between the son and the father, grantee and grantor in the assailed conveyance? If there is such "other evidence," then the very letter of the second condition framed by Judge Stone is present to invoke the prohibition of the statute. There is such "other evidence," and its existence is not the subject of controversy, as this expression from the opinion of the majority will show: "Filing for record a paper purporting on its face to be a deed, and recording it, makes such record or a certified copy thereof presumptive evidence of the execution of the alleged or purported deed, and is prima facie proof, in such case, as between the alleged parties thereto, of the recitals on such deed. This is a mere prima facie presumption, which the statute and the law indulge, and is not a conclusive presumption. It is open and proper for either party to dispute it, or to show that it is a forgery or a fraud, or that it is void

for any sufficient reason. * * * For example, if the purported deed in question here, which was filed for record and recorded, was as a matter of fact a forgery, by the grantee or any other party, filing and recording it could not make it valid. It may in certain cases make the record, or a certified copy thereof, presumptive evidence of the recitals therein; but it is not conclusive, and does not make a forgery a valid conveyance, though it might aid the court or jury in finding the instrument in question to have been a valid conveyance. However, it is not conclusive on judge or jury—at least, not more so than the purported deed itself would be, if its execution were proven." From this premise it is difficult, if not impossible, to understand how the testimony under consideration can be held admissible, unless the second condition defined in *Miller v. Cannon* is unsound.

But my Brothers misunderstand, I think, the contention of the solicitors for appellees, and the learned judge who presided below; for no one of them, nor any one else, for that matter, has asserted or insisted that the presumption against the commission of a crime—forgery—here imputed, it seems, to both the dead son, grantee, and to the dead notary, or the presumption always indulged against fraud until it is proven, were conclusive; but it was insisted and ruled below, and once here on this appeal, that to overcome the prima facie presumption of purported due execution, absence of fraud, and innocence of the crime of forgery imputed, the burden was on the complainant to maintain in proof his allegations, and to do so the statute inhibited him from testifying against the prima facie evidence of a transaction with the deceased whose estate would be diminished, and that of complainant enhanced, if the conveyance was held to be invalid. What is the prima facie evidence of a transaction between the father and son, purported grantor and grantee, respectively, to be read from the recitals of the instrument? They are: (a) The recital of the consideration, besides love and affection, of \$5, paid by the grantee to the grantor; (b) the recital that the grantor "signed, sealed, and delivered these presents" on the date named. In the light of these recitals and their truth, because fraud and crime are never presumed, but must be proven in such cases, can it be said that there was no "other evidence" of a transaction against which the proffered testimony of the complainant, purported grantor, was directed with the view to the weakening or rebuttal thereof, as defined in *Miller v. Cannon*. And in this connection it may be properly inquired whether there is any room for the suggestion that one may become a grantee in a deed without his knowledge; for in this instance we have the recital by the assailant of the instrument that he received from his purported grantee \$5 and also that the instru-

ment was delivered according to its purpose. The prima facie presumption is that both statements are true.

What is a transaction within this statute was defined in *Wood v. Brewer*, 73 Ala. 262. The definition there is approvingly quoted in *McDonald v. Harris*, 131 Ala. 366, 31 South. 549, among others of our decisions. It is "some act done by the deceased, or in the doing of which he personally participated." The prima facie transaction shown by the deed, fair on its face, is patently within the definition.

Furthermore, another consideration, allied to those before stated, demonstrates, I think, the existence, at least prima facie, of a transaction between the parties named in the instrument. That consideration is the theory on which the complainant's bill is filed. Its object is to expunge from the records an instrument purporting to be a deed. It must confess, prima facie, a transaction evidenced by the assailed instrument, and aver and sustain in proof the extrinsic facts necessary to destroy that which, if unimpeached, is fair. If no proof is offered to support the allegation of fraud or crime, of course, the complainant must fail. Until the presumption in favor of the instrument is overcome, the instrument, including, of course, its recitals, must be taken as true. According to the test referred to in *Wood v. Brewer* and *McDonald v. Harris*, it must necessarily be presumed that, if living, the younger Blount, purported grantee, could speak, in support of the validity of the deed, of the fact that he paid the \$5 as recited therein and of the fact of the recited delivery of the instrument to him. If so, the rule of mutuality stated in *Dismukes v. Tolson*, supra, must prohibit the living party to the transaction from testifying in respect to it.

But, aside from the foregoing considerations, this court, as early as *Kirksey v. Kirksey*, 41 Ala. 626, and as late as *Ware v. Burch*, 148 Ala. 529, 42 South. 562, has ruled in denial of the admissibility of the testimony under consideration. In *Kirksey v. Kirksey* the personal representative claimed as a credit, on final settlement, a note executed by the decedent and payable to him. The credit was contested by the widow on the ground that the note was not executed by the decedent, nor by any one authorized to bind him in the premises. On this issue the distributees were offered to testify in reference to decedent's signature to the note. They were held to be incompetent, and in the course of decision on this point the rule of mutuality before mentioned was thus invoked: "To allow the administrator to testify as to the signature to the note in controversy would be allowing him to testify as to a transaction with the intestate, within the meaning of the statute, and he would, therefore, be an incompetent witness under the act for that purpose; and hence the other parties must be held to be incompetent." It

will be noted that the court held the distributees incompetent to testify in denial of the transaction the note "purported" to show. In *Ware v. Burch* the question grew out of these facts: A. B. Ware was the administrator of the estate of Broadhurst, and on final settlement he sought to charge the estate with the amount of a note purporting to have been executed by Broadhurst to B. M. Ware and assigned by B. M. Ware to A. B. Ware. The item was contested on the ground that neither Broadhurst nor any one authorized by him executed the note. A. B. Ware undertook to testify, in his own behalf, that the signature to the note was that of Broadhurst. Upon the authority of *Kirksey v. Kirksey*, this court affirmed the court below in disallowing the witness to so testify; the exception in the statute affording the reason.

In *Ware v. Burch* the effect was to show a transaction. In the instance before this court the effort is to show there was no transaction. In *Kirksey v. Kirksey* it was also attempted to show by distributees that Isaac Kirksey did not sign the note. Is there is a distinction to be taken under the statute between cases where the effort is to show a transaction with one deceased and cases where the effort is to show there was no transaction? If so, it is not written in the statute, nor has this court ever so interpreted it. On the contrary, the concrete case presented in *Miller v. Cannon* invited a ruling on this assumed distinction with respect to a conversation—"statement—by" the plaintiff's intestate. If one otherwise within the rule is prohibited from testifying that there was no such conversation to which the decedent was a party, certainly the same reason and interpretation of the statute would seal the lips of such a one to testify that he did not execute the note, the mortgage, or the deed, as the case may be, in which the decedent was payee, mortgagee, or grantee. The concluding paragraph of the opinion in *Miller v. Cannon*, stating the status presented and the ruling of the court thereon, is as follows: "In this case the plaintiff, who sues as administrator, having proven by a witness a conversation respecting a mule in controversy between plaintiff's intestate and Edwards, from whom defendant derived title, the defendant introduced Edwards, who was allowed to testify that *no such conversation ever occurred with the deceased*. Under the rules declared above the court erred in admitting this evidence." (*Italics supplied.*)

Nor is there any merit in the argument that at least the complainant might testify that the purported acknowledgment was false. The law regards the substance and not the form. Where the law forbids at all, it inhibits indirection as well as the course that essays to directly do that which it has forbidden. The wisdom of this policy is strikingly exemplified in this instance, where the grantee and the notary are both dead, and only the

actor, grantor, lives—where the only living party becomes the actor, years after the purported deed was recorded and after his adversary has passed away. The stated argument is predicated upon the assumption that the act of taking the acknowledgment was not a transaction in which the intestate personally participated. This insistence might be satisfactorily answered, and refuted, by the suggestion that it rests on an assumption in conflict with evidence in the cause tending to show that the intestate was present when the acknowledgment of the conveyance to him was taken, and hence within the statute's prohibition as defined in *Miller v. Cannon*. But response to the argument may be based on broader reasons. The prime premise on which the argument rests is that the taking of the acknowledgment was a separate and independent transaction from the conveyance itself; in other words that, even if a conveyance, apart from the acknowledgment, evidences a transaction between the parties, the act of taking the acknowledgment is not a transaction in which the deceased participated. This proposition may be conceded to be sound in so far as it asserts that two necessarily different parties, namely, the grantee and the notary, actually participate in the acts when these are abstractly considered. But the concession does not conclude in favor of the question argued. It would so conclude if the act of taking the acknowledgment was not merged into the major and only purpose of it, viz., the execution of a conveyance, impressed, when properly acknowledged, with a measure of judicial solemnity. In the absence of subscribing witnesses to the execution of a conveyance, the acknowledgment thereof is essential to due execution—to the creation of a conveyance. It is as much a part of the completed instrument as is the habendum, or any other, clause. To permit testimony directly leading to the impeachment of the acknowledgment is just as fatal to the ordinary conveyance, as such, as would be testimony in denial of the grantor's signature thereto. Indeed, to go a step forward, the direct effect of an impeachment of an acknowledgment in proper form, in a deed duly recorded, is to strike down *prima facie* evidence, so declared by statute (Code 1898, §§ 934, 992), of the due execution of the conveyance.

If the conveyance in hand is *prima facie* evidence of a transaction between the parties, it cannot be that an essential, vital part of it can be severed as a separate, independent transaction, and which severance would result, in the absence of a subscribing witness, in the destruction of the instrument as a conveyance. Furthermore, the recital in the instrument of its delivery necessarily implies the delivery of a completed conveyance. Delivery implies acceptance. 2 Words & Phrases, p. 1958 et seq. The acknowledgment is interwoven with the other parts of

the instrument and refers in express terms to it; and, on the other hand, the granting clause, and also a general recital of the intent of the instrument, necessarily refer to the transaction between the two Blounts to the conveyance as such, and thus include the acknowledgment. The opinion is entertained that the complainant is prohibited by the statute from testifying, when his purported grantee is dead, that he never gave his acknowledgment, as the instrument *prima facie* shows. The scope and effect of this *prima facie* showing is aptly stated in *Alexander v. Alexander*, 71 Ala. 297, 298. See, also, *Naugher v. Sparks*, 110 Ala. 572, 18 South. 45, and *Williamson v. Mayer*, 117 Ala. 253, 23 South. 8.

In the opinion of the writer, this court should have reviewed the decree appealed from with reference to its support in the proof, and this, notwithstanding the ruling below excluding from consideration the discussed testimony of the complainant, all set forth in the record. Code 1896, § 3826; Code 1907, § 5955; *Shows v. Folmar*, 133 Ala. 599, 32 South. 495; *Chafin v. Muscogee Co.*, 127 Ala. 376, 383, 30 South. 555. The reversal and remandment seems to be an innovation. In my opinion the decree should be affirmed, since, without the testimony of the complainant in support of his allegation of forgery in the production of the purported conveyance, the bill is without sustaining proof.

SIMPSON, J. I concur with Justice McCLELLAN, in dissenting from the opinion of the majority. There cannot be any doubt of the proposition that a deed from one person to another is a transaction between them. The statute does not prohibit the interested party only from testifying that there was a transaction between them, but from testifying "as to any transaction," or, as our court has interpreted it, "in relation to any transaction." Whether his testimony be to uphold the transaction, or to strike it down, it is testimony as to, or in relation to, a transaction. I therefore think the witness was incompetent to testify.

(158 Ala. 200)

LIGHT v. HENDERSON.

(Supreme Court of Alabama. Jan. 19, 1909.)

1. PLEADING (§ 144*)—SET-OFF—SUFFICIENCY OF ALLEGATION—INDEBTEDNESS.

Pleas of set-off, alleging that defendant during certain months delivered to plaintiff certain goods of specified value, that plaintiff had negligently permitted cattle to run in defendant's corn and cotton, damaging it to a stated amount, and that plaintiff rented defendant a farm for a certain sum for which defendant executed the note in suit, and plaintiff failed to give possession, to defendant's damage in a certain amount, were insufficient, because they averred no present indebtedness from plaintiff to defendant for the goods delivered or for damages for failure to give possession of the farm, and did not aver

that the property delivered to plaintiff was defendant's property.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 293; Dec. Dig. § 144.*]

2. PLEADING (§ 8*)—ACTIONS—DEFENSES—FAILURE OF CONSIDERATION—SUFFICIENCY OF PLEA.

A plea of failure of consideration in an action on a note, which fails to set out the facts constituting the failure, is bad on demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 14; Dec. Dig. § 8.*]

Appeal from Circuit Court, Lowndes County; J. C. Richardson, Judge.

Action by J. M. Light against Frank Henderson. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

The following pleas were filed to the complaint: "(2) That, to wit, during the month of November, 1907, defendant turned over and delivered to plaintiff 1,006 pounds of lint cotton, of the value of \$125, and two hoes, of the value of \$1.50, and four plows, of the value of \$15, and 2,000 pounds cotton seed, of the value of \$20, and 50 bushels of corn, of the value of \$40, and that, to wit, during the months of November and December, 1907, the plaintiff negligently permitted a horse and four head of cattle to run at large on defendant's crop of corn and cotton, whereby said crop of corn and cotton was by said cattle trampled upon, knocked out of the open bolls, and devoured, to the defendant's damage in a large sum, to wit, the sum of \$50, all of which defendant offers to set off against plaintiff's claim and asks judgment for overplus. (3) That before the bringing of this suit, and during the fall of 1907, the defendant turned over and delivered at the request of the plaintiff the items with the value as set out in plea 2 (all of which is set out in plea 2), and that plaintiff permitted knowingly four head of cattle to trample, waste, and devour 2,000 pounds of cotton unpicked, belonging to the defendant, of the value of \$50, to the damage of defendant in that amount, all of which defendant offers to set off against plaintiff's claim and asks judgment for the excess. (4) That the consideration to which said note, the foundation of this suit, was given, has failed." "(7) That he rented to defendant a farm and dwelling house of plaintiff, known as 'Swanson Lighthouse,' for the year 1907, at and for the sum of \$125, and agreed to put defendant in immediate possession, for which rental and agreement on the part of the plaintiff, the defendant executed the note sued on; and defendant avers that plaintiff failed and refused to put defendant in possession of said dwelling house, to defendant's great damage, in this: That defendant was deprived of the use thereof during the whole of said rental term, to his great damage in the sum of \$25, which defendant offers to recoup against plaintiff's demand. And defendant further avers that he delivered to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

plaintiff at his request (here follows a list of the items, with their value, as set out in plea 2), all of which defendant offers to set off against plaintiff's demand and claims judgment for the overflow."

Demurrers were interposed to plea 2 as follows: "It does not appear from the allegations of said plea that the property alleged therein to have been turned over to plaintiff was to be applied to the payment of the note the foundation of this suit. (2) For aught that appears in said plea the property alleged to have been turned over to the plaintiff was in satisfaction of other claims than the one sued on. (3) Said plea seeks to have set off against the demand sued on damages which are shown to be unliquidated. (4) It does not appear from the allegations of said plea that plaintiff is indebted to the defendant for the property alleged therein to have been turned over to plaintiff by the defendant." These grounds of demurrers were also interposed to plea 3. Demurrer was interposed to plea 4 because it does not appear from the allegation of said plea wherein the consideration of said note failed. The same grounds of demurrer were interposed to plea 7 as those assigned to plea 2, with the additional ground that said plea neither admits nor denies the allegation of the complaint, all of which demurrers were overruled.

W. P. McGaugh, Evans Hinson, and J. R. Bell, for appellant. R. L. Goldsmith and H. R. Golson, for appellee.

ANDERSON, J. The rule of common law was that a plea of set-off must disclose a state of facts such as would entitle the party pleading to an action, if he were suing as plaintiff. *Crawford v. Simonton*, 7 Port. 110. It must have contained the substance at least of a declaration. *Waterman on Set-Off*, 598. The certainty and formality requisite in a declaration was not necessary, but the debt or demand must have been described by amount, the time of its making, its character, and the facts fixing the liability therefor on the plaintiff. *Sledge v. Swift*, 53 Ala. 110. While our statute enlarges the subject of set-off, it does not relieve the defendant from setting up in his plea an indebtedness from the plaintiff to him. Code 1907, p. 1202, form 37.

Pleas 2, 3, and 7, while seeking a set-off for the value of certain personal property to the plaintiff, aver no indebtedness for same. It may have been paid for when delivered, or at some subsequent time. Moreover, the pleas do not aver that the property turned over to the plaintiff was the defendant's property. It may have been the plaintiff's own property that was delivered. The trial court erred in not sustaining the plaintiff's demurrer to pleas 2, 3, and 7.

A plea of failure of consideration, which fails to set out the facts constituting the failure, is bad on demurrer. *Meyer v. Bloch*, 139 Ala. 174, 35 South. 705, and cases cited. The fourth plea was subject to the demurrer interposed.

The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, SIMPSON, and McCLELLAN, JJ., concur.

(158 Ala. 329)

HARPER et al. v. RAISIN FERTILIZER CO. et al.

(Supreme Court of Alabama. July 3, 1908. On Rehearing, Jan. 14, 1909.)

1. APPEAL AND ERROR (§ 1033*)—REVIEW—FAVORABLE RULINGS.

On defendant's appeal from a decree refusing to dismiss the bill on sustaining a demurrer thereto, the Supreme Court will not consider the chancellor's opinion as to the various grounds of demurrer, some of which he considered well taken and others not, since his ruling sustaining the demurrer was favorable to defendants.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4053; Dec. Dig. § 1033.*]

2. APPEAL AND ERROR (§ 870*)—REVIEW.

On defendants' appeal from a decree sustaining a demurrer to the bill, but refusing to dismiss the bill or strike an amendment, the Supreme Court can consider only the motions to dismiss the bill as amended and to strike the amendment; there having been no decree on the motion to dismiss the original bill before the filing of the amendment.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 870.*]

3. APPEAL AND ERROR (§ 870*)—REVIEW—MOTION TO STRIKE AMENDMENT.

The chancellor's refusal to strike an amendment to the bill can be reviewed on defendant's appeal from the final decree.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3506; Dec. Dig. § 870.*]

4. EQUITY (§ 275*)—PLEADING—AMENDMENT.

Generally, if the record shows that complainants were not entitled to relief on the original bill, subsequent occurrences set up by supplemental bill or amendment will not cure the defect.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 275.*]

5. FRAUDULENT CONVEYANCES (§ 54*)—SUITS TO AVOID—ISSUES.

In a suit to set aside a conveyance as fraudulent, the primary issue is the existence of the debt, for the payment of which, except for the conveyance, the property transferred could be made liable.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 123-137; Dec. Dig. § 54.*]

6. FRAUDULENT CONVEYANCES (§ 242*)—SUITS TO AVOID—DEFENSES.

A mere creditor cannot defend a suit to avoid a conveyance as fraudulent on the ground of limitations; but one who has acquired an interest in the property by deed or mortgage from the original owner can, to protect the property.

make any plea which the original owner himself could have made.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 689; Dec. Dig. § 242.*]

7. JUDGMENT (§ 739*)—CONCLUSIVENESS.

A judgment in a foreclosure suit, rendered after filing of a bill by the creditor to avoid a conveyance of other land as fraudulent, does not preclude the defense to the bill that the debt was barred by limitations when the bill was filed.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1267; Dec. Dig. § 739.*]

8. LIMITATION OF ACTIONS (§ 167*)—EFFECT OF BAR—BAR OF DEBT AS AFFECTING SECURITY.

Mortgage foreclosure proceedings could be maintained, though the debt was barred by limitations.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 652; Dec. Dig. § 167.*]

On Rehearing.

9. JUDGMENT (§ 270*)—WHEN EFFECTIVE—FILING.

A decree signed in vacation does not become effective until filed.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 502; Dec. Dig. § 270.*]

10. FRAUDULENT CONVEYANCES (§ 213*)—BARRED DEBT.

A conveyance is not fraudulent as to a creditor whose debt is barred by limitations.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 635; Dec. Dig. § 213.*]

Appeal from Chancery Court, Coffee County; W. L. Parks, Chancellor.

Bill by the Ralsin Fertilizer Company and others against R. Harper and another. From the decree, defendants appeal. Reversed and rendered.

H. L. Martin, for appellants. J. F. Sanders and M. Sollie, for appellees.

SIMPSON, J. The bill in this case was filed by the appellees, J. B. Harper and the Ralsin Fertilizer Company, against the appellants, R. Harper and R. F. Harper. J. B. Harper having died, the case was revived in the name of his representatives; and the bill was subsequently amended so as to substitute the widow, who is also executrix, in place of R. F. Harper, deceased. The bill is based upon a debt due by R. Harper to J. B. Harper, secured by a mortgage, which said debt and mortgage had been, by said J. B. Harper, transferred and assigned to said Ralsin Fertilizer Company, to be held by it as collateral security for a debt due by said J. B. Harper to it. It is alleged that the mortgage debt is largely greater than the value of the property mortgaged, and the bill alleges that certain other properties have been fraudulently conveyed by said R. Harper, and seeks to have the conveyances set aside, etc. While there were several decrees and orders during the progress of the case, the appeal is from the final decree rendered June 1, 1907.

The agreement to submit shows that all previous decrees are set aside; also that the

motion to dismiss the bill as amended, the demurrer to the bill as amended, and the motion to dismiss, filed February 8, 1907, are withdrawn; and the cause was to be submitted on demurrer to the bill as amended, filed September 21, 1906, the motion to dismiss the bill as amended, filed the same day, the motion to strike part of the bill, additional demurrers filed October 22, 1906, motion to dismiss bill as amended, filed October 22, 1906, motion to strike amendment to bill, and motion to dismiss bill for want of equity, filed September 21, 1906. The record does not show any note of submission, and the decree of the chancellor states that "this case is submitted on written agreement, in vacation, on demurrers to the bill as amended." The decree sustains the demurrer, and then, reciting the submission on "motion to dismiss the bill as amended, and motion to strike," overrules both. It is evident, from this recital, first, that, the demurrer being sustained, the appellant cannot call upon this court to consider any matters in the chancellor's opinion as to the various grounds of demurrer, some of which he considered well taken and others not, the decree being in favor of the appellant sustaining his demurrer (*Coleman v. Butt*, 130 Ala. 266, 30 South. 364, and cases cited); second, that, there being no decree on the motion to dismiss the original bill, before the filing of the amendment, we can consider only the motion to dismiss the bill as amended, and the overruling of the motion to strike the amendment. The ruling of the court on the motion to strike may be reviewed on appeal from the final decree. *Hood et al. v. Southern Railway*, 133 Ala. 374, 377, 31 South. 937.

The bill as amended shows that the debt which is claimed to be due to the complainant was due on the 1st day of April, 1889, the conveyance sought to be attacked was made May 1, 1902, and the original bill in this case was filed September 9, 1902; so that the debt was barred by limitations when the conveyance was made and when the bill was filed, and the amendment filed December 8, 1905, shows that, since the filing of the bill, to wit, on September 9, 1903, a decree of foreclosure on the original mortgage was rendered by the chancery court, that the property was sold, and after said sale and the application of the proceeds a personal judgment was rendered against the mortgagor for a balance of \$2,089. It also shows that the conveyances complained of were made May 1, 1902, and subsequent thereto, and that the bill for foreclosure was pending at that time. The bill was without equity as originally filed, by reason of the debt being barred. *Battle v. Reid*, 68 Ala. 153. At that time it was incapable of amendment, so as to give it equity. So the question arises, can the subsequent facts set

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

forth in the amendment impart validity to it?

It is a general principle of law "that, if the record shows that the complainants were not entitled to relief upon the original bill, matter which subsequently occurred, and which is averred by way of supplemental bill (or amendment), does not cure the defect." *Land and Wife v. Cowan et al.*, 19 Ala. 297, 298; *Hill v. Hill*, 10 Ala. 527; *Planters' & Merchants' M. Ins. Co. v. Selma Savings Bank*, 63 Ala. 585, 595; *Scheerer et al. v. Agee*, 113 Ala. 383, 21 South. 81. This court has said that "the theory on which such a bill proceeds is that the fraudulent donee is to be taken and deemed as an executor de son tort. This being the capacity in which he is sued, he can prefer any defense to the debt, with which he is sought to be charged, that the decedent in his life, or a rightful representative, could prefer." *Halfman's Ex'r v. Ellison*, 51 Ala. 544, 554; *Houston v. Blackman*, 66 Ala. 561, 41 Am. Rep. 756. In another case, in which a creditors' bill was filed attacking conveyances made by a decedent, this court said: "We do not consider the question whether the statute of limitations would protect the title of the fraudulent grantee. * * * We know of no principle or authority upon which the position can be maintained that a debtor is denied the privilege of pleading the statute of limitation against the debt because he has made a fraudulent conveyance and successfully concealed it. * * * The statute is pleaded by the administrator, and we can perceive no reason why he should not as well defend in the chancery court, upon the ground that the claim is barred by the statute, as if he had been sued at law." *Reed's Adm'r v. Minell & Co.*, 30 Ala. 65. This court has also said: "If, upon the face of the bill, it is apparent the claim or demand of the complainant is barred by lapse of time, or by the statute of limitations, the defense is available in a court of equity, on demurrer, as well as by plea or answer." *Battle v. Reid*, 68 Ala. 153; *Lovelace v. Hutchinson*, 106 Ala. 417, 424, 17 South. 623. "The grantee * * * may plead any defense, not merely personal, which the grantor or debtor could have made against it." *Deposit Bank of F. v. Caffee et al.*, 135 Ala. 211, 33 South. 152. "The fact of primary importance in such a proceeding * * * is the existence of a debt, for the payment of which, except for the conveyance, the property transferred could be made liable." *Yeend, Adm'r, v. Weeks et al.*, 104 Ala. 331, 339, 16 South. 165, 53 Am. St. Rep. 50.

It is true that our court has held, in several cases of creditors' bills, that the statute of limitations to the original cause of action was not pleadable; but the ground upon which such decisions were rendered was that in each case the effort was, not merely to set aside a deed claimed to be fraudulent, but to enforce a trust in the

land, by reason of the money of the debtor having been invested in the land or otherwise, and the court very properly said that the enforcement of the trust did not depend upon the question of limitations as to the original debt. *Stoutz, Adm'r, v. Huger et al.*, 107 Ala. 248, 253, 18 South. 126; *Guyton et al. v. Terrell*, 132 Ala. 67, 74, 31 South. 83; *N. W. Land Ass'n v. Grady*, 137 Ala. 219, 224, 33 South. 874. These decisions do not impinge upon the general doctrine that the grantee, in a conveyance claimed to be fraudulent, can make the defense of the statute of limitations as to the original debt, and so long as he is insisting on that defense the bill is without equity as to him. *Davis v. Davis*, 20 Or. 78, 84, 85, 25 Pac. 140. In the case of *Emory v. Kelghan*, 94 Ill. 543, the action was ejectment, the title being based on a purchase at a mortgage sale, and the question of the statute of limitation was attempted to be raised by a surety on the note, said note not being barred against the principal by reason of his absence from the state; and the court held that the bar as against the surety on the note did not invalidate the sale under the law of that state, by which the bar of the note also bars the foreclosure of the mortgage. That decision was, of course, correct, as the foreclosure of the mortgage did not affect the liability of the surety on the note. The case of *Cartwright v. Cartwright*, 68 Ill. App. 74, is based entirely on the last-cited case, and on *Lee v. Mound Station*, 118 Ill. 312, 8 N. E. 759, and *Shields v. Shift*, 124 U. S. 351, 8 Sup. Ct. 510, 31 L. Ed. 445, neither of which touches the question at all. While a mere creditor cannot raise the defense of the statute of limitations, yet the party who has acquired an interest in the property by deed or mortgage from the original owner is placed in the shoes of the grantor, and authorized, "for the purpose of protecting the property, to make any plea which he himself could have made." *Ward v. Waterman*, 85 Cal. 490, 507, 24 Pac. 930; *Hill v. Hilliard & Co.*, 103 N. C. 34, 38, 9 S. E. 639.

We are unable to agree with the chancellor to the effect that the statute of limitations is not applicable, because the judgment rendered in the foreclosure suit "is conclusive of the fact that at the time of the filing of the original bill in this case the debt was not barred by the statute of limitations." "A judgment against a grantor in an alleged fraudulent conveyance * * * is not evidence that the debt existed at any time anterior thereto." *Yeend, Adm'r, v. Weeks et al.*, 104 Ala. 332, 340, 16 South. 165, 53 Am. St. Rep. 50; *Lawson v. Alabama Warehouse Co.*, 73 Ala. 289, 293. The foreclosure proceedings could be maintained, notwithstanding the debt was barred by the statute of limitations (*Ohmer v. Boyer*, 89 Ala. 274, 7 South. 663), and the judgment over is rendered on motion, without any notice to the defendant, other than the fil-

ing of the bill. Wells, Adm'r, v. Am. Mort. Co., 123 Ala. 413, 26 South. 301.

It is unnecessary for the court to consider whether such a judgment could in any event take from the grantee the right which he had to defend his property by pleading the statute of limitations. It is sufficient to say that such a judgment, rendered after the institution of the creditors' bill, could not impart to the original bill equity which it did not have at the time it was filed. The amendment should have been stricken from the bill, and the bill dismissed.

The decree of the chancellor is reversed, and a decree will be here rendered dismissing the bill.

Reversed and rendered.

TYSON, C. J., and HARALSON, DOWDELL, ANDERSON, and DENSON, JJ., concur.

On Rehearing.

SIMPSON, J. While the record shows that the decree was signed in vacation, June 1, 1907, and was not filed until July 5, 1907, the decree did not become effective until said latter date. Hudson v. Hudson, 20 Ala. 364, 56 Am. Dec. 200. In this case it was held that a paper purporting to be a decree of the orphans' court, signed by the judge, and found among the papers, but not recorded, was not a decree of the court.

When a decree is rendered in vacation, as in the case now under consideration, the mere signing of it cannot make it effective, as it is still in the breast of the court, to alter or destroy, until it is filed in court; consequently the appeal on August 3d was in time.

It is not necessary to decide whether the defense of the statute of limitations can be raised by motion to dismiss the bill. This is not the case of a bill to enforce the collection of a debt, to which the defense of the statute of limitations is interposed, but the bill is by a creditor, to set aside a conveyance claimed to be fraudulent, and if, at the time the conveyance was made, the statute had barred the debt, so that the debtor was at liberty to disregard the debt and convey the property, the conveyance was not fraudulent. Hence a bill seeking to set it aside is without equity.

The motion for rehearing is denied.

TYSON, C. J., and HARALSON, DOWDELL, ANDERSON, and DENSON, JJ., concur.

(158 Ala. 41)

FORBUS v. STATE.

(Supreme Court of Alabama. Feb. 4, 1909.)

1. COURTS (§ 77*)—TERMS—ADJOURNMENT.

At common law the failure of the judge to appear on the day fixed by law for the opening

of a term of court results in the lapse of the term.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 264; Dec. Dig. § 77.*]

2. COURTS (§ 77*)—TERMS—ADJOURNMENT.

Code 1896, § 922, providing that, when any judge fails to attend, the court stands adjourned from day to day until 3 o'clock in the afternoon of the third day, when it is adjourned to the next term, if applicable to the county court of a county, operates, on the failure of the judge thereof to attend, to adjourn the court for the term on the third day.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 264; Dec. Dig. § 77.*]

3. COURTS (§ 76*)—TERMS—RECESS.

A court having regular terms, with power to take a recess from time to time during any term, cannot take a recess, unless it is organized at a fixed term.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 250; Dec. Dig. § 76.*]

4. COURTS (§ 77*)—TERM OF COURT—ADJOURNMENT.

Loc. Acts 1898-99, p. 176, as amended by Acts 1900-01, p. 2085, establishes a court with regular terms, one term on the first Monday in September, continuing until the last Saturday in January, and provides that grand juries shall be summoned to attend the court on the second Monday in December. The court attempted to organize on September 17th, though the first Monday in September came on the 3d, and the grand jury was organized in December following. Held, that the delay in the organization of the court for the September term operated to adjourn the court for the term, and the grand jury was an unauthorized body, and an indictment returned by it was void.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 264; Dec. Dig. § 77.*]

Appeal from Clay County Court; W. J. Pearce, Judge.

Ed Forbus was convicted of crime, and he appeals. Reversed, and accused discharged.

Whatley & Cornelius, for appellant. Alexander M. Garber, Atty. Gen., for the State.

SIMPSON, J. The appellant was convicted of the offense of shooting along or across a public road. It is insisted that the organization of the court at which the indictment was found, and the organization of the grand jury which found it, are void, and that the indictment is therefore void. This point was raised in the court below by motion to quash the indictment, by demurrer to the same, and by objection to being placed upon trial on said indictment.

The county court of Clay county was established by act approved December 13, 1898 (Loc. Acts 1898-99, p. 176). Section 6 of said act provides that the regular terms of said court shall begin "on the first Monday in March, in each year, and continuing till the last Saturday in July, and on the first Monday in September, in each year, and continuing until the last Saturday in January"; also that "said court may take a recess from time to time, during the terms thereof, when the business will permit" (page 178). Section 11 as amended by the act of March 2, 1901

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(Acts 1900-01, p. 2085), provides that "there shall be two jury terms in said court in each year, . . . one to commence on the second Monday in January, and one on the second Monday in July, and may continue till the business of the court, on the jury docket, shall have been disposed of, and that grand and petit juries for the trial of causes in said court shall be drawn by the judge and clerk of said court," etc., "provided that grand juries shall be summoned to attend said court on the second Monday in June and December in each year, when they shall be organized and impaneled, and may continue," etc. It appears from the record that the court was organized, or attempted to be organized, on September 17, 1906 (the first Monday in September being the 3d), and that the grand jury was organized in December, 1906.

At common law, if the judge fails to appear on the date fixed by law for the opening of the term, it results in a lapse of the term. 11 Cyc. 736; 21 Ency. Pl. & Pr. 637; People v. Bradwell, 2 Cow. (N. Y.) 445; People v. Sanchez, 24 Cal. 17; Loesnitz v. Seellinger, 127 Ind. 422, 427, 25 N. E. 1037, 26 N. E. 887; In re Terrill, 52 Kan. 29, 34 Pac. 457, 39 Am. St. Rep. 327. Our statute—section 922, Code of 1896; section 3260, Code of 1907—was evidently passed for the purpose of relieving the strictness of the common law; but, even if that section applies to the county court of Clay county, that court would have stood adjourned for the term on the third day. *Norwood v. L. & N. R. R. Co.*, 149 Ala. 151, 42 South. 683.

The court could not take a recess until after it was organized. The act provides that said grand juries shall be "summoned to attend the court." It is difficult to see how they could attend the court, when there was no court in session, and no authority is given by the act to the judge to organize the grand jury in vacation, unless the latter clause of the same section be construed to authorize the judge in vacation to organize the grand jury only for the consideration of the special offenses therein specified.

The grand jury which found this indictment, having been organized without authority of law, was void, and the indictment void.

The judgment of the court is reversed, and the appellant will be discharged.

TYSON, C. J., and DENSON and MAYFIELD, JJ., concur.

(158 Ala. 356)

TALLASSEE FALLS MFG. CO. v. MOORE.
(Supreme Court of Alabama. Nov. 19, 1908.)

Rehearing Denied Jan. 14, 1909.)

1. MASTER AND SERVANT (§ 258*)—INJURIES TO SERVANT—ACTIONS—COMPLAINT—SUFFICIENCY.

In an action for injuries to a quarry workman, amended counts of the complaint, stating

a cause of action under the employer's liability act (Code 1896, § 1749, subd. 1) for negligence in the use of a defective rope, held not subject to the demurrers interposed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 816-836; Dec. Dig. § 258.*]

2. MASTER AND SERVANT (§ 258*)—INJURIES TO SERVANT—ACTIONS—COMPLAINT—SUFFICIENCY.

In an action for injuries sustained by a quarry workman due to a defective rope, a count of the complaint held to state a cause of action at common law, and not under the employer's liability act (Code 1896, § 1749), and not subject to demurrer.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 258.*]

3. MASTER AND SERVANT (§ 258*)—INJURIES TO SERVANT—ACTIONS—COMPLAINT—SUFFICIENCY.

In an action for injuries sustained by a quarry workman, a count stating a cause of action under the employer's liability act (Code 1896, § 1749) for negligence of a superintendent in permitting a defective rope to be used held not subject to the demurrers interposed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 816-836; Dec. Dig. § 258.*]

4. MASTER AND SERVANT (§ 262*)—INJURIES TO SERVANT—ACTIONS—PLEAS—SUFFICIENCY.

A plea that an employé was guilty of contributory negligence, in that he placed himself in a position on the car where, if a rock should fall by the breaking of the rope that held the same, or from other cause, he would likely be injured, and that while the rock was being lowered into the car it did fall, because of the breaking of the rope, and strike the employé was faulty, as imposing upon him the anticipation of negligence by the employer of its servants.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 855-859; Dec. Dig. § 262.*]

5. MASTER AND SERVANT (§ 262*)—INJURIES TO SERVANT—ACTIONS—PLEAS—SUFFICIENCY.

An averment that an employé negligently placed himself in a position on the car where, if a rock should fall by the breaking of the rope that held the same, or other cause, he would likely be injured, is wholly insufficient as an allegation that the employé had knowledge that the position assumed by him on the car was dangerous.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 855-859; Dec. Dig. § 262.*]

6. MASTER AND SERVANT (§ 238*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—SELECTION OF DANGEROUS METHOD.

The fact that an employé is injured because of the way he selected to perform a duty, when if he had selected another way the injury would have been avoided, does not alone fix upon him contributory negligence; but the test is whether he has selected a dangerous way when there is a safe way, knowing the way selected to be dangerous, or if the danger is apparent or obvious.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 681, 743-748; Dec. Dig. § 238.*]

7. PLEADING (§ 8*)—CONCLUSIONS—INJURIES TO SERVANT—ACTIONS—PLEAS—SUFFICIENCY.

A plea that, while a rock which fell and injured an employé was being lowered into the car, it was obviously dangerous to get on the car and occupy a position where, if the rock

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

should fall by the breaking of the rope, or other cause, the person occupying such position would likely be injured, and that while the rock was being lowered such employé did assume such position on the car, and thereby assumed the risk of the injuries, contains no averments of facts, but states conclusions only.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28; Dec. Dig. § 8.*]

8. MASTER AND SERVANT (§ 262*)—INJURIES TO SERVANT—ACTIONS—PLEAS—SUFFICIENCY.

A plea, in a personal injury action by an employé, containing no averment that the superintendent had authority to give the orders alleged to have been violated by the employé, is insufficient.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 262.*]

9. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—RULINGS ON PLEADINGS.

Error, if any, in sustaining a demurrer to a plea, was without prejudice, where substantially the same defense was set up in another plea, upon which issue was joined.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4094; Dec. Dig. § 1040.*]

10. MASTER AND SERVANT (§ 262*)—INJURIES TO SERVANT—ACTIONS—PLEAS—SUFFICIENCY.

A plea that an employé was warned by one having charge of the work not to be on or near the car while the stone was being lowered into the car, and that the employé, disregarding such warning, got onto the car, and while on it received the injuries sustained by the falling of the stone, is insufficient, because failing to aver in what the warning consisted, whether of danger or otherwise, and, if of danger, what danger.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 262.*]

11. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—RULINGS ON PLEADINGS.

Error, if any, in the sustaining of demurrers to pleas, was without prejudice, where every fact averred therein could properly have been shown under the plea of not guilty interposed, and upon which issue was joined.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1094; Dec. Dig. § 1040.*]

Appeal from Circuit Court, Tallapoosa County; S. L. Brewer, Judge.

Personal injury action by George W. Moore against the Tallassee Falls Manufacturing Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The complaint as amended was as follows:

Count 1: "Plaintiff claims of defendant \$10,000 damages, for this: That on or about the 6th day of February, 1903, the defendant was conducting and operating a rock quarry, from which it was taking large stone for building and other purposes, which said stones were hoisted or raised by means of ropes, pulleys, and other appliances, and placed on a car, and removed or conveyed to other points; that plaintiff was employed by defendant to work at said quarry, and to assist in and about the handling or moving of said stones therefrom, and therefore it was the duty of said defendant to have in its said quarry and in its said plant for handling and removing said stones good and safe machinery and appliances, and to have said machinery run and operated with care;

that on the date above mentioned, while plaintiff was on defendant's car, engaged in the proper discharge of his duties for the defendant, while aiding and assisting in placing on said car a large stone, which was being lowered onto said car preparatory to being removed to another point or place, said stone fell, and plaintiff's foot was caught under said stone, and between said stone and the bottom or floor of said car, and was thereby so crushed and damaged that it was necessary to amputate a part of his said foot. Plaintiff avers that said injury to him was suffered because of the wrong or negligence of defendant in having and using in the operation of said quarry, and removing said stone, machines or appliances which were defective, out of order, and unsafe and unfit to be used in said business, in this: That a rope, which was a part of the ways, works, machinery, or plant used in the operation of said quarry, was old, worn, and not sufficiently strong to support the weight placed upon it in handling, removing, and conveying said stone, and said defect caused said rope to break, and permitted said stone to fall as above averred, and that said defects arose from, or had not been discovered or remedied owing to, the negligence of the defendant, or of some person in the service of the defendant and intrusted by it with the duty of seeing that the ways, works, machinery, or plant were in proper condition, and which, but for the want of proper care and diligence, would have been known to the defendant."

Count 2: Same as count 1, with the exception that it is alleged that rocks were being removed by means of a derrick, to which were attached ropes, pulleys, and other appliances, and that while lowering said rock onto the car the rope broke and permitted it to fall on plaintiff's foot, etc.

Count 3: Same as 1 and 2, with the additional allegation that the rock was being raised by means of dogs or iron hooks, in which it was clasped, and by which said rocks were held and supported, and that the dogs or hooks were fastened to a rope attached to a pulley or pulleys suspended from a derrick, and that while lowering a stone into the car the rope broke, causing the rock to fall on defendant's foot, etc.

Count 4: Substantial duplicate of count 1, except the word "rock," instead of "stone," is used.

Count 5: Same as count 1, down to and including the words "run and operated with care," with the following additional averments: "That on the date above mentioned, while plaintiff was on defendant's car, in the proper discharge of his duties for the defendant, a large rock, which was held or procured by means of dogs or iron hooks, in which it was clasped, which said dogs or hooks were fastened to a rope attached to a

pulley or pulleys suspended from a derrick, was being lowered onto a car upon which plaintiff was working for defendant, when the rope by which said rock was suspended broke, permitting said rock to fall, and plaintiff's foot was caught under said rock, and was so crushed and mangled that it was necessary to amputate his said foot. For a large part of the time he avers that said rope was old, much worn by long use, its strength greatly impaired, that it was defective, and wholly insufficient for the purpose for which it was being used, or for the work required of said rope; and plaintiff avers that his said injury was suffered because of the wrong or negligence of the defendant in having and using in the working and operation of said quarry, and in the removing of said rocks or stones, the said rope which was defective, insecure, and out of order, and unsafe and unfit to be used in said business, and which, but for the want of proper care and diligence, would have been known to the defendant, and all of which was unknown to plaintiff."

Count 6: Same as count 1, down to and including the words "same had to be amputated," and continuing: "And plaintiff avers that said rope was old and worn by use, and in one part of it had become much weakened, and was wholly insufficient for the work for which it was being used, because it was not of sufficient strength to support the weight that it was required to sustain." Then follows the concluding allegation of count 1.

Count 9: Same as count 1, down to and including the words, "run and operated with care," with the following addition: "That on the day above mentioned, while plaintiff was at work on defendant's car, in the proper discharge of his duties to defendant, and while aiding and assisting in the placing upon said car a stone which was being lowered into said car preparatory to being removed to another point or place, the rope, which was the necessary part of the works, ways, machinery, or appliances by which said stone was sustained, broke, and said stone fell with great force and power, and plaintiff's foot was caught under said stone, and between said stone and the bottom or floor of said car, and was thereby so crushed, mashed, and mangled that it was necessary to amputate a part of plaintiff's said foot, and a part of plaintiff's said foot was amputated, to his permanent injury and great damage and suffering, both in body and mind. Plaintiff avers that said injury to him was caused by reason of the wrong or negligence of one Abraham Smith, who was in the service or employment of defendant, and who had superintendence of the plaintiff and of said ways, works, machinery, and appliances, and said rope intrusted to him, and who was at the said time in the exercise of such superintendence, in this: That said rope by which said stone was suspend-

ed was worn, decayed, and weak, and was not strong enough to hold said stone; wherefore it broke, and that said Smith negligently allowed the said rope to be used in hoisting the said rock when it was worn, weak, and decayed as aforesaid, and said Smith had knowledge of the worn, weak, and decayed condition of said rope herein alleged, or could have had knowledge of same with the exercise of proper care and prudence."

Demurrers were interposed to counts 1, 2, 3, 4, 5, and 6 as amended, as follows:

To each of the counts separately: "(1) For that it does not state facts sufficient to constitute a cause of action against defendant. (2) Negligence is alleged merely as a conclusion of the pleader. (3) The particular negligence that is complained of is nowhere alleged or set out. (4) It nowhere appears that the wrong or negligence of defendant contributed to the injury. (5) It does not appear what particular appliances were defective, insecure, out of order, and unsafe and unfit to be used, or what was the particular negligence of defendant. (6) The allegations were so vague, indefinite, and uncertain that it is impossible to ascertain under what section of the employer's liability act the count is framed, if any. (7) It does not appear whether it was the machine or whether it was the appliances which were defective, out of order, etc. (8) There is no such description of the machines or appliances which are alleged to be defective, etc., as to inform defendant of the particular machines or appliances referred to. (9) Said counts impose a too high duty upon defendant in alleging that it was his duty to have in said quarry good and safe machinery and appliances. (10) It does not appear that defendant failed to use reasonable care to procure safe and suitable machinery and appliances for use in said work, or that it failed to use reasonable care to maintain the same in a safe and suitable condition. (11) It is not made plain whether defendant violated its duty in respect to the original selection or furnishing said machinery or appliances, or that it failed in its duty in respect to maintaining the same. (12) It does not appear that said condition of said machinery was not discovered or remedied because of the negligence of defendant or some person in the employ of defendant, and charged by it with the duty of seeing that its ways, works, etc., were in proper condition. (13) It does not appear that defendant knew of said alleged condition of said machinery and appliances in time to have remedied the same before plaintiff's injury, or that by the use of reasonable care it could have known of the same in time to have remedied said alleged condition before plaintiff was injured. (14) No causal connection is alleged or shown between said alleged defective, unsafe, and unsuitable condition of said machinery or appliances and the injury to plaintiff. (15) It does not appear whether

the proximate cause of plaintiff's said injuries was the alleged condition of the machinery and appliances, or whether it was the breaking of the rope."

The following additional grounds of demurrer were interposed to the second count: "(a) It does not appear that said rope was defective. (b) No connection is averred between the alleged defective condition of machinery and appliances and the breaking of the rope."

To the fifth: "(d) It does not appear whether this defendant was guilty of any negligence in originally procuring or furnishing said rope for said work, or whether it was subsequently guilty of any negligence in not discovering or remedying said alleged defect. (e) It does not appear that defendant had opportunity to remedy said alleged defects between the time when they could with proper care and diligence have become known to defendant, and the time plaintiff was injured."

Also to the sixth: "(f) It appears that the overloading of said rope was the act of a fellow servant of the plaintiff, and that defendant was not therefore liable therefor. (g) It does not appear that plaintiff's injury was caused by the negligence of any person in the employment of defendant who had any superintendence intrusted to him, while in the exercise of such superintendence. (h) The name of the employé who is alleged to have had charge of said work is not set forth."

The following additional grounds were interposed to counts 1, 2, 3, 4, 5, and 6: "(1) It does not appear that plaintiff was employed to be on said car at the time and place when he was injured. (2) Said rope was no part of defendant's ways, works, or machinery."

Demurrers to the ninth count were interposed on the same grounds heretofore mentioned to counts, 1, 2, 3, 4, 5, and 6, and the following additional ground: "(1) The Christian name or initial of the person alleged to have had superintendence to him is not alleged. (2) The count fails to show that plaintiff was injured by reason of the negligence of any person in the service or employment of defendant who had any superintendence intrusted to him, whilst in the exercise of such superintendence. (3) Said count fails to show the plaintiff was injured as the result of any act of superintendence on the part of any one intrusted by the defendant with such superintendence. (4) Said count shows that plaintiff was injured by reason of the defective or unsuitable character of the rope, and not by reason of any act of superintendence on the part of said plaintiff. (5) Said rope constitutes no part of the ways, works, machinery, or plant of defendant under section 1749, Code Ala. 1896."

These demurrers being overruled, the defendant filed the following pleas:

(1) The general issue.

(2) "That at the time of receiving his said injuries plaintiff was guilty of negligence that contributed proximately to his said injuries in this: That plaintiff negligently placed himself in a position on said car where, if said rock should fall by the jerking of the rope that held the same, or from other cause, plaintiff would likely be injured by said rock falling upon him; and defendant avers that while said rock was being lowered into said car, and while plaintiff was in said dangerous position, said rock did fall from the breaking of the rope which held it, or from other cause, and did strike plaintiff."

(3) "Plaintiff was guilty of negligence that contributed proximately to his said injuries in this: That while said stone was being lowered onto said car plaintiff negligently got on said car, when and where he was injured by the falling of said stone, and plaintiff's said negligence consisted in this: That plaintiff, instead of taking a position on said car where, if said rock fell, it would not have fallen upon him, as he could have done, took a position where said rock, if it should fall, would likely strike him."

(4) "That plaintiff's duty in and about the work in which he was engaged was to see that the rock, when lowered, was placed in its proper position on said car, and, when said rock had been so placed, to unloose the dogs that held it while it was being lowered. Defendant avers that said duty could have been faithfully and properly performed if plaintiff had stood on the ground next to said car, and near the point where said rock would descend. But defendant avers that, although plaintiff might have adopted said safe manner of doing his work, he in fact negligently got upon said car while said rock was being lowered, and stood at a place thereon where there was danger of being injured if said rock should fall as a result of the breaking of a rope or otherwise. And defendant avers that plaintiff was guilty of contributory negligence in assuming said dangerous position on said car when he could by standing on the ground have safely performed said duties without said danger, and that his said negligent conduct contributed to his said injury."

(5) Same allegation as 4 relative to the duties of plaintiff, with the allegation that "the proper performance of said duty did not require that plaintiff should be near the place where said rock was being lowered until said rock had been lowered so near the car that it could be put in place and said dogs unloosed without danger of being injured; but defendant avers that while said rock was being lowered, and before it had reached a point of proximity to said car where plaintiff's duty would attach as aforesaid, plaintiff assumed a position on said car where, if said rock should fall, by the breaking of the rope or otherwise, he would likely be injured; and defendant avers that said rock did so

fall while plaintiff occupied said position, and he was injured thereby, wherefore said plaintiff's negligence contributed proximately to his injury."

(6) "That while said rock was being lowered by said rope into its position on said car it was obviously and manifestly dangerous to get on said car and occupy a position thereon where, if said rock should fall, by the breaking of said rope or other cause, the person so occupying said position would likely be injured thereby, and that the danger of being so injured was patent and obvious; and defendant avers that while said rock was being so lowered plaintiff did assume said position on said car and thereby assumed the risk of the injuries he sustained."

(8) "Defendant says that plaintiff was warned by an employee of this defendant who had charge of the work in which plaintiff was engaged not to be on or near said car while the stone was being lowered onto said car; and defendant avers that plaintiff, disregarding said warning, got on said car while a large stone was being lowered onto the same by means of a derrick with a boom and rope attached, and that while plaintiff was on said car in disregard of said warning he received his said injuries by the falling of said stone, wherefore plaintiff assumed the risk of injuries received."

(14) Same as 5, with the additional averment that "while plaintiff was at said place the rope broke by reason of a defect that was concealed from observation, and that said rock then and there fell while plaintiff was occupying said position, and he was injured, and that his negligence in being at said place proximately contributed to his injuries."

(20) This plea alleges the duty and position of defendant as is alleged in plea 5, and that he voluntarily assumed the position, and that the danger of rock falling was patent and obvious. Wherefore plaintiff assumed the risk.

J. M. Chilton and G. A. Sorrell, for appellant. J. W. Strother and G. L. Bulger, for appellee.

TYSON, C. J. The complaint, as originally framed, contained seven counts. To each of these counts, except the fifth, a demurrer was sustained. All of these counts, except the fifth and seventh, were amended so as to state a cause of action under subdivision 1 of the employer's liability act (section 1749 of the Code of 1896). As amended they were not subject to the demurrers interposed.

The seventh count must be treated as having been eliminated from the complaint. To it the demurrer was sustained, and it does not appear that it was subsequently amended to meet the ruling. The fifth, to which the demurrer was overruled, states a cause of action at common law, and not under the

statute, as seems to be supposed by counsel for appellant, and was clearly not subject to the demurrer. *Laughran v. Brewer*, 113 Ala. 509, 21 South. 415; *Tutwiler Coal, Coke & Iron Co. v. Farrington*, 144 Ala. 157, 39 South. 898.

The ninth count, which was added by way of amendment, was not subject to any of the grounds of demurrer interposed to it. Indeed, those grounds which seem to be insisted on are in contradiction of the averments of the count. Whether the count was entirely unassailable we do not determine. All that we hold on this point is that, if defective, the defect was not pointed out by the demurrer. See *Williamson Iron Co. v. McQueen*, 144 Ala. 274, 40 South. 306; *Reno's Employers' Liability Act*, § 57.

A number of special pleas were filed. Many of these were held insufficient. Plea 2 was faulty in imposing upon the plaintiff the anticipation of negligence on the part of defendant or its servants. Furthermore, it fails to aver that plaintiff had knowledge that the position assumed by him on the car was a dangerous one. The averment that he "negligently placed himself in a position on said car where, if said rock should fall by the breaking of the rope that held the same, or for other causes, the plaintiff would likely be injured by said rock falling upon him," is wholly insufficient; no fact being alleged imputing knowledge of the danger to the plaintiff. Upon the consideration last adverted to, pleas 3, 4, and 5 were bad. "The fact that the party was injured because of the way selected, when if he had selected the other way the injury would have been avoided, alone, does not fix upon him contributory negligence. The result is not the true test. If a party selects a dangerous way to perform a duty when there is a safe way, knowing the way selected to be dangerous, or if the danger 'is apparent' or 'obvious,' then he assumes the risk and is guilty of contributory negligence." *T. C., I. & R. R. Co. v. Herndon*, 100 Ala. 451, 14 South. 287. Plea 6 contains no averments of fact relied upon as defense, but states conclusions merely. Plea 7 contains no averment that the superintendent had authority to give the orders alleged to have been violated by plaintiff. Furthermore, substantially the same defense attempted to be set up by it was set up in plea 15, upon which issue was joined; so that in any event the sustaining of the demurrer, if erroneous, was without prejudice. Plea 8 fails to aver in what the alleged warning consisted, whether of danger or otherwise, and, if of danger, what danger. *Dresser's Emp. Liability*, p. 467; 29 Cyc. 525.

The defense attempted to be set up in pleas 14 and 20 was nothing more nor less than a traverse of the issues tendered by the complaint. Every fact averred in these pleas could properly have been shown under the plea of not guilty, which was interposed

and upon which issue was joined. The sustaining of the demurrers to each of them, if erroneous, was clearly without injury.

Affirmed.

DOWDELL, ANDERSON, and McCLELLAN, JJ., concur.

(158 Ala. 78)

CURTIS et al. v. HUNT.

(Supreme Court of Alabama. Jan. 14, 1909.)

1. EXECUTORS AND ADMINISTRATORS (§ 358*)—SALE OF DECEDENT'S ESTATE—PROBATE PROCEEDINGS—APPEAL—TIME FOR TAKING.

Code 1896, § 458, subd. 6, limiting to 30 days the time for taking an appeal from an order of probate on any issue as to the insolvency of an estate and on any issue as to any allowance of any claim against insolvent estates, does not apply to an application by personal representatives for sale of real estate to pay debts of decedent, which negatives the issue of insolvency; the subdivision having reference only to decrees or orders in a proceeding looking to the adjudication of the insolvency of estates, and the allusion to the allowance of claims in insolvency proceedings having reference to contests of claims in accordance with section 313.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 358.*]

2. EXECUTORS AND ADMINISTRATORS (§ 336*)—SALES TO PAY DEBTS—APPLICATION.

The jurisdictional averments in an application by personal representatives to sell lands of decedent to pay debts being that there are debts of intestate to be paid and that the personal estate which he left is insufficient to pay them, omission from the application of an averment stating which of the heirs or devisees were married women, even if a defect, did not affect the jurisdiction of the court.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 336.*]

3. EXECUTORS AND ADMINISTRATORS (§ 341*)—SALE TO PAY DEBTS—APPLICATION—PROOF OF DEBTS.

The undisputed debts of decedent being \$70, and the personal assets of the estate only \$20, it is immaterial, on an application to sell lands of decedent to pay his debts, in the absence of objection to selling all the lands when part would be enough, whether there were any other debts, so that any error in rulings as to the validity of another debt was harmless.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 341.*]

4. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR—EVIDENCE.

Though the administratrix, on application by her to sell land of deceased to pay debts, is not a disinterested witness as to the value of the personal property, though she is as to its character and identity, within Code 1896, §§ 164, 167, providing that the applicant must by deposition of disinterested witnesses show the personal property is insufficient to pay the debts, and that, where there are minors or persons of unsound mind interested in the estate, an order for sale shall be void unless evidence of the necessity of sale is taken by deposition, yet, it appearing that all parties interested are adults and presumably of sound mind, the receiving of testimony of the administratrix and grounding the order of sale thereon was, in the absence of objection to her competency, whereby the objec-

tion was waived, a mere irregularity, not rendering the order void or reversible.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1050.*]

5. EVIDENCE (§ 471*)—STATEMENT OF FACT.

Testimony that witness knew that deceased owned at his death a cow and a calf, and that he did not know of any other personal property owned by him, is of a fact, and not an opinion or conclusion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2161; Dec. Dig. § 471.*]

6. EVIDENCE (§ 471*)—OPINIONS—VALUE.

Testimony of value of property can only be matter of opinion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2162; Dec. Dig. § 471.*]

7. EVIDENCE (§ 586*)—SALE TO PAY DEBTS—AMOUNT OF PERSONAL PROPERTY—EVIDENCE.

As against positive testimony that the personal property of deceased consisted only of a cow and calf, a finding to that effect on application to sell real estate to pay debts cannot be disturbed on testimony merely tending to show a large income to intestate and his frugal habits.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 586.*]

Appeal from Probate Court, Clarke County; Clayton Foscoe, Judge.

Application by Eunice H. Hunt, administratrix of James L. England, deceased, for sale of real estate to pay debts. Objections of A. B. Curtis and others were overruled, and from an order for sale they appeal. Affirmed.

Miller & Bonner and Wilson & Aldridge, for appellants. Johnson & Johnson, for appellee.

McCLELLAN, J. This appeal arises from an order entered for the sale of real estate, upon application of personal representatives, to pay debts of the estate of the decedent. Motion to dismiss the appeal is made by appellee upon the ground that the appeal was not effected in 30 days, as required by section 458, subd. 6, Code 1896. That subdivision, so far as necessary to quote, reads: "Upon any issue as to the insolvency of an estate, and upon any issue as to any allowance of any claim against insolvent estates, in which cases the appeal must be taken within thirty days after the determination of such issue." The proceeding at hand itself negatives the existence of any issue of insolvency, as stated in the quoted subdivision. That subdivision has reference only to decrees or orders in a proceeding looking to the adjudication of the insolvency of estates; and the allusion in the subdivision to the allowance of claims in insolvency proceedings has reference to contests of claims in accordance with section 313, Code 1896. The motion to dismiss the appeal is denied.

The jurisdictional averments in an application by a personal representative to sell lands of the decedent to pay debts are "that

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

there are debts of the intestate to be paid and that the personal estate which he left is insufficient to pay them." *Garner v. Toney*, 107 Ala. 352, 18 South. 161, and authorities therein cited. Accordingly the omission from the application of an averment stating which of the heirs or devisees were married women did not affect the jurisdiction of the probate court in the premises, if, indeed, it rendered the application defective (see *Poole v. Daughdrill*, 129 Ala. 208, 30 South. 579), an inquiry not raised on this record.

Included in the list of debts of the intestate, presented for payment by Mrs. Hunt and Mrs. Vaughan as the only heirs of Mrs. Hutchinson, deceased, who, it is alleged and proven without dispute, paid them, was one to Dr. Evans for medical attention to decedent, amounting to about \$48, and one to Gunn for coffin, amounting to about \$22, aggregating upwards of \$70. There can be no question of the liability of the estate of the decedent to reimburse Mrs. Hunt and Mrs. Vaughan for these debts so paid by Mrs. Hutchinson. Another item of alleged indebtedness, embraced in the presented claim of Mrs. Hunt and Mrs. Vaughan, is a note for \$1,500, alleged to have been executed by decedent to Mrs. Hutchinson some years. Against this item the appellants directed their resistance as being a true item of charge on the estate of decedent; and the grounds of this insistence were stated to be that the decedent was at the time the note was executed mentally incapable of contracting, that the note had been paid, and that there was no consideration for it. The major portion of the errors assigned are predicated upon rulings below in the admission or exclusion of proposed evidence bearing on these issues affecting the validity of the note as a charge on the estate and on the allowance or disallowance of interrogatories seeking testimony touching such issues.

If the personal assets of the estate of decedent are only of a value of \$20, and the debts, aside from the note mentioned, are at least \$70, it is obvious that the controversy in respect of the validity of the note as a charge against the estate is, in the absence (as is the case here) of any objection to the propriety of a sale of all the land, when a comparatively small quantity thereof would have sufficed to pay the debts mentioned (*Miller v. Mayer*, 124 Ala. 437, 26 South. 892), wholly immaterial in the present proceeding, for the reason that the personal assets of the estate are insufficient to pay the debts, even when unenhanced, in the aggregate, by the amount of the note. If so, whatever errors (if any) intervened with reference to the issues raised against the note were harmless to appellants, since an order of sale might have been entered upon such state of proof, notwithstanding the note was not a valid charge against the estate. So we premit entirely consideration of the questions in-

involved in the contest of the note as an element of indebtedness against the estate.

The indebtedness being at least \$70, the only point of controversy important, in our view of the case, is the value of the personal assets, including what such assets were. The decree of sale appealed from rests the finding of the fact, viz., the insufficiency of the personal assets to pay the debts of the estate, upon the testimony of Eliza Borum, James McDonald, Mike Morgan, Preston Slater, and Mrs. E. H. Hunt. Mrs. Hunt was the administratrix of the estate, and was hence not a disinterested witness, within the meaning of sections 164 and 167 of the Code of 1896. *Stevenson v. Murray*, 87 Ala. 442, 6 South. 301. But to her competency as a witness in the proceeding no objection was made by the contestants on the hearing, nor, of course, is there any error assigned upon such competency of the personal representative to testify in the premises. We have considered whether the effect of accepting, and grounding the decree of sale upon, testimony of the personal representative, was to render the decree reversible, there being no objection to the competency of the witness or assignment of error taking the point. That, in default of seasonable objection to the witness' competency, a mere irregularity resulted seems to have been, in principle, decided in *Thompson v. Boswell*, 97 Ala. 570, 12 South. 809. Such would not, of course, be the case, were minors or persons of unsound mind or unknown parties interested in the estate. *Stevenson v. Murray*, supra.

It affirmatively appears here that all parties in interest are adult and are known, and presumably are of sound minds. Hence the condemnation for nonobservance of the requirements of Code 1896, §§ 164, 167, does not apply. This quotation from *Thompson v. Boswell*, supra, may be here aptly made: "Moreover, where the interests of minors [and, we may add, persons of unsound mind or unknown parties in interest] are not involved, a sale ordered upon a petition stating the jurisdictional facts would not be absolutely void, though no proof of the necessity therefor were made in the probate court." Of course, on appeal, properly presenting the matter for review, reversal would result from the nonobservance of the statutory requirements for proof of the essential facts in such proceeding as the sale of lands to pay debts of the estate. In *Alford v. Alford*, 96 Ala. 387, 388, 11 South. 317, treating the statutes in question, it was said: "Debts being proved by evidence not rendered incompetent by other provisions of law, the further fact that the personal property of the estate is insufficient for the payment of such debts must be proved by the depositions of disinterested witnesses. The object of the statute is to require very satisfactory proof of the salable value of the personal property, so as to show the necessity of

resorting to the land of the decedent for the payment of his debts."

From this interpretation of the statutes in hand it necessarily results that the personal representative is a disinterested witness in respect to the character and identity of the personal property of the estate, but that he is not such disinterested witness upon the question of value of that property. This is rational. The personal representative is presumably, from the duty made his by statute, best favored to know the personal property belonging to the estate. He is required to make out and file in the probate court an inventory thereof, in keeping with his duty to ascertain and collect the assets of the estate. *Miller v. Mayer*, 124 Ala. 434, 28 South. 892, holds that a creditor is a disinterested witness, in a proceeding to sell lands, within the provisions of Code 1896, §§ 164, 167. Upon the filing of a proper petition by a personal representative to sell lands for the payment of debts of the estate a proceeding in rem is instituted; and, when parties in interest appear and contest the application, the proceeding takes on the added quality of a proceeding in personam. *Davis v. Tarver*, 65 Ala. 98.

In view of the foregoing considerations, it must result, we think, that the failure to object to the competency of the administratrix to testify as to the value of the personal property of the estate operated a waiver thereof. There is, hence, on this record, no reversible error presented on that score.

The witness McDonald, it appears from his deposition taken on interrogatories, testified: "I know that Jas. L. E. England owned at the time of his death one cow and calf, and do not know of any other personal property owned by him. * * * In my judgment the personal property owned by said England at the time he died was not worth more than \$20." The court, on motion to that end, declined to exclude these answers. This ruling was proper. Every statement, except that of his opinion of value, which is always and can only be matter of opinion, is of fact, and not an opinion or conclusion. Neither the opinion in this case on former appeal (51 Ala. 507, 44 South. 54, 56) nor *Quarles v. Campbell*, 72 Ala. 64, deal with similar answers. The former opinion in this case predicated its ruling upon an opinion given in reference to the sufficiency of the personal assets to pay the debts. *Quarles v. Campbell*, supra, is to like effect. The witness here asserted facts, and not opinion, as appears from the quoted answers.

There was abundant testimony, from the witnesses named in the decree, to support the court's finding of fact. But additional personal assets were undertaken to be shown by way of testimony tending to prove a large income to intestate and his frugal habits, and that this income, including

rents and crops from lands owned by intestate, were received and appropriated by Mrs. Hutchinson during intestate's lifetime. Such testimony could be, on the issue, only negative in character, and against the positive testimony from other witnesses, besides the personal representative, of the existence of only a cow and a calf as personal assets, such negative testimony cannot prevail.

It was not contended that the personal representative received any of the income of the intestate during his lifetime; but the effort was directed to tracing into the hands of Mrs. Hutchinson, deceased at the time of the hearing, income and crops, by mere proof that intestate had an income, etc., and that she appropriated them. However frugal intestate's habits may have been, we cannot, on this alone, reverse the finding below upon the idea that such testimony shows personal assets additional to the cow and calf mentioned. To induce the action indicated, to in effect cancel debts and also directly enhance personal assets, testimony of a more satisfactory character, more certain in designation of assets unreduced to possession by the personal representative, must be presented, in order to overcome positive testimony to the contrary.

There is no prejudicial error in the record, and the decree of sale is affirmed.

Affirmed.

TYSON, C. J., and HARALSON, SIMPSON, ANDERSON, and DENSON, JJ., concur.

(158 Ala. 129)

FIDELITY & DEPOSIT CO. OF MARYLAND v. WALKER et al.

(Supreme Court of Alabama. Feb. 18, 1909.)

1. PLEADING (§ 223*)—DEMURRER—EFFECT OF SUSTAINING.

Where a count in a complaint is demurred to on several grounds, the count becomes of no effect on the sustaining of one of the grounds.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 223.*]

2. APPEAL AND ERROR (§ 1033*)—RIGHT TO ALLEGE ERROR—FAVORABLE RULINGS.

Appellant can take nothing by assignments of error to rulings on demurrer in its favor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.*]

3. INJUNCTION (§ 239*)—BOND—DAMAGES.

Where an injunction bond was conditioned for payment of all damages caused by the suing out of the injunction, the sureties were liable for damages accruing prior as well as subsequent to the bond.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 542, 543; Dec. Dig. § 239.*]

4. INJUNCTION (§ 250*)—BOND—DAMAGES—PLEADING.

In an action on a bond given on obtaining an injunction against the foreclosure of a mortgage, plaintiffs could not recover for depreciation in value of the mortgaged property during

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

the continuance of the injunction, where it was not alleged that plaintiffs' security was thereby rendered insufficient.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 250.*]

5. INJUNCTION (§ 252*)—BOND—LIABILITY—ATTORNEY'S FEES.

Attorney's fees paid or incurred in procuring the dissolution of an injunction are recoverable in an action on the bond.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 586-598; Dec. Dig. § 252.*]

6. SET-OFF AND COUNTERCLAIM (§ 35*)—PLEAS.

In an action on an injunction bond, pleas of set-off alleging breach of covenant by plaintiffs and others against the plaintiff in the injunction suit were not demurrable as sounding in damages for which the law provided no pecuniary standard of measurement.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 58-64; Dec. Dig. § 35.*]

7. PRINCIPAL AND SURETY (§ 144*)—ACTION ON BOND—SET-OFF—RIGHT OF SURETY.

Where a surety is sued alone, it is authorized by Code 1896, § 3731, with the consent of its principal, to set off a debt due from plaintiff to such principal at the commencement of the action.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 394; Dec. Dig. § 144.*]

8. COVENANTS (§ 114*)—WARRANTY OF TITLE—EVICTION.

Since a covenant of warranty of title in a deed is broken as soon as made, if there is a superior outstanding title, or an incumbrance diminishing the value of its enjoyment, a plea alleging breach of such covenant need not allege an eviction.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 198; Dec. Dig. § 114.*]

Appeal from Circuit Court, Colbert County; C. P. Almon, Judge.

Action by Robert H. Walker and others against the Fidelity & Deposit Company of Maryland for the breach of an injunction bond. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

It is unnecessary to set out the first and second counts. The third, fourth, fifth, and sixth counts are in the following language:

(3) "Plaintiffs claim of the defendant the sum of \$1,500 for the breach of the conditions of a certain bond made by the defendant on, to wit, the 8th day of March, 1898, together with George Gillham, S. E. Hunt, and M. L. Selden, who are not sued in this action, payable to the plaintiffs, in the sum of \$1,500, and which bond is in words and figures, as follows: 'State of Alabama, Colbert County, Second District, Northern Chancery Division, at Tuscumbia, Alabama. Know all men by these presents, that we, S. E. Hunt, George Gillham, and M. L. Selden, and Fidelity & Deposit Company of Maryland, surety, are held and firmly bound unto Robert H. Walker, John A. Walker, Eliza J. Walker, and R. D. S. Bell in the sum of \$1,500, to be paid to the said payee or assigns, for the payment of which, well and truly to be made, we bind ourselves jointly and severally, and each of us, our heirs, exec-

utors, and administrators, firmly by these presents. Witness our hands and seals this 8th day of March, 1898. Whereas, George Gillham, Myletus L. Selden, and Sara E. Hunt filed their bill of complaint in the chancery court of the Second district, Northern chancery division of said state [then the Northwestern chancery division] on the 26th day of October, 1892, against Robert H. Walker, John A. Walker, Eliza J. Walker, and R. D. S. Bell, and amongst other things praying for an injunction against the sale of certain property under a mortgage executed by complainants in said bill on the 4th day of April, 1890, and have obtained an order for the issuance of said injunction in accordance with the prayer of the bill, upon the execution of bond and security; and whereas, by the decree of the chancery court at regular term held on the 14th and 15th days of February, 1898, on motion of defendants, by their solicitors, the said complainants are required to give sufficient sureties on the injunction bond in said sum of \$1,500: Now, therefore, the conditions of the above obligation are such that if the above-bound George Gillham, S. E. Hunt, and M. L. Selden, their heirs, executors, administrators, or any of them, shall and do well and truly pay all damages and costs which any person may sustain by the suing out of said injunction, if the same be dissolved, then the above to be void; otherwise, to remain in full force and effect. [Signed and sealed by the parties above named, together with the Fidelity & Deposit Company of Maryland, by Henry B. Gage, attorney in fact, and attested by R. F. Manly, general agent.] Which said bond was delivered by the maker thereof to and approved by the register of said chancery court, and was upon the condition that, if the said George Gillham, S. E. Hunt, and M. L. Selden, their heirs, executors, administrators, or any of them, should well and truly pay all damages and costs which any person may sustain by the suing out of the injunction mentioned in said bond in said cause, if said injunction is dissolved, then said bond was to be void, but otherwise to remain in full force. And the plaintiffs aver and say that the said injunction was issued by and out of said chancery court and served upon the plaintiffs herein, and the said sale by them mentioned in said bond thereby stayed and enjoined, and that the condition of the said bond above described has been broken in this: That the said injunction so sued out and sustained by said Gillham, Hunt, and Selden in said chancery court in said cause has been and the same is dissolved by said chancery court, and that the said Gillham, Hunt, and Selden have not paid the damages, with the interest thereon, which the plaintiffs have sustained by the suing out of said injunction, nor has any one of them done so, or any part thereof,

and that the condition aforesaid of said bond has been broken in and by the failure of said Gillham, Hunt, and Selden, or any of them, to pay to the plaintiff the following damages, which were sustained by them by the suing out of said injunction: That plaintiffs have sustained damages to the amount of \$1,500 in the depreciation and loss in value of the land mortgaged by said Gillham, Hunt, and Selden to plaintiffs, the sale of which was enjoined, restrained and prevented by said Gillham, Hunt, and Selden, by said injunction so sued out by them, which depreciation and loss occurred between the issuance and service of said injunction and its dissolution, and which said damages have not been paid by any or either of the obligors aforesaid, or any part thereof."

(4) Same as 3, down to and including the words "to pay to plaintiffs the following damages, which were sustained by them by the suing out of said injunction, to wit," and adds the following: "That plaintiffs have sustained damages to the amount of \$1,500 in the depreciation and loss in value of the personal property mortgaged by said Gillham, Hunt, and Selden to plaintiffs, the sale of which was enjoined, restrained, and prevented by said injunction so sued out by said Gillham, Hunt, and Selden, which depreciation and loss occurred between the issuance and service of said injunction and its dissolution, and which said damage, nor any part thereof, has not been paid by any or either of the obligors to said bond."

(5) Same as 4, with the exception that the damages sustained are alleged to have resulted from a dissipation and removal of the personal property mortgaged, etc.

(6) Same as 3, down to and including the words "to pay the plaintiffs the following damages, which were sustained by them by the suing out of said injunction, to wit," and adds: "That plaintiffs have sustained damages in the amount of \$500, in that they have incurred liability for and have become liable to pay said sum as the reasonable fees and compensation to their attorneys and solicitors for their services rendered in procuring the dissolution of said injunction."

The following demurrers were filed to the complaint: "(1) It appears from said count that George Gillham, S. E. Hunt, and M. L. Selden are necessary parties defendant, without the presence of whom the plaintiffs cannot maintain their action. (2) It does not appear from the complaint to whom the bond referred to therein was made payable; the complaint simply averring that it was made to the plaintiffs, without stating whether it was made payable to each and all the plaintiffs, or, if not all of them, it does not state to which one of them the same was payable, without which the plaintiffs cannot maintain this action for one on behalf of all of them. (3) So much of said complaint as avers the right to recover damages for reasonable fees and compensation to plaintiffs' solicitors in

procuring the dissolution of said injunction and in defending and defeating the suit, said damages are not within the terms and conditions of said bond. (4) To so much of said complaint as avers that plaintiffs are entitled to recover damages for the depreciation and loss in the market value of the real estate and personal property, the sale of which is alleged to have been enjoined, the complaint does not aver that said real estate and personal property was thereafter sold, or that, if sold, it failed to realize the amount of indebtedness intended to be secured by the mortgage thereon. (5) The complaint fails to show any consideration for said bond sued on in this: The suing out of the injunction and stopping the sale of the property under the alleged mortgage had all been done, and the liability of the complainant in the alleged injunction suit had been incurred, before the bond sued on had been executed, and the promise by this defendant to pay the damages sustained by the plaintiffs by reason of the previous issuing of the injunction is without consideration. (6) It is not shown by the complaint when the injunction complained of was sued out by Gillham, Hunt, and Selden. (7) The complaint fails to allege what particular part or parcel of the real estate embraced in the alleged mortgage was depreciated in value by reason of the suing out of the injunction. (8) The complaint fails to show how the suing out of the injunction depreciated the value of the real estate. (9) The complaint fails to describe the real estate alleged to have been damaged or depreciated in value by the injunction. (10) The complaint fails to show how or in what way the suing out of the injunction depreciated the value of the personal property covered by said mortgage. (11) The complaint fails to show whether the whole or any part of the personal property was affected or depreciated in value by the suing out of said injunction. (12) The complaint fails to particularize the personal property alleged to have been damaged by the suing out of the injunction. (13) The complaint fails to particularize the damage done the personal property which was effected by the suing out of the injunction. (14) Because the element of attorney's fees is not an element of damages recoverable on the same bond, and because attorney's fees for the defense of the suit on its merits are not recoverable against this defendant, and because the services were rendered prior to the time that the bond here sued on was executed."

The following additional grounds were interposed to count 6: "Said count fails to show any expense was incurred in an effort to dissolve the injunction. It is not shown that any motion was made to dissolve the injunction complained of in this suit."

The defendant filed the following pleas:

(1) "At the time this suit was instituted

the plaintiffs were indebted to said George Gillham, M. L. Selden, and Sara E. Hunt in the sum of \$3,080 as damages for the breach of the covenants in a deed of conveyance made and entered into by the said Robert H. Walker, J. A. Walker and his wife, Eliza Walker, and S. A. T. Bell and her husband, R. D. S. Bell, to the said George Gillham, M. L. Selden, and Sara E. Hunt, which deed was dated April 4, 1890, wherein the plaintiffs, in consideration of a large sum of money, to wit, the sum of \$20,000, sold and conveyed to the said Gillham, Selden, and Hunt a three-fourths interest in certain real estate and personal property lying and being in the counties of Colbert and Franklin, in the state of Alabama, known as the 'Walker Mine,' and more particularly described in said deed as an undivided three-fourths interest in the N. W. $\frac{1}{4}$ of section 27, and the N. $\frac{1}{2}$ of section 28, and the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ and the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 28; also an undivided three-fourths interest in an undivided one-half interest in the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 27, all in township 5, range 11 W.; also all the implements, machinery, tools, etc., now on said land, consisting in part of one steam pump, a 70 horse power boiler, 300 feet of 3-inch piping, 1,200 feet of 16-inch steel rails, 20 tram cars, one lot of mining tools, one flume about 400 feet long, one 20-foot log washer, one 12-foot revolving screw, one 50 horse power boiler, one 40 horse power engine with all appurtenances and connections, and all machinery placed by Walker & Co. on said land; also 6 mules, 10 wagons, and harness, and one blacksmith outfit, tools, etc. To all of said property the plaintiffs warranted the title by the terms of said deed. And defendant avers that the said plaintiffs, as a part of their said agreement and covenant, agreed that a good and sufficient pump was to be at once supplied by plaintiffs and at their expense to throw a sufficient stream of water to the washer, and that all the machinery on said land known as the 'Walker Mine' should be put in proper condition for work at the expense of said plaintiffs. And defendant avers that the plaintiffs failed and refused to supply the pump and necessary machinery to complete the works, and failed to supply tram cars and piping; also failed to complete the flume, and failed to put the machinery on said land at said mine in the proper condition for work, and failed utterly to do or perform the things they had by their covenant agreed to do. And defendant avers that at the time of the execution of said deed as aforesaid the plaintiff represented that the machinery at said mine was in good working condition and suitable for the work intended to be done by it. And defendant avers that said representations were false, and that the said Gillham, Selden, and Hunt were required to spend large sums of money, to wit, the sum of \$3,080, to put the said machinery in

good working order. And defendant further states: That the covenants of warranty in said deed were broken, in this, to wit: At the time of the purchase by said Gillham, Selden, and Hunt there was a [mortgage lien] upon said property for taxes to the amount of \$113.13; that the title failed to a large part of the property embraced in said deed as follows, to wit: The N. W. $\frac{1}{4}$ of section 28, township 5, range 11 W.; also 40 acres in the S. W. $\frac{1}{4}$ of section 28, township 5, range 11 W. That said land was valued in the purchase thereof by said Gillham, Selden and Hunt at \$11 per acre, and that there is to that extent a breach in the covenants of warranty in said deed made by the plaintiffs to the said Gillham, Selden, and Hunt to said property. And defendant avers that by reason of the said plaintiffs failing to keep and perform the covenants in said deed of conveyance the said Gillham, Selden, and Hunt were damaged to the amount of \$3,080. Wherefore this defendant pleads the said damage or such part thereof as is necessary to a set-off to plaintiff's claim in this cause."

(3) "At the time this suit was instituted the plaintiffs were indebted to said Gillham, Selden, and Sara Hunt in the sum of \$3,080 as damages for the breach of the covenants in a deed of conveyance made and entered into by the said Robt. H. Walker, J. A. Walker and his wife, Eliza Walker, and S. A. T. Bell and her husband, R. D. S. Bell, to the said George Gillham, M. L. Selden, and S. A. Hunt, which deed was dated April 4, 1890, wherein the plaintiffs, in consideration of a large sum of money, to wit, the sum of \$20,000, sold and conveyed certain real estate, a three-fourths interest therein, to the said Gillham, Selden, and Hunt, and the same interest in certain personal property; said real estate and personal property lying and being situate in Colbert and Franklin counties, in the state of Alabama, and known as the 'Walker Mine,' and more particularly described in said deed." Same as in plea 1, down to and including the words, "in proper condition for work at the expense of said plaintiffs," after which is the following: "Said agreement is in words and figures as follows: 'April 4, 1889. Whereas, M. L. Selden, S. E. Hunt, and George Gillham have purchased from J. A. Walker and others certain mining property in Colbert county, Alabama, and have assumed to pay a debt to W. T. Adams Machine Company, \$6,600, and to Peter Clay, \$4,000, as a part of the consideration for said property: Now it is agreed by said J. A. Walker and his associates that there are no other debts on said property or liens on the same, and if there are they will discharge and pay the same without costs to said Selden et al. They further agree that a good and sufficient pump is to be at once supplied by said Walker and associates at their expense to throw a sufficient stream of water to the washer,

and to do this at once and with the least possible delay; that all the machinery on said land known as the "Walker Mine" shall be put in proper condition to work and wash ore at the expense of said Walker. And we instruct said Selden et al. not to pay Adams Machine Company any money until the pump is put in order or supplied by one that will do the work required. Said Walker agrees to hold the note given by Selden and others, due April 9, 1891, for \$2,025, to him, and not to dispose of the same until all said work is completed, said pump supplied, and the title to all land conveyed to Selden and others by said Walker and others is made satisfactory. [Signed] J. A. Walker." The remainder of the plea is the same as plea 1.

Demurrers were interposed to said pleas as follows: "(1) The matters and things set up in said pleas are not the subject of set-off. (2) The matters and things set up in said pleas as matters of set-off are demands sounding in damages merely. (3) The matters and things set up in said pleas are not debts or liquidated demands due from these plaintiffs to the comakers or principals of this defendant. (4) To so much of said pleas as seek to set off the failure of plaintiffs to supply a sufficient pump and necessary machinery to complete the work, they are not debts or liquidated demands due from these plaintiffs to the comakers or principals of this defendant. (5) To so much of the pleas as seek to set off \$3,090 to put the machinery in good working order, that this was not a debt or liquidated demand due from plaintiffs to the comakers or principals of this defendant. (6) To so much of said pleas as seek to set off as damages for the breach of covenants of warranty for the alleged failure of title, that the damages claimed are not debts or liquidated demands due from these plaintiffs to the comakers or principals of defendant. (7) To so much of the pleas as seek to set off damages for the breach of covenants in the deed of conveyance to the comakers or principals, because the damages claimed are not a debt or liquidated demand due from these plaintiffs to the comakers or principals of this defendant. (8) To so much of said pleas as seek to set off damages for a failure of title to part of the land conveyed by plaintiff to the comakers or principals of defendant, because said pleas fail to show any brief of the covenants of said deed, because they fail to show that the comakers or principals of defendant have been evicted, because said pleas fail to allege or show wherein the defect in such title consisted, because said pleas fail to show or allege that such defect has been ascertained by some court of competent jurisdiction, and because said pleas fail to allege or show that the defects were not known to said comakers or principals."

Kirk, Carmichael & Rather, for appellant.
Joseph H. Nathan, for appellees.

DOWDELL, C. J. The complaint as originally filed contained two counts, and was subsequently amended by adding counts, 3, 4, 5, and 6. A demurrer was filed to the first and second counts, assigning many grounds. The judgment entry recites, after amendment allowed to the first count, that the demurrer to counts 1 and 2 is sustained on the fourteenth ground, overruling all other grounds. It does not appear that any amendment was made or offered as to counts 1 and 2 after this ruling on the demurrer. The sustaining of any one ground of a demurrer to a count is as effective in putting such count out as would be the sustaining of all the grounds, if no amendment is made to meet the ruling on the demurrer. The ruling of the court below on the demurrer to the first and second counts being in favor of the appellant, the appellant can take nothing by its assignments of error addressed to the action of the court on the demurrer to these two counts.

The writ of injunction was obtained to restrain an attempted foreclosure of a mortgage under a power of sale contained in the mortgage. The bond sued on was given after the issuance of the writ and upon a decretal order of the chancery court, pending the injunction proceedings in that court requiring an additional bond. The condition of the bond is to pay all damages caused by the suing out of the injunction. By the condition of the bond damages prior to its execution, as well as subsequent, occasioned by the issuance of the writ, are included.

In the third and fourth counts, added by way of amendment to the complaint, the special damages claimed are for the alleged depreciation in value of property embraced in the mortgage. It is not averred that the plaintiffs, by the alleged depreciation in value of the property, were thereby deprived of their security for the mortgage debt. For aught that appears from the averments, except inferentially, the property, notwithstanding the depreciation in value, was more than sufficient to pay the mortgage debt, and, if so, no damage resulted to the plaintiffs by reason of the depreciation in value. As was said in the case of *Daniels v. Carney*, 148 Ala. 81, 84, 42 South. 452, 453, 7 L. R. A. (N. S.) 920, 121 Am. St. Rep. 34: "Good pleading requires that the facts which constitute the cause of action relied on shall be stated in the complaint and not left in inference. Facts, when averred, may be established inferentially from other facts shown in evidence, but this is a rule of evidence and not of pleading." For the omission to aver that the alleged depreciation in value so impaired the mortgage security as to defeat in whole or in part the collection of the mort-

gage debt, the count was defective and subject to demurrer.

The special damages claimed in the sixth count, added by way of amendment, are for attorney's fees paid or incurred in procuring the dissolution of the injunction. The claim is confined to attorney's fees incurred in obtaining the dissolution, and was therefore free from objection on demurrer. Such damages are always deemed recoverable in a suit upon the injunction bond. The rule in respect to what fees are recoverable in actions of this kind is stated in the case of *Jackson v. Millsbaugh*, 100 Ala. 285, 14 South. 44. See, also, the later case of *Curry v. Mortgage Co.*, 124 Ala. 614, 27 South. 454.

The demands sought to be set off by pleas 1 and 3 are for damages for which the law gives a pecuniary standard of measurement, and are not claims sounding in damages merely, and these pleas were not subject to demurrer on that ground. *Debter v. Henry*, 144 Ala. 552, 39 South. 72, and cases there cited.

The defendant, as surety on the injunction bond, being sued alone, could, with the consent of his principal, set off a debt due from the plaintiff to him, the defendant's principal, at the commencement of the suit. Code 1896, § 3731. The pleas were not subject to any of the grounds stated. It is not necessary that plea should show an eviction. "The covenant of warranty of title in a deed of conveyance is broken as soon as made, if there is a superior outstanding title, or an incumbrance diminishing the value of the enjoyment." *Sayre v. Sheffield Co.*, 106 Ala. 441, 18 South. 101; *Copeland v. McAdory*, 100 Ala. 553, 13 South. 545.

There are other assignments of error; but the views we have taken render it unnecessary to consider them, as the questions are such as are not likely to arise on another trial.

For the errors indicated, the judgment is reversed, and the cause remanded.

Reversed and remanded.

ANDERSON, McCLELLAN, MAYFIELD, and SAYRE, JJ., concur.

(153 Ala. 68)

CITY OF ANNISTON v. COURT OF COUNTY COM'RS OF CALHOUN COUNTY.

(Supreme Court of Alabama. Feb. 9, 1909.)

STATUTES (§ 146*)—ADOPTION—"CODE."

The fact that Acts 1907, p. 847, § 120, relating to a special road and bridge tax, is embodied as a section in the printed Code of 1907, imparts to it no validity, because it was approved after the approval of the "Code," which is properly the manuscript prepared by the Code commissioner, revised by the Code committee, and adopted by the Legislature, and not the printed volumes labeled "Code of Alabama."

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 215; Dec. Dig. § 146.*

For other definitions, see *Words and Phrases*, vol. 2, pp. 1230-1240.]

Appeal from City Court of Anniston; Thomas W. Coleman, Jr., Judge.

Action between the City of Anniston and the Court of County Commissioners of Calhoun County. From a judgment for the latter, the former appeals. Affirmed.

A. P. Agee, for appellant. H. D. McCarty, for appellee.

MAYFIELD, J. There is but one question involved in this case, and that is: Is section 120 of the act approved August 13, 1907 (Acts 1907, p. 847), known as the "Municipal Code Bill," valid? Was it constitutionally enacted?

The act of which it is a part being passed and approved after the act adopting the Code, it appearing in the Political Code as section 1335 thereof, does not impart any validity or invalidity to any part of the Municipal Code bill as it was passed and approved: First, because the act adopting the Municipal Code was a subsequent act to the one adopting the Code of Alabama, which includes a Political Code, a Civil Code, and a Criminal Code; second, because the act adopting the Code of Alabama, approved July 27, 1907 (Acts 1907, p. 499), expressly provided that "no act passed on or after July 9, 1907, shall be repealed or affected in any manner by the adoption of the Code of Alabama," and, further, that all acts passed at that session of the Legislature, of a general nature, should be incorporated in the Code of Alabama. While there was authority for printing the act in the General Code, dividing it into sections and numbering them numerically with matter constituting the Code of Alabama proper, it does not thereby form a part of the Code law of this state, but is purely statutory law, only compiled and arranged with the Code proper for convenience. See preface to volume 1 (Political Code).

The Code of Alabama proper is not the three printed volumes bound and labeled "Code of Alabama." The Code proper, as adopted by the Legislature, is in the manuscript prepared by the Code commissioner, and revised by the Code committee, and adopted by the Legislature. The Code proper is only a part of the three printed volumes. The other matter is either historical, constitutional, or statutory matter, together with annotations prepared by the commissioner, compiled and edited by the Code commission, printed, bound, and distributed, for convenience. The reconstruction acts are in these printed volumes, and have been in every previous printed Code, since they were passed by Congress. The Declaration of Independence is in the printed volumes called the Code, and has been in the printed copies of every previous Code; but, of course, it is not a part of the Code proper.

The exact question involved in this case was necessarily involved in the case of *Bir-*

mingham v. Miller, Treas'r (decided by this court at this term) 48 South. 496, in which the opinion was written by Justice Denson, which the writer of this opinion adopts as a clear, forceful, and correct exposition of all the questions involved on this appeal; and on the authority of that case the judgment of the trial court must be affirmed.

Affirmed.

DOWDELL, O. J., and ANDERSON and McCLELLAN, JJ., concur.

(153 Ala. 8)

SIMMONS v. STATE.

(Supreme Court of Alabama. Feb. 18, 1909.)

1. HOMICIDE (§ 135*)—INDICTMENT—INSTRUMENT USED.

An indictment for homicide is not invalid because it charges that the killing of deceased was by "shooting him with a 'gun,'" instead of with a "gun."

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 220; Dec. Dig. § 135.*]

2. CRIMINAL LAW (§ 278*)—PLEA IN ABATEMENT—GROUNDS—DRAWING OF GRAND JURY.

The fact that the key of the grand jury box was not deposited with the county treasurer is not a ground for abatement of the indictment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 640; Dec. Dig. § 278.*]

3. WITNESSES (§ 77*)—TESTING COMPETENCY OF CHILD—DISCRETION OF COURT.

It is within the discretion of the court to allow counsel for the state to examine a child 12 years of age as to his religious training, to determine his understanding of the obligation of an oath.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 195; Dec. Dig. § 77.*]

4. WITNESSES (§ 45*)—COMPETENCY—UNDERSTANDING OF CHILD.

A child 12 years of age, who testifies that he goes to Sunday school, has "heard of God and Jesus Christ, that boys who tell the truth go to heaven, and boys who swear to lies go to the bad world," is competent to testify.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 106; Dec. Dig. § 45.*]

5. HOMICIDE (§ 174*)—EVIDENCE.

In a prosecution for homicide, the testimony of a witness as to why he advised defendant, after the homicide, to go to another state, was properly excluded.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 365; Dec. Dig. § 174.*]

6. HOMICIDE (§ 193*)—EVIDENCE.

Where the defense in a prosecution for homicide sought to show that deceased had a pistol and was trying to use it, it was proper to allow his wife to testify that his pistol was in his trunk.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 416; Dec. Dig. § 193.*]

7. CRIMINAL LAW (§ 789*)—INSTRUCTIONS—REASONABLE DOUBT.

In a prosecution for homicide, there was no error in instructing the jury: "It is not every doubt that justifies an acquittal, because everything pertaining to human affairs may be subject to some doubt. A doubt must be reasonable, such as grows out of the sufficiency of the evidence to convince the jury to a moral certainty of defendant's guilt. The state is not required

to prove defendant's guilt to an absolute or mathematical certainty, but only to a moral certainty."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1906; Dec. Dig. § 789.*]

8. CRIMINAL LAW (§ 789*)—INSTRUCTIONS—"REASONABLE DOUBT."

In a prosecution for homicide, the court properly defined reasonable doubt as "such a doubt as leads the mind of the jury, in view of all the evidence, in a state of reasonable uncertainty as to the guilt of defendant."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1906; Dec. Dig. § 789.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5958-5972; vol. 8, p. 7779.]

9. HOMICIDE (§ 300*)—INSTRUCTIONS—SELF-DEFENSE.

In a prosecution for homicide, it was proper to instruct that, to entitle defendant to an acquittal on his plea of self-defense, "at the time the fatal shot was fired there must have been a present and impending necessity, real or apparent, to fire to protect himself from such impending real or apparent danger, and that there was no other reasonable mode of escape from such danger, and defendant must not be in default in bringing on the difficulty."

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 617; Dec. Dig. § 300.*]

10. CRIMINAL LAW (§ 829*)—TRIAL—REFUSAL OF INSTRUCTION.

It is not error to refuse a requested instruction, the substance of which has already been given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

11. CRIMINAL LAW (§ 789*)—INSTRUCTIONS—REASONABLE DOUBT.

In a prosecution for homicide, it was error to refuse to charge that, "if there is one single fact proven to the satisfaction of the jury which is inconsistent with defendant's guilt, this is sufficient to raise a reasonable doubt, and the jury should acquit."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1906; Dec. Dig. § 789.*]

12. CRIMINAL LAW (§ 561*)—REASONABLE DOUBT—GROUNDS—GOOD CHARACTER.

In a prosecution for homicide, proof of good character of defendant is not sufficient to create a reasonable doubt as to his guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1267; Dec. Dig. § 561.*]

13. HOMICIDE (§ 300*)—SELF-DEFENSE—DEFENDANT'S FREEDOM FROM FAULT.

It is proper to refuse an instruction on self-defense which fails to require freedom by defendant from any fault in bringing on the difficulty.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 617; Dec. Dig. § 300.*]

Appeal from Circuit Court, Jackson County; W. W. Haralson, Judge.

Walter Simmons was convicted of murder in the second degree, and appeals. Reversed and remanded.

The pleas in abatement are sufficiently set out in the opinion. The demurrers thereto are in the following form: "Comes the state, by its solicitor, and demurs to the plea in abatement filed in the indictment in the above-entitled cause, and assigns the following grounds: (1) Said plea alleges that the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

defendant's name is Walter Simmons, and not Walter Sunmons, whereas said indictment shows that the defendant is charged by the name of Walter Simmons, and he is nowhere in or on said indictment called or charged by the name of Walter Sunmons. (2) The defendant is charged in said indictment as Walter Simmons, and by his plea he avers that is his name. (3) It is not averred in defendant's third plea or ground for quashing the indictment that the matter therein set out as matter of abatement of the indictment in any way prejudices the substantial rights of the defendant, and it does not appear that his substantial rights were in any way prejudiced by the matters so averred. (4) It is not averred in the plea in abatement that the grand jury, or any members of the grand jury, were not drawn in the presence of the officials designated by law." Counsel for appellant contends that the demurrers should admit the fact pleaded and submit to the court the law arising on that fact.

The witness Lee Smith being called, an objection to his competency as a witness was raised by the defendant, and the court directed the state's attorney to examine him on his voir dire, when the following answers were made: "I am 12 years old. I go to Sunday school. I have heard of God and Jesus Christ. Bad boys go to the bad world, and good boys go to heaven. Boys who tell the truth go to heaven, and boys who swear to lies go to the bad world." Will Gilley was asked by defendant's counsel: "What prompted you to make that suggestion to him (defendant) about going to Utah?" The witness answered: "He had no money or influential friends to stand by him in court. I had been informed that the Smiths would kill him. I knew they had considerable influence, and would swear anything in court; and I thought it best for the boy to go to Utah, where his people were."

The following charges were given at the request of the state: "(1) It is not every doubt that justifies an acquittal, because everything pertaining to human affairs may be subject to some doubt. A doubt must be reasonable, such as grows out of the sufficiency of the evidence to convince the jury to a moral certainty of the defendant's guilt. (1½) The state is not required to prove the defendant's guilt to an absolute or mathematical certainty, but only to a moral certainty. If the jury is morally certain of the defendant's guilt, they should find him guilty. (2) There are three well-defined elements of self-defense: At the time the fatal shot was fired, there must have been a present and impending necessity, real or apparent, to fire to protect himself from such impending real or apparent danger; and that there was no other reasonable mode of escape from such danger; and the accused must not be at fault in bringing on the difficulty. (3) The doubt that justifies an acquittal must be

a reasonable doubt, such a doubt as leads the mind of the jury, in view of all the evidence, in a state of reasonable uncertainty as to the guilt of the defendant."

The fourth charge given at the request of the defendant is as follows: "(4) If you find from all the evidence in the case that there is a probability of defendant's innocence, you must acquit."

The following charges were refused to the defendant: "(A) The court charges the jury that if there is a probability of defendant's innocence you should acquit him. (B) I charge you, gentlemen of the jury, that, if there is one single fact proved to the satisfaction of the jury which is inconsistent with defendant's guilt, this is sufficient to raise a reasonable doubt, and the jury should acquit. (C) If the prisoner has proved a good character as a man of peace, the law says that such good character may be sufficient to create or generate a reasonable doubt of his guilt, although no such doubt would have existed but for such good character. (D) If the jury believe from the evidence that deceased was in the act of drawing a pistol from his pocket, and that the defendant was approaching the door of the room where deceased was at the time, and the defendant, upon seeing the deceased in the act of drawing his said pistol and hearing him threaten to use the same, shot the deceased, then the defendant had the right to act upon the reasonable appearance of things at the time. (E) If the jury believe from the evidence that the name of the defendant was not as charged in the indictment, then they should acquit the defendant. (F) If the jury believe from the evidence that the name of the defendant is not Walter Sunmons as charged in the indictment, then they should acquit him. (G) If the jury believe from the evidence that the deceased was shot with a gun, then they should acquit the defendant. (H) If the jury believe from the evidence that deceased was shot with a gun, and not with a gum, as charged in the indictment then they should acquit the defendant. (I) If the jury believe from the evidence that the name of defendant is Walter Simmons, and that he was known by that name and by no other, then the jury should acquit the defendant."

Lawrence E. Brown, for appellant. Alexander M. Garber, Atty. Gen., and Thomas W. Martin, Asst. Atty. Gen., for the State.

SIMPSON, J. The appellant was indicted for the crime of murder in the first degree, and was convicted of murder in the second degree. The demurrer to the indictment, based on the ground that it charges the killing to have been done with a "gum," is without merit. Any person of "common understanding" knows that it was intended to be with a "gun." Code 1907, § 7134. The expression is, "shooting him with a gum." The word "gum," in this connection, cannot mean anything else than "gun," as there is no such

thing as a "gum" with which a man could be shot.

The plea in abatement, that the defendant's name is "Simmons" and not "Sunmons," is without merit, as an inspection of the original indictment, which is certified to this court, shows that the word is "Simmons."

The other ground of abatement is likewise without merit, to wit, that the key to the jury box was not deposited with the county treasurer. *McLeroy v. State*, 120 Ala. 274, 25 South. 247; *Linnehan v. State*, 116 Ala. 471, 478, 22 South. 662; Code 1907, § 7258.

There was nothing in the form of the demurrer to the pleas in abatement which made it necessary to overrule it.

There was no reversible error in allowing the solicitor for the state to examine the witness Lee Smith, on his voir dire, as to his having sufficient knowledge to understand the obligation of an oath. This is a matter which rests in the sound discretion of the court, to examine the proposed witness itself or permit counsel to examine him. *Carter v. State*, 63 Ala. 52, 35 Am. Rep. 4; *Henderson v. State*, 135 Ala. 43, 44, 33 South. 433.

The witness was competent to testify. *McGuff v. State*, 88 Ala. 147, 150, 7 South. 35, 16 Am. St. Rep. 25; *Wade v. State*, 50 Ala. 164, 166; *Castleberry v. State*, 135 Ala. 24, 27, 33 South. 431; 5 *Mayfield's Dig.* p. 972, 973.

There was no error in striking from the showing as to the witness Bud Reeves, the statement in regard to the "wife and various members of the Smith family" doing all in their power to prevent him from telling what he saw and heard. This was the mere conclusion of the witness. He should have stated what was said to him, and who said it.

The question to the witness Gilley as to why he advised his nephew (defendant) to

go to Utah, and the answer thereto, were properly excluded.

Testimony had been given on the part of the defense tending to show that the deceased had a pistol and was attempting to use it. It was, therefore, proper to allow his wife to testify that his pistol was in his trunk.

There was no error in the charges given at the request of the state. *Coleman v. State*, 59 Ala. 52; *Welsh v. State*, 96 Ala. 92, 11 South. 450; *Jackson v. State*, 94 Ala. 90, 10 South. 509.

Charge A, requested by the defendant, is substantially the same as charge 4 given at his request.

Charge B, requested by the defendant, should have been given. *Walker v. State* (Ala.) 45 South. 640.

There was no error in the refusal to give charge C, requested by the defendant. *Goldsmith v. State*, 105 Ala. 9, 12, 16 South. 933; *Crawford v. State*, 112 Ala. 3, 13, 24, 21 South. 214; *Eggleston v. State*, 129 Ala. 81, 84, 30 South. 582, 87 Am. St. Rep. 17; *McClellan v. State*, 140 Ala. 100, 101, 103, 37 South. 239.

There was no error in refusing to give charge D, requested by the defendant. It omits any mention of freedom from fault by the defendant in bringing on the difficulty; also of the duty to retreat.

There was no error in the refusal to give charges E, F, G, H, and I, requested by the defendant. The matters therein have been treated of in discussing the pleas in abatement and the demurrers thereto.

The judgment of the court is reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and DENSON and MAYFIELD, JJ., concur.

WALDROP v. STATE. (No. 13,617.)

(Supreme Court of Mississippi. Feb. 22, 1909.)

HOMICIDE (§ 169*)—ASSAULT WITH INTENT TO KILL—EVIDENCE—ADMISSIBILITY.

In a prosecution for assault and battery with intent to kill, evidence as to improper communications claimed to have been written by defendant to the wife of the prosecuting witness was not pertinent to the issue as to defendant's guilt of assault, since proof of the fact that defendant sent the objectionable communications did not show any reason why he should assault the husband of the woman to whom they were sent.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 341; Dec. Dig. § 169.*]

Appeal from Circuit Court, Harrison County; W. H. Hardy, Judge.

B. J. Waldrop was convicted of assault and battery with intent to kill and murder, and appeals. Reversed and remanded.

The record discloses the fact that a Mrs. Seillier had received a postal card and letter, the latter of which was signed with appellant's name, though appellant denies having sent either the letter or the postal card to Mrs. Seillier, but says that they were sent by another party, to wit, one McKinney. Afterwards Mrs. Seillier's husband accused appellant of writing this letter and postal card, which appellant denied. Later on in the same day appellant drove by Seillier's house, and Seillier came out to the buggy, when some words ensued, and each began to shoot at the other. They were each indicted for assault and battery with intent to kill. At the trial of Seillier, appellant was placed on the stand as a witness, his cross-examination being conducted by Seillier's attorney, W. J. Gex. On the trial of appellant, Gex was permitted, over appellant's objections, to testify as to the matters touching the sending of the letter and postal card brought out in the cross-examination of appellant at the trial of Seillier. The letter and post card were also introduced in evidence over appellant's objections; he having denied writing either of them, and it not being proven that they had been written by him.

The giving of the first instruction for the state is assigned as error by the appellant. This instruction is as follows: "(1) The court instructs the jury, for the state, that if they believe from the evidence in this case beyond a reasonable doubt that defendant Waldrop forwarded or directed to be forwarded to Mrs. R. A. Seillier's residence the letter in evidence, and then rode up to R. A. Seillier's residence and provoked the difficulty, and entered the difficulty armed with a deadly weapon, and so brought the difficulty on and entered it intending to use his pistol and overcome Seillier, and caused and provoked Seillier to advance on him with a pistol in his hand, defendant had no right to

shoot at Seillier, although defendant may have been in danger of suffering great bodily harm from Seillier at the time of the shooting, unless the jury from the evidence have a reasonable doubt that the defendant had abandoned the difficulty at the time of the shooting."

J. H. Mize, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

MAYES, J. It was error for the court to admit in evidence either the postal card or letter. Neither should the court have permitted the testimony of Mr. Gex. None of these things could possibly throw any light on the issue being tried. This testimony having no pertinency to the issue, it was unfair to the defendant and prejudicial in the highest degree to allow testimony which could only operate to personally prejudice him in the eyes of the jury. The letter, the postal card, and the testimony of Mr. Gex only tended to prove that the appellant had been writing improper letters to the wife of Seillier, and did not tend to prove the guilt of appellant of the crime charged. The De Silva Case, in 91 Miss. 776, 45 South. 611, is not analogous to this case. In that case Mrs. De Silva was the party charged with the assault and battery, and at that time Mrs. De Silva had in her hands some insulting postal cards, which she charged the prosecutrix with sending to her daughter. At the time sharp words ensued between the parties, followed by the assault. The court said, under these circumstances, and because the cards were the cause of trouble at the very time, and were in the hands of Mrs. De Silva, they should have been admitted when Mrs. De Silva was being prosecuted. But the facts of this case are quite different. Waldrop is the person accused of sending the letters, and he had denied to the husband that he had done so. Since Waldrop was accused of sending the letters, there was no reason why this should have caused him to assault Seillier.

We may remark here, also, that the first instruction asked for the state is erroneous. The principle of law declared by this instruction may, in a rare case, have its application; but under the facts of this case it should not have been given.

Reversed and remanded.

E. E. FORBES PIANO CO. v. HENINGTON. (No. 13,647.)

(Supreme Court of Mississippi. March 1, 1909.)

EXECUTION (§ 262*)—SALE—RIGHTS OF PURCHASER—PROPERTY PASSING.

A company, which took a bill of sale to a piano as part payment on another, under an agreement that the piano should remain with the customer until the company called for it, was entitled to the piano as against one claim-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes
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ing under a subsequent execution against the customer.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 747; Dec. Dig. § 262.*]

Appeal from Circuit Court, Marion County; W. H. Cook, Judge.

Replevin by the E. E. Forbes Piano Company against L. Henington. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

The defendant claims title by virtue of a sale under an execution issued on a judgment against a Mrs. Williams, and levied on the piano in question as her property. The piano was sold and appellee became the purchaser. The plaintiff claims title through a bill of sale given him by Mr. Williams; it being agreed between plaintiff's agent and Mr. and Mrs. Williams that this piano should be given as part payment on a new instrument, and should remain in Mrs. Williams' house until such time as plaintiff demanded possession of it. Thereupon Mr. Williams, in Mrs. Williams' presence and with her consent, and in pursuance with this agreement, executed a bill of sale, and the piano was allowed to remain in the Williams home until levied upon, as heretofore set out. Both sides asked a peremptory instruction, and the court gave that for the defendant. Appellant contends that appellee acquired no title under the execution sale, since Mrs. Williams had no title in the property.

Harris & Willing, for appellant. Watkins & Watkins and Mounger & Mounger, for appellee.

MAYES, J. The Forbes Piano Company clearly make out a perfect title to the property in question, and should have been given a peremptory instruction for same. Since this was not done, but a peremptory instruction was given the other way, the case must be reversed and remanded.

(95 Miss. 466)

MAXWELL v. MISSISSIPPI VALLEY CO.
et al. (No. 13,697.)

(Supreme Court of Mississippi. March 1, 1909.)

1. RAILROADS (§ 72*)—DEEDS—CONSTRUCTION—CONDITIONS.

A deed recited a consideration of \$1 and the benefits to the grantors from the construction of a railroad through their lands. Another deed recited that, in consideration of the public convenience from the construction of a road to a particular town as surveyed through the grantors' lands and the establishment and maintenance of a depot on land conveyed to grantee, and upon the completion of the road, certain land was granted. A third deed recited as consideration \$1 and benefits to accrue through construction of the road and the establishment and maintenance of a depot on lands conveyed. *Held*, that the first deed imposed no condition

precedent, but that the other two did, viz., the establishment and maintenance of a depot.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 171; Dec. Dig. § 72.*]

2. EJECTMENT (§ 90*)—EVIDENCE—ADMISSIBILITY.

Where, in ejectment, defendant claimed under deeds containing conditions precedent, it was error to exclude plaintiff's testimony as to whether the conditions had been met.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 255; Dec. Dig. § 90.*]

Appeal from Circuit Court, Lawrence County; R. L. Bullard, Judge.

"To be officially reported."

Ejectment by W. C. Maxwell against the Mississippi Valley Company and another. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

W. C. Maxwell brought suit in ejectment for possession of a strip of land 300 feet wide, which was used by the Mississippi Valley Company and the Brookhaven & Pearl River Railroad Company for railroad purposes under a contract between plaintiff and defendants, which contract is in the form of certain deeds hereinafter set out. The first deed is dated September 4, 1902, and contains the following stipulations: "In consideration of the sum of one dollar to us in hand paid, the receipt of which is hereby acknowledged, and of the benefits that will accrue to us by reason of the construction of a railroad through our lands, we hereby bargain, sell, convey, and warrant to Stuyvesant Fish," etc. The second deed is dated December 29, 1902, and recites as follows: "For and in consideration of the public good and convenience to be derived therefrom by the citizens of the town of Monticello, in said county and state, and the public weal of the county of Lawrence generally, in the event of the construction of a railroad to the town of Monticello, as now surveyed and located over, through, and across our lands, and the establishment and maintenance of a depot at some point on the strip of land this day conveyed by us to Stuyvesant Fish, or on the right of way heretofore conveyed for the purpose of the construction of a railroad to the said Fish through our lands or either of them: Now, in consideration of the above condition, and upon the construction and completion of said railroad, we hereby grant and donate to Stuyvesant Fish and his successors in office of the president of the Illinois Central Railroad Company, for the use of the citizens of the town of Monticello and the public weal generally of said Lawrence county, the following described land, situated in the county of Lawrence and state of Mississippi, to wit." The third deed, of date December 29, 1902, contains the following stipulation: "For and in consideration of the sum of one dollar cash in hand paid, receipt whereof is hereby acknowledged, and of the benefits that will accrue to us by rea-

son of the construction of a railroad through our lands and the establishment and maintenance of a depot to be erected and maintained, at some point on the lands herein conveyed or heretofore conveyed to Stuyvesant Fish by us for a right of way, at and for the town of Monticello, in said county and state, we hereby bargain, sell, convey, and warrant unto Stuyvesant Fish, his successors and assigns, the following described lands, situated, lying, and being in the county of Lawrence and state of Mississippi, to wit." On the trial the court gave a peremptory instruction for the defendants. On appeal the appellant contends that the deeds above set out contained conditions subsequent, which were to have been performed by the grantee.

Touchstone & Salter, for appellant.

WHITFIELD, C. J. The court's construction of the deed executed by W. C. Maxwell and Mollie L. Maxwell, on the 4th of September, 1902, was correct. This deed conveyed a strip of land 100 feet wide, and contained no condition precedent whatever. But the construction of the two deeds executed by the same parties on the 29th of December, 1902, one for a strip of land 150 feet in width, and the other for a strip of land 50 feet in width, was not correct, as they both do contain conditions precedent. The consideration expressed in both these deeds, as moving from the railroad company to the grantors, is that the railroad company shall establish and maintain a depot, and it is expressly said: "Now, in consideration of the above condition, upon the construction and completion of said railroad, we hereby grant," etc. This is the language of the deed conveying the land 150 feet in width, and in the other deed a part of the consideration is expressed to be, also, the establishment and maintenance of a depot to be erected and maintained, etc., and yet the court held that these deeds contained no condition whatever, and refused to allow Maxwell to testify whether those conditions and considerations had been complied with. All this was error. See *Railroad v. Baldwin's Ex'rs*, 78 Miss. 59, 29 South. 763.

Reversed and remanded.

FOREMAN v. STATE. (No. 13,753.)

(Supreme Court of Mississippi. March 8, 1909.)
CRIMINAL LAW (§ 599*)—CONTINUANCE—SURPRISE—AMENDMENT OF INDICTMENT.

Where an indictment for embezzlement of funds as secretary of a certain lodge was amended at the trial so as to charge defendant with embezzlement as the agent of another society, distinct in its organization and objects from the first, defendant was entitled to a continuance on the ground of surprise.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1333, 1334; Dec. Dig. § 599.*]

Appeal from Circuit Court, Sharkey County; John N. Bush, Judge.

Lee W. Foreman was convicted of embezzlement, and he appeals. Reversed and remanded.

Beadle & Howard and W. E. Mollison, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

FLETCHER, J. This appellant was indicted for embezzling certain funds which came into his hands as "secretary of the B. K. Bruce Lodge of Colored Odd Fellows." On the trial it was developed by the testimony that it was appellant's duty to collect these funds and remit them to the secretary of the "Odd Fellows' Benefit Association of Mississippi"; this latter organization being somewhat distinct in its organization and objects from the Odd Fellows lodge proper. Thereupon the court, over the objection of defendant, permitted the state to amend the indictment so as to charge that Foreman was "agent of the Odd Fellows' Benefit Association of Mississippi." Appellant's counsel, insisting that the amendment made a new case and that he was thereby taken by surprise, and was unprepared to make defense, asked that the case be continued.

We think it was fatal error to deny this request. It is manifest that the amendment did make a new case, and reasonable opportunity should have been given defendant to meet the changed aspect of affairs. Indicted for embezzling funds received as an officer of one society, he was tried for embezzling funds received as an officer of another, toward which he sustained a different attitude and in regard to which he owed a different duty. Since the case must be reversed, we here express grave doubts as to the propriety of the amendment, and suggest that a new indictment be secured, which will correctly describe appellant's attitude toward the funds collected and contain proper averments as to the ownership of the moneys alleged to have been misappropriated.

Reversed and remanded.

WHITE et al. v. STATE. (No. 13,613.)

(Supreme Court of Mississippi. March 1, 1909.)

ANIMALS (§ 45*)—MALICIOUS SHOOTING—AFFIDAVIT—AMENDMENT.

Where an affidavit for maliciously shooting a horse, which neither set out the name of the horse nor its description, laid the ownership of the horse in one person, it was error to amend the affidavit by laying the ownership in another.

[Ed. Note.—For other cases, see Animals, Dec. Dig. § 45.*]

Appeal from Circuit Court, Harrison County; W. H. Hardy, Judge.

Bud White and another were convicted for

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

maliciously shooting a horse, and they appeal. Reversed and remanded.

Appellants were informed against before a justice of the peace for maliciously shooting a horse; the affidavit reciting that it was the property of one James Riley. On the trial the affidavit was amended, so as to lay the ownership in his son, Willie Riley. Neither the name of the horse nor its description is set out in the affidavit. On appeal among other errors assigned is the action of the court in permitting this amendment to the affidavit.

J. H. Mize, for appellants. Geo. Butler, Asst. Atty. Gen., for the State.

MAYES, J. We do not think the amendment to the affidavit should have been allowed by the court. This case cannot be distinguished from the case of *Hudson v. State*, 73 Miss. 784, 19 South. 965.

Reversed and remanded.

DAMPF v. YAZOO & M. V. R. CO.

(No. 13,527.)

(Supreme Court of Mississippi. Feb. 15, 1909.)

1. NEGLIGENCE (§ 124*)—CARE AS TO CHILDREN—INJURIES ON TURNABLES—PERMISSION TO PLAY ON—EVIDENCE.

In an action for injuries to a child on a railroad turntable, evidence as to permission given to the child to play on the turntable by an employé of the railroad was admissible.

[Ed. Note.—For other cases, see *Negligence*, Dec. Dig. § 124.*]

2. NEGLIGENCE (§ 136*)—INJURIES TO CHILDREN ON TURNABLE—QUESTIONS FOR JURY.

In an action for injuries to a child playing on a railroad turntable, evidence held sufficient to go to the jury on the issues of negligence and contributory negligence.

[Ed. Note.—For other cases, see *Negligence*, Dec. Dig. § 136.*]

Appeal from Circuit Court, Wilkinson County; M. H. Wilkinson, Judge.

"To be officially reported."

Action by Jacob Dampf, by his next friend, against the Yazoo & Mississippi Valley Railroad Company. From a judgment for defendant on a directed verdict, plaintiff appeals. Reversed and remanded.

Appellant, a boy between 12 and 13 years of age, was playing with a lot of other small boys around a turntable of the defendant railroad company. The turntable had been left unlocked, being fastened in place only by an iron rod, which seems to have been removed by the boys, who began to turn the turntable around; and while so doing, appellant's foot was caught, and one of his toes so crushed that the removal of the bone became necessary. The defendant pleaded the gross negligence of the plaintiff, who had knowledge of the danger, and who had been warned by some one passing by that it was dangerous. On the trial the plaintiff offered testimony

tending to show that one Abe Bonney, an employé of the railroad company, who was near the turntable at the time engaged in watching an engine, had given these boys permission to play on the turntable. This evidence was excluded, and a peremptory instruction was given for defendant, and plaintiff appeals.

Shannon & Jones and E. G. Shannon, for appellant. Mayes & Longstreet, for appellee.

WHITFIELD, C. J. The excluded testimony as to Abe Bonney's permission was competent. On the testimony in this record, the case should most manifestly have gone to the jury. The court, therefore, erred in giving a peremptory instruction for the defendant.

Reversed and remanded.

EVANS v. M. C. LILLY & CO. (No. 13,547.)

(Supreme Court of Mississippi. March 8, 1909.)

1. ASSOCIATIONS (§ 16*)—INDIVIDUAL LIABILITY OF MEMBERS.

Members of a voluntary association, signing a note given by the association, are individually liable thereon, regardless of their intentions respecting liability or their belief as to the law relating thereto, and even though their signatures were followed by abbreviations indicating their offices in the association.

[Ed. Note.—For other cases, see *Associations*, Cent. Dig. § 26; Dec. Dig. § 16.*]

2. APPEAL AND ERROR (§ 1028*)—HARMLESS ERROR—RULINGS ON PLEADINGS.

Where the whole course of a trial clearly shows defendant's liability, and that no other result could ever be reached, a judgment against defendant will not be reversed merely because some of defendant's pleas were traversed on immaterial issues.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4034; Dec. Dig. § 1028.*]

3. APPEAL AND ERROR (§ 302*)—QUESTIONS FOR REVIEW—PRESENTATION ON MOTION FOR NEW TRIAL.

Though a peremptory instruction for plaintiff was given in the absence of defendant's counsel and before opportunity was offered to defendant to present additional proof, the judgment will not be reversed on appeal, where defendant on his motion for a new trial made no showing as to the materiality of the additional evidence which he would have introduced.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1744; Dec. Dig. § 302.*]

Appeal from Circuit Court, Noxubee County; R. F. Cochran, Judge.

Action by M. C. Lilly & Co. against T. J. Evans. From a judgment for plaintiffs, defendant appeals. Affirmed.

Baskin & Wilbourn, for appellant. J. E. Rives and L. Brame, for appellees.

FLETCHER, J. This case, as made by the declaration, pleas, and proof, presents the question of the liability of the members of a voluntary association for an obligation of the association, evidenced by a promissory note signed by the members; the signature being followed by certain abbreviations indi-

cating the offices which they held in the association. That the members signing such a note are individually liable is thoroughly well settled. The case of *Lawler v. Murphy*, 58 Conn. 294, 20 Atl. 457, 8 L. R. A. 113, is precisely in point. That case holds that the individual members are liable for the contracts of the association, without regard to the question as to what was intended by the members in regard to liability, and despite the fact that the members mistook the law. That case further holds that the addition of the words "secretary," "treasurer," etc., to the signatures, in no way affects the individual liability of the members. This is not an isolated case, but is in harmony with the weight of authority. *Lewis v. Tilton*, 64 Iowa, 220, 19 N. W. 911, 52 Am. Rep. 436; *Chick v. Trevett*, 20 Me. 462, 37 Am. Dec. 68; *Wells v. Gates*, 18 Barb. (N. Y.) 554; *Hodgson v. Baldwin*, 65 Ill. 532. Since the liability of appellant is perfectly clear, we cannot reverse merely because some of the pleas were traversed on immaterial issues, since the whole course of the trial shows that no other result could ever be reached.

The point most earnestly pressed upon our attention is that a new trial should have been granted because of the alleged arbitrary action of the court in giving a peremptory instruction for appellee in the absence of counsel, and before opportunity was given to present additional and important proof as to the corporate character of the association. We would unhesitatingly reverse for this reason if appellant on his motion for a new trial had made any satisfactory showing as to the character and effect of the additional evidence. It was claimed that this evidence tended to show that the commandery had been incorporated; but the charter was not produced, nor was there any specific reference to any legislative charter. It was clearly the duty of appellant to produce this evidence, that both the trial court and this court might judge of its competency and effect. There was a total failure to comply with this well-settled rule, and we cannot, therefore, yield to the contention.

Affirmed.

(36 Miss. 63)

WOODS et al. v. CHESBOROUGH et al.
(No. 13,825.)

(Supreme Court of Mississippi. March 8, 1909.)

EQUITY (§ 430*)—DECREE—SETTING ASIDE—DEFENSES—LIMITATIONS AND LACHES.

Six years after a decree adjudicating the title to certain lands, which decree was not appealed from, the parties against whom the decree was rendered sued to cancel the same title. Being met by a plea of *res judicata*, they filed an amended bill to set the former decree aside because the attorney in charge was too ill to give the case proper attention. The fact of the attorney's illness came to the knowledge of the parties 3½ years before the amended bill was

filed. *Held* that, whether the amended bill was or was not technically a bill of review, plaintiffs could not maintain it, as the facts showed no excuse for the delay in seeking to set aside the decree, in view of their want of diligence after knowledge of the attorney's illness.

[Ed. Note.—For other cases, see *Equity*, Dec. Dig. § 430.*]

Appeal from Chancery Court, Marion County; T. A. Wood, Chancellor.

Action by Mary Scott Woods and others against A. M. Chesborough and others to set aside a decree rendered against plaintiffs. From a judgment for defendants, plaintiffs appeal. *Affirmed*.

C. G. Mayson and Cross, Lovelace & Ross, for appellants. T. M. Miller and Alexander & Alexander, for appellees.

FLETCHER, J. In October, 1891, the Southern Pine Company, appellees' predecessor in title, filed a bill in the chancery court of Marion county against appellants, dealing with the identical lands here in controversy. The Southern Pine Company claimed by virtue of patents issued by the state of Mississippi subsequent to 1871, and appellants claimed title by virtue of the Pearl River Investment & Navigation Company act of 1871, dealt with in the case of *Hardy v. Hartman*, 65 Miss. 504, 4 South. 545. This case was continued from term to term, at some of which orders were taken and pleadings filed, until the July term, 1896, when a final decree was rendered on "original and amended bill of complaint, and exhibits and documentary evidence, and the answer and cross-bill and exhibits thereto, and the answer to cross-bill and exhibits," upholding and confirming the title of the Southern Pine Company to all the lands now in controversy and canceling the title of appellants to the same. This decree was not appealed from within the two years allowed by law for taking appeals. In 1902, six years after the rendition of this final decree, appellants, defendants in the former proceeding, filed their original bill against the successors in title of the Southern Pine Company, seeking a cancellation of the same title involved in the previous litigation. Being met by a plea of *res adjudicata*, appellants in 1904 filed their amended bill, seeking to have the decree of July, 1896, set aside because the attorney in charge of the earlier litigation was too ill to give the case the proper attention.

It is shown that notice of the fact of the attorney's illness came to the knowledge of appellants in January, 1901, 3½ years before it was sought to set the decree aside. In this state of facts there is no escape from the authority of *Brooks v. Spann*, 63 Miss. 198, and an attentive examination of that case will show that it can make no difference whether the amended bill is or is not technically a bill of review. Furthermore, we do not think there is such diligence shown

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date & Reporter Indexes

by appellants in this case as would entitle them to vacate the former decree, even though no statute of limitations barred the way. We cannot see our way clear to go further than this, and decide the other important and interesting questions presented, since the action of the court in upholding the plea of res adjudicata disposes of the case.

Affirmed.

(35 Miss. 79)

CUMBERLAND TELEPHONE & TELEGRAPH CO. v. JACKSON. (No. 13,763.)

(Supreme Court of Mississippi. Feb. 22, 1909.
Rehearing Denied March 15, 1909.)

1. TRIAL (§ 295*)—INSTRUCTIONS—CONSTRUCTION—CONSTRUING TOGETHER.

All the instructions should be construed together, so as to harmonize them if reasonably possible.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

2. TRIAL (§ 296*)—INSTRUCTION—CURE BY SUBSEQUENT INSTRUCTION.

In an action against a telephone company for damages for failure to answer a telephone call to enable plaintiff to procure a physician, an instruction to allow such damages as will compensate plaintiff for necessary inconvenience, anxiety, and worry caused by defendant's negligence, if erroneous, because the use of the word "anxiety" allowed damages for mental anguish, was cured by another instruction that plaintiff could only recover for the actual damages sustained.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-718; Dec. Dig. § 296.*]

3. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—INSTRUCTIONS—CURE BY VERDICT.

Plaintiff was compelled to get up at midnight and go for a doctor for his sick wife because his telephone calls were not answered, and in an action against the company for \$1,000 damages for its failure to answer the calls the court instructed to allow such damages as would compensate plaintiff for necessary inconvenience, anxiety, worry, etc., and subsequently instructed that recovery could only be had for actual damages sustained. The verdict was for \$100. Held that, even if the use of the word "anxiety" was erroneous, as permitting damages for mental anguish, it was evident, from the size of the verdict, that neither punitive damages nor damages for mental anguish were allowed for, and the instruction was not prejudicial to the merits of the action.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1068.*]

4. TELEGRAPHS AND TELEPHONES (§ 67*)—DAMAGES—ACTUAL DAMAGES—ANNOYANCE.

Where plaintiff was compelled to get up at midnight and go out to search for a doctor for his sick wife, because a telephone company negligently failed to answer his telephone call, the loss of time and the extra effort, etc., caused by defendant's negligence, would constitute annoyance, for which actual damages could be recovered.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 67.*]

5. APPEAL AND ERROR (§ 1170*)—REVERSAL—TECHNICAL ERROR.

The function of the Supreme Court is to determine whether the right result was reached below without reversible error, and it will not

make a hypercritical search for technical error in order to reverse.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4540-4545; Dec. Dig. § 1170.*]

Appeal from Circuit Court, Adams County; M. H. Wilkinson, Judge.

"To be officially reported."

Action by M. H. Jackson against the Cumberland Telephone & Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The appellee's wife was taken sick during the night and needed the attention of a physician. Appellee went to the telephone to call a doctor, and after ringing several times got no response. He waited about 15 minutes, and then had to go out into the night for a doctor, leaving his wife in the care of a servant. After arriving at the doctor's house, he tried to phone his residence, but got no response from the exchange. He brought suit for \$1,000 because of the injury suffered by the delay, anxiety, and worry on account of his sick wife, and also for punitive damages. No willfulness on the part of the employees of the telephone company seems to have been shown in their failure to make response, but it was shown that at night there were only 2 girls in the exchange, whereas there were 15 in the day. The court declined to permit the jury to consider punitive damages, limiting them to actual damages, under an instruction which permitted them to consider inconvenience, anxiety, and worry as an element of actual damage. From a judgment for \$100, the telephone company appeals.

Harris & Willing, for appellant. M. W. Rely and Lemuel P. Conner, for appellee.

WHITFIELD, C. J. The verdict in this case was manifestly, under the instructions and the testimony, for compensatory damages only. The chief complaint of the appellant is as to instruction No. 1 for the plaintiff, which is as follows: "That, if the jury find for the plaintiff, it should assess such reasonable amount of damages against said defendant, not to exceed \$1,000, as will compensate plaintiff for necessary inconvenience, anxiety, and worry caused, if any, by said wrongful act, if any." It is insisted "anxiety" must necessarily mean mental anxiety, and that hence this is a charge to find damages due to mental anguish. But the court gave, for the defendant, instruction No. 3, by which they were told that the defendant company could not be held liable, in any event, for more than the actual damages sustained. There is no complaint whatever as to any other instruction than said instruction No. 1 for the plaintiff, and that complaint is based upon the hypercritical contention that the word "anxiety" must mean, necessarily,

mental anxiety in that instruction. It is familiar learning that all the instructions given in any case must be construed together, so as to harmonize them, if reasonably it can be done. When, therefore, the court told the jury, in said instruction No. 3 for defendant, that only actual damages could be recovered, that should be taken as curing the first instruction in the mere use of the word "anxiety" on the face of the instructions themselves.

But there are other considerations quite determinative against the contention of appellant: First, the word "mental" is not used in the first instruction in connection with the word "anxiety"; second, looking at the case and the result reached in the case in a common-sense, practical way, the only way in which courts can successfully administer justice between litigants, it is perfectly obvious that the verdict awarded by the jury for \$100 must necessarily have only been for actual damages—that is to say, neither for punitive damages, nor for any damages due to mental anguish. If the jury had intended in their verdict to find damages due to mental anguish, there can be no question that the verdict would have been far in excess of \$100. The fact, therefore, that it was limited to that small sum, is conclusive to our minds that the jury did not embrace in their finding any damages due to mental anguish. So that, even if the word "anxiety" was improperly in the first instruction, and even if, going further, it did constitute error, it is impossible to say, from any rational standpoint, that it had anything to do with the amount of this verdict, and so could not possibly constitute reversible error.

The learned counsel for appellant seems to have overlooked that the Hobart Case, 89 Miss. 252, 42 South. 349, 119 Am. St. Rep. 702, classed the finding of damages for "annoyance" as actual damages, as, manifestly, such damages may be, in many cases, easy to be imagined, of which this case itself is a very striking illustration. When this plaintiff was required to get up at midnight and go on a search for a doctor, is it to be said that the loss of time and the extra effort, etc., involved in this search at midnight for a doctor, would not constitute annoyance, and annoyance, as an element of actual damages, just as it was in the Hobart Case? Surely not. In short, when this court looks to see whether the right result has been reached by the court below in this particular case, it is not engaged in a microscopical search for error whereby a technical reversal might be secured; but it is engaged, as it ought to be engaged, in ascertaining whether the right result has been reached, and no reversible error committed by the court below.

Thus looking at the result, and keeping in

mind said instruction No. 3 for the defendant, keeping in mind the extent of the annoyance, the extra effort, and the trouble occasioned the plaintiff, and especially keeping in mind the very small verdict rendered in the case, it would be manifestly a defeat of practical justice to reverse this case, even if it should be held that the use of the word "anxiety" in said first instruction for the plaintiff was technical error. It is hardly necessary to add that the Rogers Case, in 68 Miss. 748, 9 South. 823, 13 L. R. A. 859, 24 Am. St. Rep. 300, is in no way interfered with by this case.

Affirmed.

CARTER et al. v. EASTMAN GARDNER & CO. (No. 13,657.)

(Supreme Court of Mississippi. March 8, 1909.)

1. FRAUD (§ 50*)—PRESUMPTIONS.

Fraud will not be presumed, but must be clearly proven.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 46; Dec. Dig. § 50.*]

2. EXCHANGE OF PROPERTY (§ 3*)—SETTING ASIDE—FRAUD.

Where an illiterate colored person was induced to exchange 160 acres of land with the timber thereon, worth \$1,120 exclusive of the timber, for 100 acres of land worth \$800 without the timber, but incumbered with reservations of timber and minerals and burdened with easements, and only made the exchange after persuasion by one whom he trusted, and who was in the employ of the other party, the deed will be set aside as fraudulent.

[Ed. Note.—For other cases, see Exchange of Property, Dec. Dig. § 3.*]

Appeal from Chancery Court, Simpson County; J. L. McCaskill, Chancellor.

Action by Isom Carter and others against Eastman Gardner & Co. to set aside a deed. From a judgment for defendants, plaintiffs appeal. Reversed and remanded, with directions.

May, Flowers & Whitfield, for appellants. Shannon & Street, for appellees.

MAYES, J. The original bill was filed on February 6, 1906, within a few months after the complainants deeded to Eastman Gardner & Co. the 160 acres of land in question, and about six years after the deed conveying the timber on same. Both deeds are sought to be canceled as fraudulent. As the consideration for the deed to the land to Eastman Gardner & Co. by Isom Carter and wife, which deed was made on November 1, 1905, Eastman Gardner & Co. conveyed to appellants another tract of land containing only 100 acres. The consideration paid by Eastman Gardner & Co. for the timber on the same land was a cash consideration of \$300, and the deed gave 15 years in which to remove the timber. This last deed men-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tioned was the first deed executed, and was made some time in 1899. As to that part of the bill which seeks to cancel the timber right on the ground that the real contract was for 7 years, and that the insertion of 15 years was fraudulently done, it is only necessary to say that the proof fails to establish that charge in the bill. While it may be conceded that there are many suspicious circumstances surrounding the transaction, yet fraud is not to be presumed, but must be clearly proven, and it is our judgment that the evidence offered as to this fails to measure up to the degree of conclusiveness required by the law. As to this charge in the bill all relief should be denied.

As to that feature of the bill which seeks to cancel the conveyance made by the deed of November 1, 1905, we think it clear that this should be done. In the first place, the facts conclusively show that appellants were not only illiterate and ignorant, but very reluctant to make the conveyance, yielding only when overpersuaded by one whom they trusted, and who was then in the employ of Eastman Gardner & Co., even if it be conceded that no threats were made which influenced them against their will. When the true situation of the parties is thoroughly understood, the evidence of unfair, if not fraudulent, dealing is made manifest from an inspection of the deeds themselves, and this, coupled with other proof in the case, abundantly warrants the court in setting aside the transaction. It is shown that appellants owned 160 acres of land, of the value of \$1,120, exclusive of the timber already sold to Eastman Gardner & Co. They were induced in some way to exchange this land with Eastman Gardner & Co. for a tract containing only 100 acres of land, of the value of \$800, exclusive of the timber; Eastman Gardner & Co. retaining all the timber thereon. By this transaction they are shown to have lost in quantity of land 60 acres, amounting in dollars and cents to \$320. The tract of 100 acres is still further reduced in value by the fact that Eastman Gardner & Co. retain the right to allow the timber to stand on this 100 acres of land for 25 years. The rights reserved in the land by Eastman Gardner & Co. do not stop here; but in addition to the above they reserve the right to all oil, coal, and mineral rights. In addition to this, Eastman Gardner & Co. further reserve the right to construct, maintain, and use the 100 acres of land conveyed by them for logging railways and tram or dirt roads until the timber is removed, to wit, for 25 years. In short, though Eastman Gardner & Co. obtain the fee-simple title to a tract of land without right or reservation of any kind left in the grantors, giving in exchange therefor land of far less value, they so reduce the value of the land conveyed as the consideration therefor as to render their con-

veyance a mythical, valueless, unmarketable thing.

It is charged in the bill, and there is some evidence to support the charge, that the confidential friend and adviser of the appellants was their white neighbor, Runnells; that Runnells had been employed and paid by Eastman Gardner & Co. the sum of \$50 to induce appellants to make the transfer. It is indisputable that Runnells was in the employ of Eastman Gardner & Co. at the time this deed was procured from Isom Carter, and that he was the confidential and trusted friend of these appellants, and that Eastman Gardner & Co. did pay him \$50 for some transaction, though Eastman Gardner & Co. deny that it was for the purpose of obtaining Runnells to procure appellants to sign the deed. Be this as it may, this whole transaction is so manifestly unfair and unjust, made between parties standing upon such an unequal footing, showing so clearly that appellants have been overreached, that it must be set aside. The true purpose of the court would be lost sight of if so palpable a wrong could be allowed to go uncorrected.

The court below is directed to enter a decree requiring appellants to execute a conveyance to Eastman Gardner & Co. of the 100 acres of land, and should then direct a cancellation of the deed made by appellants to Eastman Gardner & Co., revesting the title to the 160 acres of land in appellants.

Reversed and remanded.

BATESVILLE GIN CO. v. WHITTEN. (No. 13,676.)

(Supreme Court of Mississippi. Feb. 22, 1909.)

BAILEMENT (§ 33*)—LIABILITY OF BAILEE—ACTIONS.

A bale of cotton, after being ginned and tagged, was rolled out on the gin platform, the attached tag containing the bale number, and a duplicate, which contained the number, weight, and name of the owner, was given to the person who brought the cotton, and when the owner called for it next morning it could not be found. There were notices around the gin stating that the company would not be liable for cotton after it was ginned and baled, of which the owner knew, as well as that it was the general custom of ginners to dispose of baled cotton as defendant had done. *Held*, in an action by the owner for the value of the missing bale, that it was error to give a peremptory instruction for plaintiff.

[Ed. Note.—For other cases, see Bailment, Dec. Dig. § 33.*]

Appeal from Circuit Court, Panola County; W. A. Roane, Judge.

Action by W. W. Whitten against the Batesville Gin Company. From a judgment for plaintiff on a directed verdict, defendant appeals. Reversed and remanded.

Mr. Whitten sent a bale of seed cotton to the Batesville Gin Company to be ginned. It arrived late in the afternoon, was immediate-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ly ginned and tagged, and rolled out on the platform, as was the custom of the appellant. The tag contained the bale number, and the duplicate, containing the number, weight, and name of owner, was given to the driver of the wagon who brought the cotton to the gin. The next morning Mr. Whitten called for the cotton, and it could not be found, and was never located. Suit was filed to recover the value thereof. Defendant denied any knowledge of the whereabouts of the cotton, and denied his responsibility for it after it was rolled out on the platform. At the conclusion of the testimony each side asked for a peremptory instruction, and the court gave a peremptory instruction to find for plaintiff.

Defendant contends that, having performed all of the duties required of it by ginning and baling and rolling it out on the platform, it was not liable to plaintiff for loss of the cotton, which evidently was stolen; the testimony showing that notice by posting large placards about the premises informed the public that the defendant was not liable for cotton which had been ginned and baled and that this fact was known to plaintiff, and that it was the general custom of ginners to act just as defendant did in this instance. The plaintiff contends that defendant is an insurer, and is liable, and that he had made out a prima facie case when he proved the loss of his cotton, or the failure of the defendant to deliver it on demand.

Lowrey & Lamb, for appellant. Pearson, Echols & Carothers, for appellee.

MAYES, J. The facts of this case did not warrant the giving of a peremptory instruction for plaintiff.

Reversed and remanded.

JACKSON ELECTRIC RY., LIGHT & POWER CO. v. CARNAHAN. (No. 13,444.)

(Supreme Court of Mississippi. March 15, 1909.)

1. STREET RAILROADS (§ 104*)—INJURIES TO PEDESTRIANS—WILLFUL INJURY.

Plaintiff, an elderly man, desiring to take a street car in the outskirts of a city, saw a car approaching at a rapid rate and signaled it to stop at the next crossing, 200 feet away. There being no sidewalk, plaintiff walked in the middle of the track, which was straight and frequently used by pedestrians, with his back to the approaching car. When he had gone about 20 feet, he discovered that the car had not slackened speed, and was struck and severely injured. *Held*, that the motorman was guilty of gross negligence, amounting to willfulness, justifying a recovery in spite of plaintiff's negligence.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 220; Dec. Dig. § 104.*]

2. STREET RAILROADS (§ 118*)—INJURIES TO PEDESTRIANS—ACTION—INSTRUCTIONS.

Where plaintiff was struck by a street car as he was walking along the track, the court erred in refusing to charge that the motorman was

entitled to presume plaintiff would exercise reasonable care and would not continue to walk along the track when he knew the car was coming or should have known it was coming, and if plaintiff did not act in a reasonably prudent manner, and the motorman in handling the car did act with ordinary care, and plaintiff's negligence proximately contributed to his injury, he could not recover.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 268; Dec. Dig. § 118.*]

Appeal from Circuit Court, Hinds County; W. H. Potter, Judge.

Action by Wallace Carnahan against the Jackson Electric Railway, Light & Power Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The appellee desired to take a street car out in the suburbs of the city of Jackson, and, coming from the house to the track at a place where there was no regular stop, he saw the car approaching at a rapid rate of speed, and signaled for it to stop at the next crossing, which was about 200 feet distant; and, there being no sidewalk, he got in the middle of the track, which was frequently used by pedestrians, and with his back toward the approaching car walked down the track toward the stop. After he had gone about 20 feet, he discovered that the car had not slackened its speed, but was almost upon him, and he was struck and severely injured by the car before he could get off of the track. The appellee is an elderly man, and the track straight at the point where he was struck. There is a dispute as to whether the gong was sounded before the car struck appellee. The railroad company pleaded contributory negligence on the part of the plaintiff in the court below. The case was submitted to the jury, who returned the verdict for \$955, and the railway company appeals.

Williamson, Wells & Peyton, for appellant. Powell & Powell, for appellee.

FLETCHER, J. It is argued on behalf of appellant that a peremptory instruction should have been given for the defendant on the ground that the plaintiff proximately contributed to the injury by his own negligence and that a recovery should not be permitted to stand on the facts shown. We cannot yield to this contention in the light of plaintiff's testimony, which tended to show that the motorman was guilty of gross negligence, amounting to willfulness and recklessness, of such a character as to warrant recovery in spite of plaintiff's conceded negligence. *Railroad Co. v. Brown*, 77 Miss. 338, 28 South. 949. This view is accurately enough presented in the instructions given for plaintiff, in which the jury was informed that, although plaintiff was himself negligent, still the defendant would be liable if the motorman did not stop his car, provided he could have done so, after

it became reasonably apparent that plaintiff was oblivious to his danger. Such conduct is tantamount to reckless negligence. We cannot say that this view was without warrant in the testimony, since the plaintiff insists that he went upon the track when the car was 150 or 200 feet away, that he had signaled the car to stop at the next stopping station, and that he was traveling along the path usually employed by pedestrians. It has been well said by the Alabama court in a recent case that, while the motorman of a street car has a right to assume that a person on or near the track will remove himself from danger, yet that the law will not permit him to indulge this assumption beyond the time when the person's danger becomes imminent. *Birmingham Ry., Light & Power Co. v. Williams* (Ala.) 48 South. 93. Accepting this as an accurate statement of the law, we think it is for the jury to say whether the company was guilty of such reckless or willful negligence as renders ineffective the mere contributory negligence of the plaintiff.

However, the defendant was entitled to have his theory fairly presented to the jury. We have seen that the Alabama case above cited holds that the motorman may assume that a pedestrian on the track will not continue in a place of danger, when he knows that a car is approaching. This being true, we think it was error to refuse defendant's second charge, which reads as follows: "The court instructs the jury that the motorman had a right to suppose that Mr. Carnahan would exercise reasonable care for his own safety, and would not continue to walk along the track when he knew the car was coming, or should have known it was coming; and if the jury believe from the evidence in this case that Mr. Carnahan, upon the occasion of his injury, did not act in a reasonable, prudent, and careful manner to protect himself against injury, and that the motorman did act in the handling of the car with ordinary care and prudence, and that the negligence of Mr. Carnahan contributed proximately to his injury, they must find for the defendant." The exact principle therein announced is not covered in any other charge given for the company. It makes a failure to recover depend upon the exercise of ordinary care and prudence by the motorman, and the plaintiff must recover in this case upon the jury's belief that the motorman not only did not use ordinary care, but that he was willfully and recklessly unmindful of the safety of the plaintiff.

For error in refusing this instruction, and for this reason alone, the case is reversed and remanded.

WHITFIELD, C. J. (specially concurring). I concur in reversing the case for the error in refusing the instruction indicated in the

opinion in chief. On the facts as set out in this record, my present inclination would be to hold that the plaintiff was guilty of such reckless negligence as barred his right to recover under the authorities in this state and elsewhere; but I withhold any definite expression on this point until the facts of the case shall have been more fully developed on a new trial. And this I do, first, because the majority of the court are clearly of the opinion that on this record the case should have been given to the jury, and hence any view of my own would be immaterial; but, secondly, and chiefly, because of the unusual candor and the absolute truthfulness of the testimony of the appellee himself, the Rev. Mr. Carnahan. It is impossible to read his testimony without believing every word of it, so manifest is its sincerity and its candor. Indeed, he measures fully up to the exalted standard prescribed by the Psalmist, that of one who "sweareth to his own hurt and changeth not." I confess testimony of this sort commends itself strongly to the favorable consideration of the court, and this inclines me, since there must be a reversal and a new trial anyway, to withhold a definite expression as to whether, on this record, he would be barred of recovery by reckless negligence. I prefer to determine that question, so far as I am concerned, when fuller testimony on another trial shall have been had.

CAMPBELL v. YAZOO & M. V. R. CO.

(No. 13,525.)

(Supreme Court of Mississippi. March 1, 1909.)

CARRIERS (§ 347*)—INJURIES TO PASSENGER—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Where a passenger, while standing on the edge of a station platform awaiting a train, was struck by the engine bumper, which projected slightly over such platform, the fact that at the time of the accident he had his back to the train did not make him guilty of contributory negligence as a matter of law.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1364; Dec. Dig. § 347.*]

Appeal from Circuit Court, Franklin County; M. H. Wilkinson, Judge.

"To be officially reported."

Action by J. P. Campbell against the Yazoo & Mississippi Valley Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

The appellant, a passenger on appellee's road, had to change cars at the junction of Harrison. Some time elapsed between the two trains, and appellant, while at the station at Harrison, was standing on the edge of the concrete platform between the waiting room and the railroad tracks, and while standing on said platform, with his back toward the incoming train, he was struck by

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the bumper on the engine, which projected slightly over the edge of said platform, and was knocked down; one foot being so badly crushed that amputation became necessary. The plea of the defendant was that the proximate cause of the injury was the negligence of the plaintiff in standing at the edge of the platform and paying no attention to the approaching train. After the testimony was in, the court gave a peremptory instruction for defendant, and plaintiff appeals.

McKnight & McKnight, for appellant.
Mayes & Longstreet, for appellee.

WHITFIELD, O. J. The pivotal point in this case is whether the company was negligent in the construction of its platform, so as to have the bumper of the engine and the body of the cars themselves project over—that is to say, overlap—said platform, to the extent, at least, of two inches as the cars would go by said platform. There was testimony to the effect that this platform was so negligently constructed that the cars, in going by, would oscillate so as to overlap to the extent of two inches, at least, said platform. The query, therefore, is whether this negligent construction is the proximate cause of this injury, and we think, on the testimony in the record, there was sufficient evidence to send the case to the jury to decide that question of fact.

In the case of *Archer v. N. Y., N. H. & H. R. R. Co.*, 106 N. Y. 589, 13 N. E. 318, it was held in a case like this that the passenger has the right to act upon the "assumption that every necessary and reasonable precaution would be taken to make the platform safe, that he had a right to regard the platform as a safe and proper place, and that to bring, without notice, a train at such a speed up to a station and into the neighborhood of outgoing and incoming passengers, and so near a platform provided for them as to sweep a portion of it, was negligence." In the case of *Langan v. St. Louis, etc., R. R. Co.*, 72 Mo. 392, 3 Am. & Eng. R. R. Cases, at page 359 et seq. the court say: "A person, who is wrongfully on the track of a railroad, knowing that a train passing over the track would necessarily pass over him unless he got out of the way, who fails to look and listen for a train, in case of injury, nothing more appearing, such person would, as a matter of law, be declared to be guilty of such contributory negligence as to prevent a recovery; but in the case of a passenger awaiting a train on the platform provided by the company for his occupancy the same rule does not obtain; for, being in a place where he is invited to be by the company, he has a right to suppose that he will be safe from collision with a train running on the track so long as he occupies a place on the platform, and the

mere fact that plaintiff, while on the platform, did not look behind him for an approaching train, cannot be held evidence of contributory negligence, any more than the failure of a person, struck from behind by a vehicle passing along a street of a city, and knocked into the street and run over by the vehicle, while such person was walking on the sidewalk adjacent to such street, to look behind him for an approaching vehicle, would, as a matter of law, render him chargeable with such contributory negligence as would prevent a recovery for injuries thus received. Negligence is not imputable to a person for failing to look out for danger, when, under the surrounding circumstances, the person sought to be charged with it had no reason to suspect that danger was to be apprehended."

We think this is the correct view, that the peremptory charge was erroneous, and the judgment is reversed, and the case remanded.

JOHNSON et al. v. STANSELL et al.
(No. 13,770.)

(Supreme Court of Mississippi. March 8, 1909.)

WILLS (§ 390*)—CONTESTS—APPEAL—REVERSAL.

Where the appellate court in a will contest is convinced by an examination of the will that it was the product of a mind so completely shattered that testamentary capacity was wholly lacking, and the instrument was evidently drawn in contemplation of suicide, and the matter in the will cannot be reconciled with any theory of sanity, the chancellor's finding that the will was valid will be reversed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 862; Dec. Dig. § 390.*]

Appeal from Chancery Court, Hancock County; T. A. Wood, Chancellor.

Will contest by Mrs. Sarah E. Johnson and others against Mrs. B. D. Stansell and others. From a judgment for defendants, plaintiffs appeal. Reversed.

This is an appeal from a decree admitting to probate what purported to be the last will and testament of one Frank Jacob, or Jacob Frank, as he sometimes called himself. The record discloses the fact that Frank Jacob had resided in the town of Bay St. Louis for about five years, where he evinced certain peculiarities of character. Little seems to have been known of him, not even the place of his former residence having been disclosed by him. He was about 75 years old at the time of his death, which was by suicide. He was seen writing just prior to the time he killed himself, and the writing which was found after his death, in which he attempted to dispose of his property, was filed for probate as his will by his housekeeper, who was made the principal beneficiary. This writing is rambling in its terms, is very abusive of

certain persons for whom he had a strong dislike, is very obscene, and written evidently in contemplation of suicide. After his death it was learned that his real name was Johnson, and that he had a wife and children in Kansas, whom he had deserted, and who knew nothing of his whereabouts. Mrs. Johnson and her children contest the will; the principal ground upon which they rely being that deceased was of unsound mind and lacking in testamentary capacity. In support of this contention they introduce evidence tending to show that for many years he had marked eccentricities of character and was the victim of hallucinations. Issue devisavit vel non was joined, and a jury was waived, and upon the hearing of the testimony the chancellor found that Frank Jacob and Johnson were the same person, but found that he was of disposing mind and memory at the time of the execution of his will, and admitted same to probate, and the contestants appeal.

McDonald & Marshall and Longino & McDowell, for appellants. E. J. Gex and Flow-ers & Whitfield, for appellees.

FLETCHER, J. An examination of the will attempted to be executed by Johnson, alias Jacob, convinces us that it was the product of a mind so completely shattered that testamentary capacity was wholly lacking. The document was evidently drawn in contemplation of immediate suicide, and the unprintable nonsense it contains cannot be reconciled with the theory of sanity. We deem it unnecessary to review the evidence. The eccentricities shown to have marked Johnson's earlier life may be consistent with testamentary capacity; but it is our view that at the time the alleged will was written these eccentricities had developed into general insanity. Reluctant as we are to disturb the chancellor's finding on the facts, we cannot sanction a disposition of property resting on such a document.

The case is reversed and remanded, with directions to the chancery court to enter a decree setting aside the probate of the will.

TOWN OF WOODVILLE v. JENKS. (No. 13,775.)

(Supreme Court of Mississippi. Feb. 22, 1909.)

1. APPEAL AND ERROR (§ 1167*)—REVIEW—REVERSAL.

Const. 1890, § 147, declares that no judgment or decree in any chancery or circuit court rendered in a civil cause shall be reversed for want of jurisdiction, from any mistake as to whether the cause in which it was rendered was of equity or common-law jurisdiction. *Held*, that where an action was brought in the chancery court to recover a balance due under an alleged contract, though that court had not jurisdiction, since the action was in assumpsit,

a decree overruling a demurrer on that ground cannot be reversed by the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1167.*]

2. COURTS (§ 487*)—REVIEW—TRANSFER OF CAUSE.

The Supreme Court has no power to enter an order transferring a cause from the chancery court to the circuit court as improperly brought in equity, as such procedure is for the chancery court.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 487.*]

Appeal from Chancery Court, Wilkinson County; J. S. Hicks, Chancellor.

Bill by C. H. Jenks against the Town of Woodville. From a judgment overruling a demurrer to the bill, defendant appeals. *Affirmed*.

The appellee filed a bill in chancery to recover of the appellant a balance due him under an alleged contract. The appellant demurred to the bill, alleging that a court of equity was without jurisdiction, since it was an action of assumpsit. The demurrer was overruled, and this appeal is prosecuted. There are two errors assigned: "(1) The court erred in overruling appellant's demurrer. (2) The court erred in not transferring the case to the circuit court."

Bramlette & Tucker, for appellant.

FLETCHER, J. The demurrer interposed to the bill in this case raises no question, except that the cause is of common-law, and not equity, cognizance. The chancery court, however, overruled the demurrer, thereby taking jurisdiction. Under section 147 of the Constitution of 1890 this court is powerless to reverse for this cause. Nor do we think we are authorized, as urged by counsel, to enter an order here transferring the cause to the circuit court. Such a procedure is for the chancery court.

Affirmed.

STURGES v. CITY OF MERIDIAN. (No. 13,630.)

(Supreme Court of Mississippi. March 15, 1909.)

MUNICIPAL CORPORATIONS (§ 713*)—CITY DITCH—ADVERSE USE.

Where a ditch had been dug for more than 10 years, and continuously used since that time by a city to carry off water falling upon a certain area of the city, the city obtained the right by prescription to maintain the ditch; but the right was limited by the character and extent of the right exercised during the period of prescription, and it could not thereafter enlarge the ditch, either by actual excavation or by increasing the flow of water.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 713.*]

Appeal from Circuit Court, Lauderdale County; R. F. Cochran, Judge.

Action by Theodore Sturges against the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

City of Meridian. There was a directed verdict for defendant, and plaintiff appeals. Reversed and remanded.

Bourdeaux & Venable, for appellant. Williamson & Gilbert, for appellee.

FLETCHER, J. In this suit, instituted by a property owner against the city to recover damages caused by the digging of a ditch near the property, by which ready and convenient access is denied, it was conclusively shown that the ditch was dug much more than ten years before the suit was instituted, and that continuously from the time of its construction it was used by the city to carry off the water falling upon a certain area of the city. This being conceded, we think the circuit court held correctly that the city has obtained the right by prescription to maintain the ditch as originally constructed. We cannot give to the case of *Levee Commissioners v. Dancy*, 65 Miss. 335, 3 South. 568, the construction contended for; that is to say, that section 17 of the Constitution of 1890 makes it impossible for an individual to lose, by lapse of time, his right to claim compensation for property taken or damaged for public use. That case distinctly recognizes and emphatically states that private property may be obtained for public use by adverse possession long enough to bar the owner's claim for compensation.

But there was some evidence in this case which showed that shortly before the suit was instituted this ditch had been enlarged by the city, and that in comparatively recent times there had been a substantial increase in the volume of water made to flow through this channel, by reason of which the ditch was increased in size, so that the value of adjacent property was thereby additionally impaired. It is clear that, because the city had secured by subscription the right to run a certain amount of water through a ditch of given dimensions, it does not thereby secure the right to enlarge this ditch either by actual excavation or through the medium of a largely increased flow of water. This view finds support in the case of *Mississippi Mills v. Smith*, 69 Miss. 299, 11 South. 26, 30 Am. St. Rep. 546, where it is said: "The courts hold that the right secured by prescription is limited by the character and extent of that exercised during the period of prescription, and that for any increase causing material injury an action can be brought." This view, we feel sure, is without dissent in the authorities. It will not do to say that no substantial damages have been shown, due to the enlargement of the ditch. The record contradicts this assertion, and it was peculiarly for the jury to say what extent the damages proven are attributable to such increase.

The peremptory instruction for the city should not have been given, and for the error in doing so the case is reversed and remanded.

MOORER v. LELAND LUMBER CO.
(No. 13,479.)

(Supreme Court of Mississippi. Feb. 1, 1909.
Motion to Correct Judgment Overruled
March 8, 1909.)

STIPULATIONS (§ 14*)—CONSTRUCTION—EFFECT ON LIABILITY UNDER BUILDING CONTRACT—"ESTIMATE."

The original estimate for the construction of a building estimated the lumber needed at \$1,400. Considerable of the lumber included in the estimate was not furnished, and for such deficiency \$226.90 was credited back; and \$900 was also credited on the account for cash payment. *Held*, that any recovery in excess of the difference between \$1,400 and the sum of the two credits was excessive, though the parties had stipulated that \$1,390.06 worth of lumber was furnished under the "estimate," since the word "estimate," as used in the stipulation, referred to the original estimate, and not to extras that may have been furnished, and hence recovery for extras by reason of the stipulation was not warranted.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 24, 34; Dec. Dig. § 14.*

For other definitions, see Words and Phrases, vol. 3, pp. 2492, 2493.]

Appeal from Circuit Court, Hinds County; W. H. Potter, Judge.

"To be officially reported."

Action by the Leland Lumber Company against L. C. Moorer. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Appellant had awarded a contract to erect a building to one Ellis, a contractor, on an original estimate of \$1,400; and, Ellis being insolvent, appellant agreed to protect the Leland Lumber Company, from whom the lumber was to be purchased. The lumber was furnished to the contractor, Ellis, and there were a number of extras which Ellis ordered, which were not included in the original estimate. Appellant paid \$900 cash on his account, and was credited with \$226.90 for lumber which was not furnished under the original estimate. The Leland Lumber Company afterwards brought suit against the appellant, and recovered judgment for \$413.91, the amount claimed to be due. Appellant admits an indebtedness of \$273.10 under the original estimate, but denies the additional amount claimed for extras, since they were not included in the original estimate, and were not guaranteed by him, and claims that there was never an agreed price for said estimates, or any imputed promise by appellant to pay for them, and that therefore the verdict was in excess of the amount proven to be due. Appellant also filed a motion to purge from the record certain documents contained on pages 79 to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

34 of the record, because these documents were not in evidence in the trial below.

Tim E. Cooper and V. Otis Robertson, for appellant. J. B. Stirling and F. M. West, for appellee.

WHITFIELD, C. J. The original estimate in this case, which is attached to the declaration as Exhibit B thereto, shows the amount, in value, of the lumber deemed necessary for the building to be \$1,400. It is plainly shown that \$900 in cash were paid the appellee, and that \$226.90 worth of lumber was credited back by way of deficiencies; that is to say, that much lumber under the original estimate was never furnished and never was in the building. If these two sums be added together and subtracted from the amount of the original estimate, it shows, beyond controversy, that only \$273.10 could have been recovered in this suit on the evidence in this record, if extras furnished are not embraced under the terms of the agreement set out at page 84 of the record.

That agreement is in the following words: "It is agreed between counsel that the full amount furnished under the estimate, as shown by the slips or dray tickets, is \$1,890.06, of which the dray tickets contain the statement: Sold to Ellis, \$834.04; sold to Moor, \$556.02." We do not think there can be any reasonable controversy as to the meaning of the word "estimate" in this agreement. We think it is clear that this agreement refers alone to the amount of the original estimate, and not at all to the amount of any extras that may have been furnished. This being so, it is plain that the verdict of the jury was for too much.

There is also a motion in this case to purge from the record certain assignments on pages 79, 80, 81, 82, 83, and 84. It is entirely unnecessary to a decision in this case to deal with this motion at all.

The judgment is reversed, and the cause remanded.

95 Miss. 21)

HOLBERG MERCANTILE CO. v. STATE
(No. 13,591.)

(Supreme Court of Mississippi. March 13, 1909.)

1. INTOXICATING LIQUORS (§ 249*)—SEIZURE—PROCEEDINGS.

A proceeding for the seizure and destruction of intoxicating liquors unlawfully kept, as authorized by Code 1906, § 1749, can be instituted only before a justice of the peace, who is required to destroy all liquor so seized for which no claim is made.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 249.*]

2. INTOXICATING LIQUORS (§ 251*)—SEIZURE—PROCEEDINGS—TRANSFER OF CAUSE—VALUE OF LIQUORS CLAIMED.

Code 1906, § 1749, provides for the seizure of liquors unlawfully kept by proceedings be-

fore a justice of the peace; and section 1750 provides for the trial of a claim to liquors so seized before the justice, unless the value thereof is over \$200, when the justice is required to send the claim to the circuit court for trial. *Held*, that where liquors valued at more than \$400 were seized, and four claimants filed affidavits together covering all the liquor, but the value of the part claimed by each was less than \$200, the justice must try each claim, and not transfer the cause to the circuit court.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 251.*]

Mayes, J., dissenting.

Appeal from Circuit Court, Jones County, R. L. Bullard, Judge.

"To be officially reported."

Proceedings for the seizure and destruction of liquors alleged to have been unlawfully kept, etc., in which the Holberg Mercantile Company filed a claim to a part of the liquor seized. In the circuit court, to which the matter was referred by the justice of the peace, claimant moved to dismiss for want of jurisdiction, and from an order overruling the motion it appeals. Reversed and remanded.

R. E. Halsell and Stone Deavours, Jr., appellants. R. V. Fletcher, Atty. Gen., for the State.

FLOWERS, Special Judge. Affidavit was made before a justice of the peace, under section 1749 of the Code of 1906, that liquors were being kept for an unlawful purpose in certain rooms and buildings in the city of Laurel. The writ issued and liquors valued at more than \$400 were seized as the property of one Ike Laskey. Four claimants appeared, whose affidavits together covered the liquors seized. The value of that part claimed by each of them was less than \$200. At the hearing the justice of the peace made an order sending the entire matter to the circuit court to be tried. When the cause came up in the circuit court, the claimants moved to dismiss it "because the court is without jurisdiction." The motion was overruled. It was agreed that the issue with this appellant should be tried, and that the other claims should abide the decision in this case. The jury found against the claimants, and the liquors were ordered to be destroyed.

The record presented calls for a construction of that part of section 1750 of the Code which requires the justice of the peace to "send the claim to the circuit court of the county for trial" if the value of the liquors seized is over \$200. The appellant contends that the jurisdiction of the courts is fixed by the value of the liquors claimed by one person. The appellee insists that the determining value is that of the liquors seized. This proceeding is statutory. It can be instituted only before a justice of the peace. The writ is returnable to a justice court. Section 1749. If no claimant appears, an order is

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

made by the justice of the peace, on the return day of the writ, directing the destruction of the liquors. This order is made without regard to the value of the property. Unless a claim is made, the justice of the peace has exclusive and final jurisdiction in all cases of seizure under these statutes. There is no case to send to the circuit court unless an affidavit of ownership is filed. The circuit court can get jurisdiction in no case of the kind unless the property is claimed, and then it deals only with the part claimed, and need not even know how much was seized at the same time with that in controversy. In the case at bar, if no claimant had appeared except this appellant, this justice could have destroyed \$260 worth and tried the issues as to the remaining \$140 worth.

Since the justice court has final jurisdiction unless a claimant's affidavit is filed, that court must of necessity be expected to dispose of that part of the liquor seized for which no claim is made. It follows that, when a claim is sent to the circuit court to be tried, only the property claimed is involved in that trial. The value of the liquors put in controversy by each claim must determine the jurisdiction of the courts; and where there are several claimants there are as many independent cases to be tried. The authors of the statute assumed that the liquors seized would be the same as the liquors claimed, and therefore of the same value; that there would be but one claimant. The plan of the statute is plain. It is a justice court proceeding. That court was expected to deal summarily with all liquors seized and not claimed within the time allowed. It was expected, further, that the justice court would try every claim which involved not more than \$200. It is the evident purpose of the statute to make the value of the liquors involved in each claim determinative of the jurisdiction.

The judgment is reversed, and the cause is remanded, so that the circuit court may make an order sending the case back to the justice court for further proceedings.

MAYES, J., dissents.

O'NEAL v. O'NEAL. (No. 13748)*

(Supreme Court of Mississippi. March 15, 1909.)

HABEAS CORPUS (§ 99*)—CUSTODY OF CHILD—PROBATIONARY PERIOD.

Where neither father nor mother showed superior fitness as a parent, it was proper, after divorce, to intrust a two year old child to the mother for a probationary period of six months, reserving the right at the end of that time to change the custody of the child if the mother failed in her parental duty, though the father was much better able financially to care for it.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 84; Dec. Dig. § 90.*]

Appeal from Chancery Court, Hinds County; G. G. Lyell, Chancellor.

"To be officially reported."

Habeas corpus by Mrs. C. M. O'Neal against D. L. O'Neal for possession of a child. There was a decree awarding temporary custody to petitioner, and respondent appeals. Affirmed and remanded.

Mrs. C. M. O'Neal instituted habeas corpus proceedings against her divorced husband for the possession of their infant daughter, who was at the time of the institution of the proceedings about 18 months old, and who was, according to the contention of the petitioner, wrongfully withheld from her. In the decree granting the divorce nothing was said as to the custody of the children. The mother retained possession of this child until it was taken from her home by the father, after which she instituted this suit. The chancellor awarded temporary custody to the mother, and an appeal was granted from this decree. A superseas was obtained, and the father retained possession of the child. Before the appeal was perfected, or could be acted upon in the Supreme Court, the probationary period fixed by the chancellor for the mother's custody of the infant had expired, and the question presented is whether the court should render a decree on the merits or dismiss the appeal.

May & Sanders, for appellant. Hallam & Cooper and C. W. Girdlestone, for appellee.

FLETCHER, J. On July 27, 1908, the chancellor on a habeas corpus hearing, after full proof taken in open court, rendered a decree awarding to appellee the temporary custody of her infant until the January, 1909, term of the chancery court, at which term she was required to present herself and child to the court, there "to receive and abide by such further orders pertaining to the custody of said child as at that time shall appear to be to the best interests of said child." The court further permitted the appellant, father of the child, to visit it at all reasonable times. It was evidently the view of the chancellor that this child of tender years could safely be intrusted to its mother for a time at least, provided she proved herself able to support it and demonstrated her fitness to rear it. The court, as we think, wisely reserved the right, after the lapse of a six months' probationary period, to change the custody of the child in case the mother failed in her parental duty.

An examination of this voluminous record, abounding in charges and countercharges, criminations and recriminations, convinces us that the chancellor's view was correct. We need not exhaustively review the testimony. Suffice it to say that many of the charges against both husband and wife were

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Motion to modify decree overruled April 12, 1909.

not satisfactorily proven, and we think that neither litigant can be said to have demonstrated his pre-eminently superior fitness as a parent. True, the father is financially far better qualified to give the child the comforts, if not the luxuries, of life; but balanced against this consideration is the powerful influence of a mother's love and tenderness. The child is but two years old, and we think that at such an age the interest of the infant will not suffer in the arms of a mother, though she eats only the bread of comparative poverty.

We commend the action of the chancellor, and affirm his decree so far as may be under the anomalous situation that has arisen. This situation is due to the fact that the chancellor's decree was superseded and the custody of the child retained by the father. The probationary period has now expired, so that the decree cannot now be literally complied with. However, upon the return of the cause to the chancery court, a supplemental decree can be entered in vacation, if the chancellor shall so desire, creating a new period of probation, and directing the mother and child to report to the next or some subsequent term of the court, in accordance with the manifest scheme of the decree appealed from. The custody of the child will, upon the filing of the mandate in the court below, be returned to appellee, there to rest until further directed by the chancery court.

Affirmed and remanded.

WHITFIELD, C. J. I express no opinion on the merits of this case, for the reason that I think the extent of our decree should be to merely dismiss the appeal. The decree of the court below, set out in the opinion in chief, is a merely provisional one, awarding the custody of the child to its mother until a set time, to wit, the January term, 1909, at which time all parties were to be present, and, presumably, the permanent custody awarded. The January term of the chancery court has long since passed. Owing to delay in getting the appeal before us, such lapse of time has intervened between the date of the provisional decree and the hearing of the appeal from that decree that any decree we could now render would be purely nugatory. We can only deal with the case made by the record, with the precise decree appealed from. If we affirm that decree, what do we affirm? Simply that the court was right in awarding the custody until the January term; but that is an idle declaration, since that term has long since passed. Again, should we reverse, we would merely hold that the custody should not have been awarded until the January term; but that would be equally idle for the same reason, to wit, that that term has long since passed. The futility, therefore, of any decree on the present state

of the record arises out of the fact that the chancellor made an award of the custody only until a time now long passed. In 2 Cyc. p. 535, it is said: "Mere lapse of time might create this condition"—that is, a condition where an appellate court could only properly dismiss the appeal. And at page 533 it is said: "Hence it is not within the province of appellate courts to decide abstract or hypothetical questions, disconnected from the granting of actual relief, or from the determination of which no practical result can follow."

My view is that the only proper form of decree we can now enter here is one dismissing the appeal, and leaving the learned chancellor below to make such new award, temporary or permanent, of the custody of the child, as to him may seem wise, especially as this court does not now decide, in the opinion in chief, anything as to the permanent custody of the child. Practically it makes no difference whether the view taken by the majority prevails or the view I take prevails, since, if the appeal be dismissed, the appellee would equally have to surrender the custody of the child to its mother, subject to such further award of that custody as the chancellor may choose to make.

I write only because I think it is important that we should be careful to render, as a matter of practice, the proper decree in form, which is, as I have stated, in my view, merely one dismissing the appeal.

(96 Miss. 353)

HICKS v. MISSISSIPPI LUMBER CO.

(No. 13,493.)

(Supreme Court of Mississippi. Feb. 22, 1909.)

1. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—AFFECTING ONE NOT ENTITLED TO SUCCEED.

Where the jury found that plaintiff consented to defendant's entering upon land and cutting timber thereon, any error in charging, in an action for actual damages and the statutory penalty, that the statutory penalty could not be recovered, was harmless; the finding being conclusive of the right to recover both actual damages and the penalty.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4223; Dec. Dig. § 1068.*]

2. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In trespass for entering upon land and cutting timber, an instruction that plaintiff could not recover if her agent consented to the entry and the cutting was not objectionable, as precluding a recovery of the contract price if there had been a contract, where the evidence showed no contract, as the jury must have understood the instruction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 601; Dec. Dig. § 252.*]

3. TRESPASS (§ 25*)—ACTIONS—DEFENSES—CONSENT.

A verbal license by the owner is a good defense to an action for entering upon land and cutting timber thereon.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 54; Dec. Dig. § 25.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Circuit Court, Clarke County; F. R. Cochran, Judge.

Action by M. L. Hicks against the Mississippi Lumber Company. From a judgment for defendant, plaintiff appeals. Affirmed.

The appellant, who was plaintiff in the court below, in her declaration alleges that she was the owner of certain property described in the declaration, and that the defendant had, without her consent, willfully cut down and removed certain timber from her said land. She sues for the statutory penalty and also actual value of the timber cut. The appellee defends on the ground that it was engaged in the construction of a railroad through the land of plaintiff and that it had received the permission and consent of one Pierce, the agent of the plaintiff, to go upon said land and cut said timber, and that said Pierce had power of attorney from plaintiff to act as her agent, and was so acting at the time he gave defendant permission to enter upon the land in question. On the trial the court instructed the jury that plaintiff was not entitled to recover the statutory penalty, and also instructed the jury that there could be no recovery if Pierce gave defendant verbal permission to enter upon the premises to construct a railroad. The jury found for defendant, and plaintiff appeals.

Ed. D. Pierce, C. R. Gavin, and Stone Deavours, for appellant. Sam H. Terrell and Watkins & Watkins, for appellee.

FLETCHER, J. The controlling question in this case is whether Mr. Pierce gave the appellee permission to enter upon the land and cut such timber as was needed for a right of way, and the jury by the verdict has answered this question in the affirmative. This all-important fact renders harmless the error of the court, if error it was, in charging the jury that there could be no recovery of the statutory penalty for cutting the trees. In this case the right to recover for the actual value of the timber and the right to recover the statutory penalty depend upon exactly the same question; and, this being settled on, one issue must be held conclusive as to the other. In other words, since the jury has said that permission was given, the result would have been the same, had the court submitted to the jury the question of statutory penalty, as well as actual damages. The alleged mistake was, therefore, *damnum absque injuria*.

The third instruction given for defendant is vigorously assailed, because it states that there can be no recovery if Pierce gave the appellee verbal permission to enter and construct a railroad, since this charge would preclude a recovery of the contract price provided there had been a contract. But the significant fact is "that no contract was shown in the testimony, and the jury must

have understood the true purport and apprehended the real meaning of the charge.

We think the power of attorney executed by Mrs. Hicks to Pierce was sufficient to enable her agent to give the permission upon which the appellee relied, and we think such verbal license is a good defense to this action. *Currie v. Railway Company*, 61 Miss. 725.

Affirmed.

McPHERSON v. DAVIS et al. (No. 13,584.)
(Supreme Court of Mississippi. March 8, 1909.)

1. MORTGAGES (§ 364*) — FORECLOSURE BY SALE—PURCHASE BY JUNIOR MORTGAGEE—PAYMENT.

That a junior mortgagee is entitled in equity to the balance remaining in the hands of the trustee after sale under the prior mortgage does not relieve him from paying into the hands of the first trustee the full amount of his bid, should he become the purchaser at the sale under the first mortgage.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 364.*]

2. MORTGAGES (§ 365*)—FORECLOSURE BY SALE—PURCHASE BY JUNIOR MORTGAGEE—PAYMENT.

Where a junior mortgagee bid in the land on sale under the senior mortgage, but refused to pay the full amount of his bid, offering only the amount of the senior mortgage debt, there was no sale, and the trustee rightfully refused to convey.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1089; Dec. Dig. § 365.*]

3. MORTGAGES (§ 370*)—FORECLOSURE BY SALE—IRREGULARITIES—RESALE.

It was agreed that land subject to two mortgages should be sold under both on the same day. The junior mortgagee purchased at the sale under the first mortgage, but refused to pay the amount of his bid, and the property was then sold under the junior mortgage, and the junior mortgagee again purchased, for an inadequate consideration, and the trustee in that mortgage conveyed to him. Later in the day, and after the other bidders had dispersed, the first trustee made another sale to a bidder with notice. *Held*, that the resale was invalid, because the purchaser had notice, and because under the circumstances it could only have been made after readvertisement.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 370.*]

4. MORTGAGES (§ 369*) — FORECLOSURE BY SALE—SETTING ASIDE SALE.

The sale under the second mortgage should be set aside, because the mortgage purchaser knew and caused all the trouble, and the sale was not held as advertised, and the amount bid was inadequate.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 369.*]

5. EQUITY (§ 223*)—PLEADING—PRAYER FOR RELIEF—DEMURRER.

Though the prayer for relief in a bill was uncertain and prolix, a demurrer on that ground should not have been sustained.

[Ed. Note.—For other cases, see *Equity*, Dec. Dig. § 223.*]

6. MORTGAGES (§ 369*) — FORECLOSURE BY SALE—SETTING ASIDE SALE—RELIEF.

On agreement to sell land subject to two mortgages on the same day, the junior mortgagee purchased at the sale under the first mort-

gage, but refused to pay the amount of his bid, and a sale was had under the junior mortgage, at which he purchased for \$10 and received a conveyance. After the bidders dispersed the trustee in the senior mortgage resold and conveyed to a purchaser with notice for \$1,000. Held, on a bill by the junior mortgagee to cancel the sales and for other relief, that the court would cancel the conveyances, set aside the sales, appoint a commissioner to ascertain the amounts due on the mortgages, resell to satisfy the same in order of priority, give the balance to the mortgagor, and if the purchaser under the first mortgage had paid his bid to the trustee, and it had been applied to the satisfaction of that mortgage, he should be subrogated to the rights of the first mortgagee, such purchaser being entitled to an accounting with the trustee, and that the costs in the trial court should be taxed to the junior mortgagee, he having caused the trouble.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 369.*]

Appeal from Chancery Court, Attala County: James F. McCool, Chancellor.

Bill by O. S. McPherson against J. A. Davis and others to set aside mortgage foreclosure sales and for other relief. From a decree dismissing the bill, complainant appeals. Reversed and remanded.

S. L. Dodd and May, Flowers & Whitfield, for appellant. Mayes & Longstreet, for appellees.

MAYES, J. The substantial averments of the bill of complaint filed in this cause, in so far as they affect a decision in the case, are: In 1905, on the 11th day of March, W. J. Johnson executed to the C. C. Kelley Banking Company a deed in trust to cover an indebtedness of about \$500. The trust deed was given on a certain tract of land then owned by Johnson, and J. A. Davis was made the trustee therein. Later in the same year, to wit, on the 26th day of June, Johnson gave a second deed in trust on the same property to the firm of McPherson & McNeill to cover an indebtedness of \$2,500. One T. A. Massey was named as trustee in this second deed in trust. Later McPherson & McNeill transferred this deed in trust to O. S. McPherson, and S. L. Dodd was appointed as substituted trustee therein in place of Massey. Both deeds in trust are admitted to be valid liens on the property in controversy, and having priority in the order named. W. J. Johnson died on the 28th of April, 1906. Neither of the mortgages being paid at maturity, by oral agreement between the holder of the senior and junior mortgages, a sale was advertised by both trustees to take place on the same day, to wit, the 14th day of September, 1906; the holder of the junior mortgage not desiring to pay off the debt of the senior mortgagee and obtain an assignment of same. On the 14th day of September the trustee under the first deed in trust, Mr. Davis, duly appeared for the purpose of making sale under his trust deed in accordance with the advertisement to that effect; but S. L. Dodd, sub-

stituted trustee in the junior mortgage, being then engaged in the trial of a cause in court and unable to be on hand, requested Davis to make sale under both deeds in trust, but Davis declined to act for the trustee in the junior mortgage in any way. In pursuance of the advertisement made by him, and acting for the senior mortgagee, Davis proceeded to sell, and McPherson, the holder of the junior mortgage, bid in the property at \$1,510. After bidding in the property McPherson declined to pay the full amount of his bid to the trustee, but claimed the right to pay over only such sum as would fully satisfy the first mortgage and retain the overplus to be credited on his own mortgage, and tendered only so much of the amount bid as was sufficient to satisfy the first mortgage. Davis declined to allow this to be done, whereupon S. L. Dodd, trustee in the second mortgage, proceeded to make a sale under the second deed in trust, and McPherson again bid in the property, this time for the sum of \$10. In short, McPherson was the only bidder at both sales, and Dodd, trustee in the junior mortgage, executed a deed to McPherson of the property in question under the sale under the second mortgage. After all of the above transactions, and after the refusal of McPherson to pay the full amount of his bid, Davis, trustee in the first mortgage, undertook to make a resale of the property, which he did late in the afternoon, after all bidders had dispersed, and at this third sale one Lowenberg, with full knowledge of all the facts, bid in the property for the sum of \$1,000, and a deed was made to him by Davis of the property in question.

The bill contains many charges of fraud; but we do not deem it necessary to take notice of these charges, since the settlement of this case must turn upon other features. The bill concludes with a prayer for the cancellation of the deed made by Davis to Lowenberg, and that, upon full satisfaction of the first deed in trust by complainant, the deed made to complainant by S. L. Dodd, trustee in the second mortgage, be declared the true title to the property. The bill further prays for an accounting from J. A. Davis, trustee, for all sums of money that have come into his hands over and above a sufficient sum to pay and satisfy the first mortgage. After this prayer the bill then prays that, if complainant is mistaken in the relief prayed for, then that the court appoint a commissioner to take an account of the sum due on both deeds in trust, and the property ordered to be sold for the purpose of paying same in the order of priority. There are other features of the prayer, but it is not necessary to set out same. An answer was filed by defendants, denying all fraud, and at the same time interposing a demurrer to the bill. The chief issues raised by the demurrer are: (1) That there is no equity shown in the bill; (2) that

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the prayer of the bill is vague and uncertain, subject to much repetition, uncertainty, and prolixity. The chancellor sustained the demurrer and dismissed the bill.

As to last ground of demurrer there is much force in the contention; but we do not think that a dismissal of the bill can be justified on this account. It seems to have been the object of complainant not to fail to ask for every kind of relief possible to be obtained, and in this we think he has succeeded. Turning to the main features of the bill, we hardly think it can be doubted that complainant has shown an abundant equity. The trustees have created so many complications that the rights of the various parties can only be worked out through a court of equity. It is undoubtedly true that a junior mortgagee in a valid mortgage is entitled in equity to the balance remaining in the hands of the trustee after sale under a prior mortgage; but because this is true it does not relieve him from paying into the hands of the first trustee the full amount of his bid, should he become the purchaser at the sale under the first mortgage. The junior mortgagee, being purchaser, cannot assume to adjudicate the validity of his own claim, as well as the amount thereof, and compel the trustee making the sale to accept a less amount than the bid for the property. It is the duty of the first trustee to collect the entire amount of the bid, by whomsoever made, and after satisfying his own mortgage to pay over the surplus to the party entitled to same; but the trustee has a right to protect himself from liability by compelling a settlement as between the parties claiming the surplus as to which is entitled to same, and if he assumes to adjudicate this for himself, and pays the amount of the surplus to the wrong party, he would be liable therefor. All the complications that have occurred would have been avoided if the junior mortgagee had paid off the debt of the senior mortgagee. Since McPherson failed to pay the full amount of his bid, there was no sale to him, and Davis rightfully refused to make him a deed to the property.

The facts shown by the bill make a second sale of the property by Davis, whereat Lowenberg became the purchaser, also an invalid sale. In the first place, Lowenberg was notified of all the facts; and, in the second place, it is shown that the sale was made late in the evening, after all bidders had dispersed. Both these things would invalidate Lowenberg's title. The mortgagors had rights to be protected, as well as the mortgagees; and one of those rights was that the sale should take place under such circumstances as gave all bidders a fair chance to be present and bid on the property, so that the best value

might be obtained therefor. The rights of the mortgagors were disregarded by the second sale, as were also the rights of the junior mortgagee. Under the facts of this case a second sale by the first mortgagee could only take place after a readvertisement. It may not be true that in every case there must be a new advertisement in order to have a resale; but it is certain that in every case the resale must be immediate and before disbursement of bidders.

The sale under the junior mortgage by S. L. Dodd cannot be sustained under the facts of this case, and the deed conveyed no title. In the first place McPherson, the purchaser, knew and caused all the trouble. The amount paid was grossly inadequate to the value, and the bill shows that the sale did not take place as advertised. The mortgagors had the right to obtain the greatest possible amount for the property, to the end that as much of the debt of this second mortgage might be absorbed by the surplus as possible. This whole transaction was a nullity, and the various deeds constitute a cloud on the title, which should be canceled by the court.

After a consideration of the whole case made by the bill, we conclude that, after decreeing a cancellation of the deeds in question, the court should appoint a commissioner to ascertain the amounts due on both deeds in trust, and order the property to be sold to satisfy same, applying the proceeds of sale in the order of priority of the mortgages, paying the surplus, if any, to mortgagors. If the facts shall show that Lowenberg has paid in the \$1,000 to the trustee, which sum was bid at the second sale of the property by Davis, whereat he became the purchaser, and that Davis has applied so much thereof as was necessary to the discharge of the first mortgage, then Lowenberg shall be subrogated in all respects to the right of the first mortgagee in the sum realized by the sale of the property as above ordered, to the extent of the claim. All surplus then remaining shall then be first applied to second mortgage debt, and, if then there be a surplus, it shall be paid to the mortgagors. The court should further require an accounting from Davis of all money that may have been received by him from Lowenberg, and should require repayment to Lowenberg of all that may remain in his hands of the purchase money paid by Lowenberg for the property. The whole cost of enforcing the rights of the parties in the chancery court should be taxed against McPherson, complainant, since his own acts caused all the difficulties. This, of course, does not include the cost of this appeal in this court.

Reversed and remanded.

EUREKA LUMBER CO. et al. v. TERRELL.
(No. 13,529.)

(Supreme Court of Mississippi. Feb. 15, 1909.)

TAXATION (§ 737*)—TAX SALES—TIMBER—TITLE OF PURCHASER.

Where it is manifest from the assessment roll that both land and timber are assessed to an unknown owner, though there is no separate assessment of the land and timber, the purchaser at a tax sale of such land takes the title to both.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 737.*]

Appeal from Chancery Court, Covington County; T. A. Wood, Chancellor.

"To be officially reported."

Suit by J. D. Terrell against the Eureka Lumber Company and another to quiet title to land. From a judgment for plaintiff for less than claimed, defendants appeal, and plaintiff files a cross-appeal. Affirmed on defendants' appeal, and reversed on the cross-appeal.

The land in question was sold for taxes and purchased by appellee. The assessment roll shows that it was assessed to an unknown owner. There is no separate assessment of the land and the timber thereon. The Eureka Lumber Company and the East-abutchie Lumber Company are made parties defendant to appellee's bill to quiet title, and answer, claiming that the land in question was owned by one of them and the timber standing thereon by the other, and that the title to the timber did not pass, since the land only was included in the assessment under which it was sold and bought in by appellee. The chancellor entered a decree holding that the title to both the land and timber passed to Terrell, since there was no separate assessment of the land and the timber. His decree further allowed Terrell the sum of \$300 for timber which had been cut by the defendants since the title passed to Terrell. The defendants appeal, and plaintiff prosecutes a cross-appeal on the ground that the chancellor should have awarded a larger amount, since the evidence showed that the timber was worth at least \$1.50 per 1,000, and that considerably more than 300,000 feet had been cut.

R. L. & E. L. Dent, for appellants. McIntosh Bros., for appellee.

WHITFIELD, O. J. The assessment roll introduced in evidence makes it manifest that both the land and timber were assessed to an unknown owner. It follows, from this, that Terrell got title to the land and the timber at the tax sale. Both the timber and the land were manifestly assessed, and both passed at the tax sale to Terrell. On direct appeal, consequently, the decree is affirmed.

(On the cross-appeal we think the chancellor

manifestly erred. The testimony clearly shows that at least 300,000 feet had been cut from the quarter section; and this, at even \$1.50 per 1,000 feet, would amount to more than \$300. The chancellor found, in his decree, that only 200,000 feet of timber had been cut. In this we think the testimony in the record shows he was manifestly mistaken; and for this reason the decree on the cross-appeal is reversed and remanded for a further accounting.

COOPER v. TICKNOR STAVE CO.

(No. 13,588.)

(Supreme Court of Mississippi. March 15, 1909.)

Appeal from Circuit Court, Lauderdale County; R. F. Cochran, Judge.

Action between C. J. Cooper and the Ticknor Stave Company. From the judgment, Cooper appeals. Affirmed.

H. R. Stone, for appellant. Bozeman & Fewell, for appellee.

PER CURIAM. Affirmed.

ARKY v. ETHERIDGE & McBEATH.

(No. 13,462.)

(Supreme Court of Mississippi. March 15, 1909.)

Appeal from Circuit Court, Lauderdale County; R. F. Cochran, Judge.

Action between L. N. Arky and Etheridge & McBeath. From the judgment, Arky appeals. Affirmed.

G. Q. Hall, Hall & Jacobson, for appellant. McWillie & Thompson and W. N. Ethridge, for appellees.

PER CURIAM. Affirmed.

LINDSLEY et al. v. McIVER et al.

(Supreme Court of Florida, Division A. Jan. 14, 1909.)

1. DESCENT AND DISTRIBUTION (§ 93*)—"ADVANCEMENTS."

An "advancement" is an irrevocable gift in present to a parent to a child in anticipation of such child's future share of the parent's estate to the extent of the gift.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 389; Dec. Dig. § 93.*]

For other definitions, see Words and Phrases, vol. 1, pp. 218-222; vol. 8, p. 7567.*]

2. DESCENT AND DISTRIBUTION (§ 93*)—"ADVANCEMENTS."

Whether property given by a parent to a child is an advancement, and, if so, its value at the time the advancement was made, are to be determined from the facts and circumstances of each case.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 389; Dec. Dig. § 93.*]

3. DESCENT AND DISTRIBUTION (§ 109*) — HOTCHPOT.

Hotchpot is the bringing into the estate of an intestate an estimate of the value of ad-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

vancements made by the intestate to his or her children in order that the whole may be divided in accordance with the statute of descents.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 416; Dec. Dig. § 109.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3348, 3349.]

4. DESCENT AND DISTRIBUTION (§ 111*)—ADVANCEMENTS — REFUSAL TO BRING INTO HOTCHPOT.

Where those who have received advancements decline to bring the same into hotchpot when legally required to do so, they may in proper proceedings be excluded from participation in the division of the property of the intestate under the statute of descents.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 418; Dec. Dig. § 111.*]

5. APPEAL AND ERROR (§ 1135*)—REVIEW—AFFIRMANCE—ERROR NOT SHOWN.

Where there is evidence to sustain the findings of fact by a chancellor that advancements were made and the value thereof when made, and such findings are not shown to be incorrect, and there appears to be no error of law in the record, the decree will be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4455; Dec. Dig. § 1135.*]

(Syllabus by the Court.)

Appeal from Circuit Court, Duval County; R. M. Call, Judge.

Bill by Lizzie McIver and others against Eugene A. Lindsley and George A. Lindsley. Decree for complainants, and defendants appeal. Affirmed.

A. H. King, for appellants. Stephens E. Foster and D. H. Dolg, for appellees.

WHITFIELD, C. J. The bill for bringing into hotchpot and for partition in this case is sufficiently stated in *Lindsley v. McIver*, 51 Fla. 463, 40 South. 619. Questions as to whether advancements were made by the common ancestor to some of the parties and the values thereof were presented by the answers. Testimony was taken by an examiner and the court decreed partition in accordance with the facts found from the testimony. On appeal the propriety of the decree is questioned.

An advancement is an irrevocable gift in praesenti by a parent to a child in anticipation of such child's future share of the parent's estate to the extent of the gift.

Whether property given by a parent to a child is an advancement, and, if so, its value at the time the advancement was made, are to be determined from the facts and circumstances of each case.

Hotchpot is the bringing into the estate of an intestate an estimate of the value of advancements made by the intestate to his or her children, in order that the whole may be divided in accordance with the statute of descents. Where those who have received advancements decline to bring the same into hotchpot when legally required to do so, they

may in proper proceedings be excluded from participation in the division of the property of the intestate under the statute of descents.

Section 2302, Gen. St. 1906, provides:

"When any of the children of the person dying intestate shall have received from such intestate, in his lifetime, any real or personal estate by way of advancement, and shall choose to come into the partition of the estate with the other parceners, such advancement, both of real and personal estate, shall be brought into hotchpot with the whole estate, real and personal, descended; and such party bringing into hotchpot such advancement as aforesaid, shall thereupon be entitled to his or their proper proportion of the whole estate so descended, both real and personal; and the value of the estate so advanced as aforesaid shall be estimated at the time of advancement and not at the death of the testator."

These provisions and principles of law were observed by the trial court in making the decree. There is evidence to sustain the findings of fact by the chancellor that advancements were made and the value thereof at the time the advancements were made upon which the decree is based; and as such findings are not shown to be incorrect, and there appears to be no error of law in the record, the decree is affirmed.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

PUTNAM et al. v. MORGAN.

(Supreme Court of Florida, Division A. Feb. 2, 1909.)

1. MORTGAGES (§ 454*)—FORECLOSURE—SUFFICIENCY OF ANSWER.

An answer to the foreclosure of a mortgage, attempting to set up defects in title to other lands bought of the mortgagee, but not included in the mortgage, and failing to show paramount title in another, or eviction, actual or constructive, or fraud, is subject to exceptions.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1320; Dec. Dig. § 454.*]

2. APPEAL AND ERROR (§ 189*)—REVIEW—OBJECTIONS NOT RAISED BELOW.

An affidavit for a continuance of a hearing before an examiner, which does not appear to have been brought to the attention of the examiner or the chancellor, will not avail upon an appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 189.*]

3. APPEAL AND ERROR (§ 667*)—FALSIFYING RECORD.

An appellate court will not falsify a record upon the unsupported statement in counsel's brief.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 667.*]

(Syllabus by the Court.)

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Circuit Court, De Soto County; Joseph B. Wall, Judge.

Bill by C. C. Morgan against E. M. Putnam and Lina Putnam. Decree for plaintiff, and defendants appeal. Affirmed.

H. J. Spence, for appellants. J. H. Hancock, for appellee.

COCKRELL, J. Upon reaching this cause in its regular order, we reversed the final decree herein because the record as then before us showed that the Barnes-Jesup Company, a necessary party, had never been served, though a decree had been entered against that party. Before issuance of our mandate, we granted a rehearing and permitted a correction of the record, showing that party had been served, and doing away with the basis for the order of reversal.

This is a bill to enforce a mortgage lien upon lands lying in De Soto county, given by the Putnams to Morgan. The Putnams filed answers attempting to set up payments for which no credit had been given, and also defects in the title to the lands, for the purchase price of which the mortgage was given, and exceptions to these answers were sustained. It is exceedingly difficult for us to spell out the particular portions of the answers to which the exceptions apply, owing to the difference in the pagings between the originals and the transcript, and for this reason alone we might decline the undertaking.

The specific rulings of the court upon the exceptions to the original answer enable us to see that the paragraphs therein referred to were subject to the objections urged. The attempts to set up pre-existing tax liens upon the mortgaged property are too indefinite as to time and otherwise, and the averments as to outstanding title fall far short of the rules laid down in *Randall v. Bourgardez*, 23 Fla. 234, 2 South. 310, 11 Am. St. Rep. 379, and *Adams v. Fry*, 29 Fla. 318, 10 South. 559. The amended answer was as bad or worse, in that it disclosed that the supposed defects of title were as to other lands sold to the mortgagor, not embraced in the mortgage, and fails to show paramount title in another, or eviction, actual or constructive, or fraud. In spite of the uncertainty in the averments as to outstanding taxes and uncredited payments upon the mortgage indebtedness, the court referred these matters to a master for a report.

The report of the special master shows that due notice of the hearing was given the defendants, and at the time and place named in the notice proceeded to take the testimony, which is incorporated in the record, and supports in every respect the findings of the master and the final decree based thereon.

We fail to find error in any action of the master or court in the reception of the evi-

dence without the presence of the solicitor for the defendants. There is copied into the transcript an affidavit of a physician that the daughter of the solicitor was ill about the time set for the hearing; but this affidavit does not appear to have been called to the attention of master or court, though the report was filed more than 30 days before brought to the chancellor for final action, and within the time allowed by rule for petition for rehearing an appeal is taken, without requesting the court to correct its record if it depart from verity. Upon the unsupported statement in counsel's brief we are not permitted to falsify that record.

The errors assigned cannot be sustained, and the decree is affirmed.

WHITFIELD, C. J., and SHACKLEFORD, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

J. P. WILLIAMS CO. v. PENSACOLA, ST. A. & G. S. S. CO.

(Supreme Court of Florida, Division B. Jan. 26, 1909.)

1. APPEAL AND ERROR (§ 1039*)—RULINGS ON PLEADING—HARMLESS ERROR.

Where a party is not injured by the rulings of a trial court upon pleadings, and is not thereby prevented from submitting his case to the jury under such a state of pleading as gives him the full benefit of his contentions, those rulings do not present a good ground for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4075-4114; Dec. Dig. § 1039.*]

2. CARRIERS (§ 99*)—DELAY IN TRANSPORTATION OF GOODS—ACT OF GOD—PROXIMATE CAUSE.

The effect of delay in the transportation of goods by a carrier, when such delay was caused by a storm or act of God, and the question of proximate cause in that connection, are treated in the cases of *Norris v. Savannah, F. & W. Ry. Co.*, 23 Fla. 182, 1 South. 473, 11 Am. St. Rep. 355, and *Williams v. Atlantic Coast Line R. Co.* (decided at the last [June] term of this court) 48 South. 209.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 425; Dec. Dig. § 99.*]

(Syllabus by the Court.)

Error to Circuit Court, Escambia County; J. Emmet Wolfe, Judge.

Action by the J. P. Williams Company against the Pensacola, St. Andrews & Gulf Steamship Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Blount & Blount & Carter, for plaintiff in error. Avery & Avery, for defendant in error.

HOCKER, J. The plaintiff in error sued the defendant in error in the circuit court of Escambia county in January, 1907. There

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

are seven counts in the declaration. The first two counts are as follows:

"(1) The plaintiff, a corporation under the laws of the state of Georgia, sues the defendant, a corporation under the laws of the state of Florida, because prior to the institution of this suit the defendant was a common carrier, for hire, engaged in the transportation of goods, wares, and merchandise from the city of Pensacola, Fla., to the city of Carrabelle, Fla., and other points in said state; that prior to the institution of this suit the defendant, as such common carrier, received from the plaintiff the plaintiff's goods, to wit, twenty (20) bales of hay of the value of twenty-three and $\frac{81}{100}$ (\$23.81) dollars, and for compensation prepaid to it by plaintiff, undertook to transport the said hay from said city of Pensacola to the said port of Carrabelle, and deliver it to plaintiff's consignee; that the said defendant, notwithstanding its said undertaking, and although a reasonable time has elapsed for so doing, has failed to deliver the said goods at the said port of Carrabelle.

"(2) And also because, prior to the institution of this suit, the defendant, a corporation under the laws of the state of Florida, was engaged as a common carrier, for hire, in the transportation of goods, wares, and merchandise from the city of Pensacola, Fla., to the city of Carrabelle, Fla., and other Florida points; that the said defendant, as such common carrier, received from the plaintiff, at Pensacola, plaintiff's goods, to wit, twenty (20) bales of hay of the value of twenty-three and $\frac{81}{100}$ (\$23.81) dollars, and for compensation prepaid to it by plaintiff, undertook to transport the said hay from the said city of Pensacola to the port of Carrabelle, Fla.; that while the said hay was so in the possession of the said defendant, and after a reasonable time had elapsed for the transportation of said goods, in accordance with the undertaking of the said defendant, a violent storm arose in the port of Pensacola, and the said hay, by reason of the carelessness and negligence of the defendant, was lost and destroyed by said storm."

The third and fourth counts are similar to the first and second, except that in each 81 bales of hay of the value of \$83.02 are charged to have been delivered for transportation to the defendant.

The fifth count alleges the payment to the defendant of \$5.18 as freight on the hay described in the first and second counts. The sixth count alleges the payment to the defendant of \$25.13 freight on the hay described in the third and fourth counts.

The seventh count is for the sum of \$30.31 money had and received by the defendant for the use of the plaintiff. The seventh count embraces the freight sued for in the two previous counts. The damages are laid at \$200.

To the first and third counts of the declaration the defendant on the 4th of March, 1907, pleaded "that the said goods without any fault or negligence on the part of the

defendant were washed away, and lost in, on account of, and by reason of a violent hurricane." To the second and fourth counts the defendant pleaded not guilty. To the fifth, sixth, and seventh counts the defendant filed the following plea: "That defendant admits that it is indebted to the plaintiff in the sum of thirty and $\frac{31}{100}$ (\$30.31), and now brings into court and tenders to the plaintiff the said sum of thirty and $\frac{31}{100}$ dollars, together with ——— dollars (\$——) being the amount of costs accrued and taxable in this case at the date of the filing thereof."

Afterwards, on the 22d of April, 1907, the defendant filed an additional plea to the first and third counts as follows:

"(6) It received the said goods from the plaintiff with the agreement between the plaintiff and defendant that the same were received and were to be carried as per conditions of defendant's bill of lading, and that defendant's bill of lading, among other things, provides, 'No carrier is bound to carry said property by any particular vessel or train, or in time for any particular market, or otherwise than with as reasonable dispatch as its general business will permit,' and that the said goods were destroyed and lost by reason of a storm before the defendant had an opportunity, with as reasonable dispatch as its general business would permit, to forward the said goods.

"(7) It received the said goods from the plaintiff with the agreement between the plaintiff and the defendant that the same were received and were to be carried as per conditions of defendant's bill of lading, and that defendant's bill of lading, among other things, provides, 'No carrier is bound to carry said property by any particular vessel or train, or in time for any particular market, or otherwise than with as reasonable dispatch as its general business will permit,' and that the said goods were destroyed and lost by reason of a storm, before the defendant had an opportunity, with as reasonable dispatch as its general business would permit, to forward the said goods."

On the 16th of March, 1907, the plaintiff filed a replication to the first plea to the first count, and to the third plea of the third count as follows: "That the defendant negligently delayed the shipment of the goods described in said count until they were washed away and lost by the hurricane mentioned in said plea." The plaintiff also filed a joinder of issue on the second and fourth pleas to the second and fourth counts of the declaration.

On the 22d of April, 1907, the defendant demurred to the replication to the first plea to the first count and to the third plea to the third count, on the following grounds:

"(1) That said replications do not present a sufficient reply to said pleas.

"(2) That it appears from the allegations of said replications that defendant is not liable in this action.

"(3) That negligent delay of shipment does not make defendant liable for goods washed away and lost by the act of God."

These demurrers were sustained by the court, and leave given the plaintiff to amend or plead further as it might be advised within 30 days. The plaintiff did not amend or plead further, and joined issue on all the defendant's pleas. A trial was had in May, 1908, which resulted in a verdict and judgment for the plaintiff for \$30.31, with interest from the 10th of September, 1906, to the 4th of March, 1907. The plaintiff sued out a writ of error, and the case is here on the record alone, without a bill of exceptions or charges of the court, for a review of the court's action in sustaining the demurrers to the plaintiff's replications to the first and third pleas to the first and third counts of the declaration.

The defendant in error contends that the action of the court in sustaining the demurrers was of no disadvantage to the plaintiff, inasmuch as under the issues made by the pleas of the defendant the question of the negligence of the defendant was fully submitted to the jury. It will be noticed that in the sixth and seventh pleas of the defendant the defense was set up that the goods "were destroyed and lost by reason of a storm, before the defendant had an opportunity, with as reasonable dispatch as its general business would permit to forward said goods," and, furthermore, that the goods were received and were to be carried as per conditions of defendant's bill of lading, and that defendant's bills of lading among other things provided that no carrier is bound to carry said property by any particular vessel or train, or in time for any particular market, or otherwise, than with as reasonable dispatch as its general business will warrant. Issue was joined on these pleas, and the question of delay in transporting the goods was directly presented by the issues. The burden of proving these pleas was on the defendant, and the plaintiff had the right and privilege of rebutting any proof that may have been offered by the defendant upon the question of delay. The issues made on the second and fourth counts also raised the question of the negligence of the defendant. In the absence of a bill of exceptions, we must presume that these issues were properly tried in the court below notwithstanding the ruling upon the demurrers to the replications. We therefore do not see how the plaintiff was prejudiced by the ruling of the court sustaining these demurrers. It seems to be the settled doctrine of this court that where a party is not injured by the rulings of a trial court upon pleadings, and is not thereby prevented from submitting his case to the jury under such a state of pleadings as gives him the full benefit of his contentions, those rulings do not present a good ground for reversal. Park-

hurst v. Stone, 36 Fla. 456, 18 South. 594; Sammis v. Wightman, 31 Fla. 10, text 32, 12 South. 525; Walter v. Florida Savings Bank & Real Estate Exchange, 20 Fla. 826; Clary v. Isom (decided at last term) 47 South. 919.

In the absence of a bill of exceptions, the presumption is that there was evidence before the jury to support the verdict. Dibble v. Truluck, 11 Fla. 135; Frisbee & Frisbee v. Timanus, 12 Fla. 537.

In conclusion, we deem it proper to call attention to the fact that the question of the effect of delay in the transportation of goods by a carrier, when such delay was caused by a storm or act of God, as considered in the case of Norris v. Savannah, F. & W. Ry. Co., 23 Fla. 182, 1 South. 475, 11 Am. St. Rep. 355, and more particularly in Williams v. Atlantic Coast Line R. Co., 48 South. 209, a case decided at the last (June) term of this court. In this last case the question of proximate cause is thoroughly considered.

The judgment of the court below is affirmed.

TAYLOR and PARKHILL, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

(37 Fla. 94)

LEE v. VAN PELT, Sheriff.

(Supreme Court of Florida, Division B. Jan. 26, 1909.)

1. HABEAS CORPUS (§ 96*)—LEGALITY OF ARREST—WANT OF PROBABLE CAUSE.

Where a party is confined in jail under a commitment issued upon an affidavit charging the offense in positive terms, the commitment and affidavit being in proper form, it is not competent for him in habeas corpus proceedings to question the legality of his arrest by showing simply that the prosecuting witness or witnesses had no personal knowledge of the facts stated in the affidavit, and thereby attempting to show a want of probable cause.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 81; Dec. Dig. § 96.*]

2. HABEAS CORPUS (§ 6*) — GROUNDS FOR AWARDING WRIT.

While the writ of habeas corpus is a writ of right in the enlarged sense of the term, it does not issue of course, but reasonable grounds must exist for awarding it; and, if it appears on the face of the petition that the party in custody would only be remanded, the writ should be denied.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 6; Dec. Dig. § 6.*]

(Syllabus by the Court.)

Error to Circuit Court, Escambia County: J. Emmet Wolfe, Judge.

Application of Oscar Lee for writ of habeas corpus against James C. Van Pelt, sheriff. From a judgment denying the writ, he brings error. Affirmed.

J. P. Stokes, for plaintiff in error. Park M. Trammell, Atty. Gen., for the State.

HOCKER, J. The plaintiff in error filed the following petition with the circuit judge of the First judicial circuit in and for Escambia county:

"Your petitioner, Oscar Lee, of Pensacola, Fla., respectfully shows unto your honor as follows, to wit:

"(1) That he is confined in the county jail of Escambia county, Fla., by the jailer of said county, James C. Van Pelt, sheriff of Escambia county, Fla., and deprived of his liberty, by virtue of a certain commitment issued by the justice of the peace of the Second district of Escambia county, Fla., wherein it is alleged that a certain affidavit of complaint had hitherto been made by one Chas. W. Johnson, wherein this petitioner is charged with having on the 11th day of December, A. D. 1908, committed the crime of petit larceny.

"(2) That said commitment is based upon an affidavit of the said Chas. W. Johnson, a deputy sheriff of Escambia county, Fla., wherein it is alleged that on December 11, A. D. 1908, in the Second justice district of Escambia county, Fla., the petitioner, of the personal property of the Pensacola Grocery Company, a corporation, did feloniously steal, take, and carry away property of the value of \$2. A copy of said affidavit is hereto attached.

"(3) That there was not before the said justice of the peace at the time of the issuance of the said warrant, based upon said affidavit, probable cause to justify the issuance of said warrant. That the said Chas. W. Johnson was absolutely and totally without knowledge of the matters and things set up in said affidavit.

"(4) That the Pensacola Grocery Company conducts its business in the city of Pensacola, Fla., with its officers and agents thereat.

"(5) That this petitioner is not guilty of the offense charged in said affidavit, and that there was and is not probable cause to believe him to be so guilty.

"Your petitioner is advised and believes, and therefore alleges, that his detention and deprivation of his liberty as hereinbefore set forth is without authority of law and in violation of section 22, Declaration of Rights, Constitution of Florida.

"The premises considered, your petitioner prays that a writ of habeas corpus do issue requiring the said James C. Van Pelt, sheriff of Escambia county, Fla., to produce before your honor at some time certain to be therein stated the body of your petitioner, with the time and cause of his caption and detention, and that your petitioner be discharged custody, etc.

"[Signed]

J. P. Stokes,
"Attorney for Petitioner."

"State of Florida, County of Escambia.

"Before the subscriber personally appeared Oscar Lee, who, being by me first duly sworn, says that he is the petitioner in the

foregoing petition; that he has heard read over the said petition and is familiar with the contents thereof; that the allegations therein contained are true, except as to those matters stated upon information and belief, and as to them he says he believes them to be true.

"[Signed]

Oscar Lee.

"Sworn to and subscribed before me this 12th day of December, A. D. 1908.

"[Signed] R. Pope Reese, Notary Public."

Exhibit A:

"Affidavit of Complaint.

"State of Florida, County of Escambia.

"Before the subscriber, a justice of the peace, in and for said county, personally came C. W. Johnson, who, being first duly sworn, says that Oscar Lee did, in said county, on the 11th day of December, A. D. 1908, did of the property of the Pensacola Grocery Company, a corporation, of the value of two dollars, unlawfully take, steal and carry away, to-wit: 1 ham, \$1.00; 5# lard, 75c; 1 can peaches 25c. Against the peace and dignity of the state, contrary to the statutes in such cases made and provided.

"[Signed]

C. W. Johnson.

"Sworn to and subscribed before me this 12th day of December, 1908.

"[Signed] R. L. Nickelsen, J. P. [Seal.]"

The circuit judge denied this petition, and made an order granting petitioner a writ of error. The case is here on writ of error for a review of the action of the circuit judge.

There is no contention here on part of the plaintiff in error that either the commitment or the affidavit is not in proper form. The crime of petit larceny is not charged on "information and belief," but in positive terms. The circuit judge was invited to investigate and determine that Chas. W. Johnson who made the affidavit "was absolutely without knowledge of the matters and things set up in the affidavit," and therefore there was not probable cause for the issuance of the warrant by the justice of the peace. It is not contended that the justice did not have jurisdiction to issue a warrant in the case, if the affidavit as presented to him supplied "probable cause" within the meaning of section 22 of the Bill of Rights (Constitution of 1885). That section is as follows: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches shall not be violated and no warrants issue but upon probable cause supported by oath or affirmation particularly describing the place or places to be searched, and the person or persons, and thing or things to be seized."

In support of his contention the plaintiff in error cites several cases, but none of them seem to be strictly applicable to this case.

In passing on a rule of court prescribing

the duty of Circuit Court commissioners (U. S.) and referring to certain abuses which had developed in practice, Judge Bradley states that an affidavit made solely on information and belief does not furnish probable cause for issuing a warrant. In *Matter of a Rule of Court*, 3 Woods, 502, Fed. Cas. No. 12,126. To the same effect are *Ex parte Dimmig*, 74 Cal. 164, 15 Pac. 619, and *People v. Heffron*, 53 Mich. 527, 19 N. W. 170. In the case of *In Matter of Sarah Way*, 41 Mich. 299, 1 N. W. 1021, the court disapproved of the use of forms of complaints containing no specific facts and general allegations only, and sworn to as a matter of form by a policeman. In the case of *Welch v. Scott*, 27 N. C. 72, it was held that it was the duty of a magistrate before issuing a warrant on a criminal charge, except in cases *super visum* to require evidence on oath, amounting to a direct charge, or creating a strong suspicion of guilt. In only two of the above-cited cases was the question of the sufficiency of the affidavit upon which a warrant of arrest was issued attacked by proceedings in habeas corpus.

The affidavit in the instant case seems to be in substantial compliance with sections 3926, 3927, Gen. St. 1906. It is true that it does not contain the names of the witnesses nor their places of abode; but we do not think the language of section 3927 makes such statements essential to the jurisdiction of the justice. The affidavit is in substantial conformity with the form laid down in the "Manual for Justices of the Peace and County Judges," prepared by Judge Geo. P. Raney under the provisions of chapter 4744, p. 130, Laws 1899. See form 48 in *Criminal Proceedings, Affidavit in Cases of Larceny*.

In the case of *State v. Vasquez*, 49 Fla. 126, 38 South. 830, this court disapproved of the use of the writ of habeas corpus to test the sufficiency of the evidence upon which an information was based. In a number of decisions this court has held that the regularity of judicial proceedings cannot be tested by habeas corpus. *Bronk v. State*, 43 Fla. 461, 31 South. 248, 99 Am. St. Rep. 119. In several states an affidavit based on information and belief is sufficient to show probable cause. *State v. Hobbs*, 39 Me. 212; and see 12 Cyc. 293, 294, and cases cited in notes 61 and 62. It is stated on page 292, 12 Cyc., that the person aggrieved or any person having knowledge of an infraction of the law may make the complaint or affidavit. In the case of *City of Holton v. Bimrod*, 61 Kan. 13, 58 Pac. 558, while the proceeding was not habeas corpus, yet the question presented was very similar to the one in the instant case. It is said in that case: "Jurisdiction of this court is invoked by the appellants for the reason that they were arrested, tried, and convicted in vio-

lation of section 15 of the Bill of Rights, which provides, * * * and no warrant shall issue but on probable cause supported by oath or affirmation," etc. The prosecutions were had under a city ordinance prescribing penalties for the keeping and sale of intoxicating liquors, except for medical, scientific, and mechanical purposes. The original complaints upon which warrants were issued by the police judge for appellant's arrest were sworn to positively, and not on information and belief. The appellants sought to introduce testimony showing that the prosecuting witnesses had no personal knowledge of the facts stated in the complaints for the purpose of proving want of probable cause. Such testimony was not entitled to consideration. The verification being positive in form, the requirements of the Bill of Rights were wholly satisfied. The secret reasons of the prosecuting witnesses for making the complaints could not be inquired into for the purpose of invalidating the warrants. Sufficient probable cause was made to appear to the magistrate for the issuing of the warrants by the charges made and the positive form of verification. A number of Kansas decisions are cited. We have found no case in which an attack has been sustained upon an affidavit charging a specific offense in positive terms, on the ground that the affiant had no knowledge of the facts. While the writ of habeas corpus is a writ of right in the enlarged sense of the term, it does not issue of course, but reasonable grounds must exist for awarding it, and, if it appears on the face of the petition that the party would only be remanded, the writ should be denied. 24 Cyc. 314.

We find no error in the order of the circuit judge denying the writ, and said order is therefore affirmed.

TAYLOR AND PARKHILL, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

LOUISVILLE & N. R. CO. v. YARBROUGH.
(Supreme Court of Florida, Division B. Jan. 14, 1909.)

1. NAVIGABLE WATERS (§ 17*)—FLOATAGE—INJURY TO BRIDGE—NAVIGATION.

The floatage of logs in a navigable river must be carried on with due and reasonable regard to the rights of a bridge owner and others, and to the general usages and customs of navigation and commerce.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. § 50; Dec. Dig. § 17.*]

2. NAVIGABLE WATERS (§ 20*) — RAILROAD BRIDGES.

While a railroad is not required to keep the open space under its drawbridges over a navigable stream free from obstructions to naviga-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion when such obstructions are present without fault on the part of the railroad, yet it is the duty of a railroad company to prevent the accumulation of wreckage or drift around the piers of its bridges which would interfere with navigation.

[Ed. Note.—For other cases, see *Navigable Waters*, Dec. Dig. § 20.*]

3. LOGS AND LOGGING (§ 20*)—FLOTAGE—INJURY TO LOGGER—RAILROAD BRIDGE.

Where a raft has lodged against the fender of the pier of a railroad drawbridge on an important line of railroad about 9 o'clock at night, there being a navigable channel sufficiently wide to easily permit the passage of boats and rafts on either side of the pier, and the raft remained there until 3 o'clock the next evening, and when the agent of the owner of the raft in charge thereof has made no proper efforts to remove the raft, or to notify the owner of its situation, the river being in a rising condition, and the raft being a menace to the bridge, and a nuisance which the railroad company has the right to remove for its own protection and the protection of the lives and property of those who had occasion to use the railroad, and the railroad officials had endeavored without avail to pull the raft away from the pier, and then cut up the raft about 3 o'clock the next day after it lodged, and part of the logs were lost, and a suit was brought by the owner of the logs to recover of the railroad company the value of the lost logs, on the trial of said suit it was erroneous to charge the jury "the duty upon the railroad before it broke up the raft to notify the owner or his agents of their intention so to do, and to allow him a reasonable time and opportunity to take care of the raft after it was turned loose." Such a charge was inappropriate to the facts. In removing the raft it was the duty of the railroad company to use ordinary care to do no unnecessary injury to the owner of the raft, but under the circumstances neither the owner nor his agent had a right to any other notice than they had of the exigencies of the situation.

[Ed. Note.—For other cases, see *Logs and Logging*, Dec. Dig. § 20.*]

4. QUESTION NOT PRESENTED.

No question is presented here of the applicability to the facts of section 3149, Gen. St. 1906.

(Syllabus by the Court.)

Error to Circuit Court, Jackson County;
J. Emmet Wolfe, Judge.

Action by W. G. Yarbrough against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Liddon & Carter, for plaintiff in error.
Price & Lewis, for defendant in error.

HOCKER, J. W. G. Yarbrough sued the Louisville & Nashville Railroad Company in the circuit court of Jackson county. The following is the declaration and bill of particulars; the latter being made a part of the former:

"Now comes the plaintiff in the above-styled and entitled cause, and sues the defendant, Louisville & Nashville Railroad Company, which has been duly summoned herein, and for cause of action says:

"(1) For that whereas heretofore, to wit: on the 27th day of February, 1908, the plain-

tiff was the owner and in possession of a certain raft of pine timber, which, at said time, was rafted and lying in the waters of the Apalachicola river at and near bridge of the defendant company across said river, and, while said raft was so lying at or near such bridge in the river aforesaid, the said defendant, by and through its servants, agents, and employes, entered upon said raft, and over and against the protest of the plaintiff cut the binders of said raft and the rope to said raft attached and turned said timber loose in the waters of said river, whereby a large portion of said logs, to wit, 64 pine logs, of great value, to wit, of the value of five hundred (\$500) dollars, were washed and carried away and were never found or recovered by plaintiff, but were wholly lost; that by reason of the unlawful acts of said defendant in so cutting and turning loose said raft of timber plaintiff was forced to expend large sums of money for labor and salvage for the recovery of a portion of the logs so cut adrift as aforesaid by the said defendant, to wit, the sum of fifty (\$50.00) dollars.

"Wherefore plaintiff sues and alleges his damages by reason of the premises in the sum of seven hundred and fifty (\$750.00) dollars.

"(2) Plaintiff further sues the defendants for that whereas heretofore, to wit, on the 27th day of February, 1908, plaintiff was the owner and in possession of a certain raft of pine timber which was then and there in the waters of the Apalachicola river; that, while floating said raft of timber down said river, the rear block of the said raft became fastened to a certain plank inclosure inclosing and surrounding one of the piers of the bridge belonging to the defendant company; that plaintiff was using all reasonable means in his power to remove said logs and unfasten the same, but that, while plaintiff was so endeavoring to unfasten said logs so that he might proceed to market therewith, the said defendant, without reasonable cause or grounds therefor, came upon said logs by its agents, servants, or employes, and over the protest of plaintiff proceeded to cut the binders which held said logs together, and also the ropes attached to said raft, and turned said timber loose; that by reason of the actions of the defendant, as aforesaid, said raft became broken up and the logs thereof drifted away, and a large part thereof, to wit, 64 pine logs of the average of 400 feet each, and of great value, to wit, the value of \$500, were never found nor recovered by plaintiff, but, on the contrary, were wholly lost; that by reason of the unlawful acts of the defendant in so cutting and turning loose said raft of timber, in addition to the loss of timber aforesaid, plaintiff was forced to expend large sums of money for labor and salvage in find-

ing and recovering a portion of said logs which were formerly a part of said raft, to wit, the sum of \$50.

"Wherefore plaintiff sues and alleges his damages, by reason of the premises, in the sum of \$750.

"Bill of particulars hereto attached, marked 'Exhibit A,' and asked to be taken and considered a part of this declaration.

"And plaintiff claims damages in the sum of seven hundred fifty (\$750.00) dollars.

"Will H. Price, Attorney for the Plaintiff."

Bill of Particulars.

Louisville & Nashville Railroad Company
in Acct. with W. G. Yarbrough.

To 64 pine logs, 400 feet average each \$500 00
To money and labor expended in recovering a portion of the original logs.. 50 00

Total \$550 00

A plea of not guilty was filed, and on the trial the plaintiff recovered a judgment for \$473.30 damages and \$45.60 costs. The judgment is here for review on writ of error.

The facts we deem it necessary to refer to briefly stated are about as follows: Some time in February, 1908, the plaintiff hired a man named Sheppard Royals to drive a raft of logs belonging to the former down the Apalachicola (Chattahoochee) river to Apalachicola, past the point where the railroad bridge of the defendant spans the river. There were 90 logs in the raft, fastened together in sections. In the first section there were 20 pine logs; in the second 21; in the third 18; in the fourth 19; and the balance were put into what the witnesses call a spantail, in the center of the raft. These sections were fastened together by couplings and binders. There was also a rope running from the bow to the stern to aid in holding the raft together. The raft was started down the river about 2 o'clock in the afternoon. The river was high, and between 8 and 10 o'clock at night it reached the bridge of the defendant corporation. The river is a navigable stream, and there is a drawbridge to permit the passage of steamboats. On either side of the pier on which the draw rests there is a navigable channel sufficiently wide to easily permit the passage of boats and rafts. In going under the drawbridge the driver of the raft, Sheppard Royals, so managed that the rear end of the raft struck against the fender which protected the pier, and, forced by the current, doubled around the pier, and thus the raft was hung up against the fender of the bridge, where it remained all night. Early the next morning it was discovered by the agent of the railroad in charge of the bridge. Sheppard Royals had two men to assist him in driving the raft, but after it lodged against the fender of the pier one of them quit work entirely, as it was cold, and the other does not seem to have been efficient. It does not appear that Royals had any apparatus what-

ever to deal with emergencies of this kind, nor does it appear that he made any effort whatever to provide apparatus, or to secure help, except in so far as it was furnished by the railroad company. He says, if he had been given time, he could have dislodged the raft, but he does not say how much time he proposed to take, nor how he proposed to do it. The railroad employes got together eight or ten men, a two-inch rope, a block and tackle, and seemed to have done everything in their power to pull the raft away from the fender. Having pulled in vain and broken the rope about 3 o'clock in the afternoon, Mr. Duncan, the superintendent of bridges, ordered the raft to be broken up so that the fender could be relieved. Mr. Wright, the bridge foreman, testifies that the river was rising, and the raft was causing a jam in the river and endangering the bridge. The fastenings and binders of the raft together with the rope were cut loose, and all the logs floated off except 11. The plaintiff afterwards recovered 25 of those that floated off, and testifies it cost him \$50 to recover these logs. After the couplings and fastenings of the logs were cut, the raft still clung to the fender because of the rope which was tied in both bow and stern and stretched from one to the other. It seems this rope was tight against the fender and held the raft to it. Sheppard Royals says he asked the "gentlemen of the railroad not to cut this line until he could untie it." He does not say how long it would have taken him to do it. He simply asked for time to do it. The railroad men did not give him time, but cut the line. Royals says that, if the line had not been cut as it was, he could have saved part of the raft by tying it to the bank with the rope. There is no plea of contributory negligence on the part of the plaintiff either in the equipment or management of the raft, or in getting it loose from the fender, or in saving the logs after the raft was broken up.

It is held in this state that a raft should be navigated with ordinary care, diligence, and skill so as to prevent injury to the rights of others. It is also settled that the floatage of logs must be with due and reasonable regard to the rights of a bridge owner. *Bucki v. Cone*, 25 Fla. 1, 6 South. 160; *Sullivan v. Jernigan*, 21 Fla. 264. The right to run logs in navigable waters must be exercised with due and reasonable care and diligence, and due regard to the rights of others, and to the general usages and customs of navigation and commerce. 1 *Farnham on Waters and Water Courses*, pp. 158, 159.

It was decided in the case of *Pensacola & A. R. Co. v. Hyer*, 32 Fla. 539, 14 South. 381, 22 L. R. A. 368, that a railroad is not required to keep the open space under its drawbridges over a navigable stream free from obstructions to navigation when such obstructions are present without fault on the part

of the railroad. We are of opinion, however, that it is the duty of a railroad company to prevent the accumulation of wreckage or drift around the piers of its bridges which would interfere with navigation. *St. Louis, I. M. & S. Ry. v. Meese*, 44 Ark. 414.

Something more than an ordinary obstruction of navigation is involved in this case. The raft being lodged against the fender of the pier of the drawbridge, the water being high, and likely to cause a jam of drift, thereby endangering the bridge itself, was a menace to the defendant's property, and a nuisance, which the defendant had the right to remove for its own protection and the protection of the lives and property of those who had occasion to use the railroad. In removing the raft it was its duty to use ordinary care to do no unnecessary injury to the owner of the raft. *Mark v. Hudson River Bridge Co.*, 103 N. Y. 23, 8 N. E. 243; *Beach v. Schoff*, 28 Pa. 195, 70 Am. Dec. 122; 1 *Wood on Nuisances* (3d Ed.) §§ 17, 71; *Joyce on Law of Nuisances*, §§ 1, 2, 368; *Graves v. Shattuck*, 35 N. H. 257, 69 Am. Dec. 536, 545, and note.

One of the assignments of error is based on the following part of the judge's charge to the jury: "A duty would also devolve upon the railroad company owning the bridge in the first instance to wait a reasonable time for the owner of the raft or his agents, to remove the raft, and, after the time expired, to use—that is, the bridge owner—to use all proper and necessary efforts to remove the raft without breaking it up or cutting it. If it proved impossible to remove it from the position it occupied without breaking it up, or cutting it, then the railroad company or owner of the bridge would have the right to cut the raft in such manner as to injure it as little as possible under the circumstances, and to expose it to as little risk or loss as possible under the circumstances, and there would also be a duty upon the bridge owner before they so broke up or cut the raft to notify the owner or agents of their intention so to do, and to allow him reasonable time and opportunity to prepare to take care of the raft after it was cut loose, and it would be the corresponding duty of the raft owner, through his agents, to take prompt and effective measures to protect the property after it was turned loose by the owner of the bridge, and there would be no special duty on the owner of the bridge to look out for the property after it was cut loose, provided the manner and time of cutting loose the raft and the means by which it was effected were such as an ordinarily prudent and cautious person would have used under the circumstances."

If this had been a case simply of an obstruction of a navigable stream, the charge would perhaps have been unobjectionable. But we are of opinion that the real question was otherwise. Not only the railroad company, but the public, were interested that no harm or damage should be done to the bridge.

This bridge is a part of the line of one of the most important railroads in the state connecting the eastern and western portions thereof. Many passenger and freight trains are daily passing over it. The river was high and rising. A serious injury to the bridge might have caused, not only loss of property and inconvenience to the public, but the loss of life. We think, therefore, that portion of the charge imposing "the duty upon the railroad before it broke up the raft to notify the owner or his agents of their intention so to do, and to allow him a reasonable time and opportunity to take care of the raft after it was turned loose," was inappropriate to the facts of this case. The reasonable time for preparation for caring for the raft might have involved many hours, if not days, of delay, and in the meantime brought disaster upon the bridge. 1 *Farnham on Waters and Water Rights*, p. 441; *Joyce, Law of Nuisances*, § 374.

The raft struck the fender of the bridge about 9 o'clock at night, and became wrapped around the fender, where it seems to have been held tight by the current. It was not cut loose until after 3 o'clock in the afternoon of the next day. The plaintiff's agent should have recognized the gravity of the situation, and have exerted himself to procure aid and facilities for relieving it. He seems to have practically done nothing. He had the whole morning, and until 3 o'clock in the afternoon, to notify his principal, and secure aid and facilities. He offers no explanation why he did not adopt and carry out with energy some plan which could have made it unnecessary for the defendant's agents to cut up the raft. Under the circumstances, we do not see why the owner or his agent should have had any other notice than they had of the exigencies of the situation. 1 *Am. & Eng. Ency. Law* (2d Ed.) 79-86, inclusive.

There are several assignments based on rulings of the court in refusing to allow the defendant to propound questions to witnesses in regard to complaints made by the captain of the steamer Callahan of the obstruction to navigation by the lodgment of the raft against the fender of the pier. We do not think the court erred. The steamer actually passed up the river, and the testimony, if elicited, would have been hearsay. Moreover, it was actually proven by one of the witnesses that the officers of the boat complained of the obstruction.

We deem it proper to remark, in order to prevent any misunderstanding, that no question is presented to us by the pleadings or argument of the applicability to the facts of this case of section 3149 of the General Statutes of 1906. If that section does not apply, then the doctrine of contributory negligence on the part of the plaintiff, as announced in the case of *Louisville & Nashville R. Co. v. Yniestra*, 21 Fla. 700, and other decisions of this court, might be applicable. If the section does apply, the facts of the case as shown

in the testimony would at the least in our opinion require a proper apportionment of the damages between the plaintiff and defendant.

The judgment of the circuit court is reversed.

TAYLOR and PARKHILL, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

(57 Fla. 541)

STATE ex rel. PURVIS et al. v. PALMER,
Circuit Judge.

(Supreme Court of Florida. Feb. 3, 1909.)

1. MANDAMUS (§ 57*)—ACTS OR COURTS—REVIEW—SUPERSEDEAS BOND.

The statutory authority and discretion of the circuit judge to determine the amount and condition of a supersedeas bond, where the decree is in whole or in part, other than a money decree, will not be controlled by mandamus.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 68; Dec. Dig. § 57.*]

2. APPEAL AND ERROR (§ 465*)—SUPERSEDEAS BOND—"MONEY DECREE."

An ordinary real estate mortgage foreclosure proceeding is in part at least other than a money decree, within the meaning of the statutes regulating supersedeas bonds.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2235; Dec. Dig. § 465.*]

For other definitions, see *Words and Phrases*, vol. 5, p. 4566.]

(Syllabus by the Court.)

In Banc. Application by the State, on the relation of D. W. Purvis and others, for writ of mandamus to B. H. Palmer, circuit judge. Petition denied.

A. J. Henry, for relators.

WHITFIELD, C. J. This is an application for a writ of mandamus to require a circuit judge to fix the amount and condition of a supersedeas bond in an appeal from a final decree in a real estate mortgage foreclosure proceeding. The right and procedure to secure a supersedeas of a judgment or decree are purely statutory, and the statutes must be pursued.

Sections 1701 and 1909 of the General Statutes of 1906 provide that every writ of error shall operate as a supersedeas if sued out during the session of the court at which the judgment was rendered, or within 30 days thereafter, if within said time the plaintiff in error shall give the required bond to be approved by the judge or clerk of the court below, etc., and that, if the judgment be a money judgment against the plaintiff in error, the bond shall be "in a sum sufficient to cover the amount for which the judgment was given together with costs, conditioned to pay the amount of the judgment with interest and costs, if the same shall be affirmed by the appellate court, but

if the judgment is in whole or in part other than a money judgment, the amount and condition of the bond shall be determined by the court below. No writ of error except as above shall operate as a supersedeas unless by special order of the appellate court or some judge thereof, made upon inspecting a copy of the record, and upon the plaintiff in error paying the costs and filing the bond required in the preceding paragraph." "No appeal from a final decree shall operate as a supersedeas unless the said appeal shall be taken within the time fixed by law for taking a writ of error operating as of course as a supersedeas or if not taken within that time, unless one of the judges of the Supreme Court, by order, direct the said appeal to operate as a supersedeas. In any event bond and security shall be given as provided in cases of writs of error."

Under these statutes the amount and condition of the bond to be given to supersede a purely money judgment or decree are fixed by the statute. In an ordinary real estate mortgage foreclosure proceeding, as in this case, the final decree is at least in part other than a money decree; and under the statute the amount and condition of the bond must be determined by the trial court, whether the appeal be entered within 30 days after the decree is rendered or upon a supersedeas order made by the Supreme Court or a justice thereof upon an inspection of a copy of the record based upon an appeal entered after 30 days from the rendering of the decree.

The petition alleges that the trial judge "erroneously conceived and held the said decree to be solely and only a money judgment in the meaning of the statute in such cases made and provided, and insisted upon such an amount of such bond as would secure the payment of the said decree as being in whole a money judgment, and named the amount thereof as being the sum of \$1,500 for the purpose aforesaid," and that the action of the judge "is contrary to law and oppressive to your petitioners."

From these allegations it appears affirmatively that the judge has fixed the amount of the bond, and inferentially that he has also determined the condition of the bond. The statutory authority and discretion of the trial judge in fixing the amount and condition of the bond will not be controlled by mandamus. When the trial court makes an erroneous order it may be reviewed by the appellate court by proper motion. See *Wheeler & Wilson Mfg. Co. v. Johns*, 37 Fla. 262, 20 South. 236. The decree is for \$1,252.82, and in fixing the amount of the bond at \$1,500 there is no apparent abuse of statutory authority. The mere statement that the bond required is oppressive is not sufficient to show abuse of authority, in the absence of allegations of fact to sustain the

statement. See *Hathcock v. Soci  s Anonyme, La Floridienne, J. Buttgenbach & Co. et al.*, 54 Fla. 522, 45 South. 22.

An allegation that the trial judge erroneously conceives the decree to be solely and only a money judgment is immaterial if the amount and condition of the bond have been determined by the judge.

The petition for mandamus is denied. All concur.

(57 Fla. 533)

STATE ex rel. ELLIS, Atty. Gen., v. TAMPA WATERWORKS CO.

(Supreme Court of Florida. Nov. 17, 1908. On Rehearing, March 5, 1909.)

1. STATES (§ 104*)—CONTRACTS FOR PUBLIC SERVICES—GOVERNMENTAL REGULATION.

The terms of a contract for the rendering of a service of a public nature are subject to the right of the governmental authority under existing laws to regulate the rendering of the service and the charges made therefor.

[Ed. Note.—For other cases, see *States*, Dec. Dig. § 104.*]

2. MUNICIPAL CORPORATIONS (§ 111*)—ORDINANCES—EFFECT OF PARTIAL INVALIDITY.

Where the illegal provisions of an ordinance may be eliminated without affecting the usefulness of the ordinance for the purpose designed and without destroying a franchise granted by the ordinance for a useful public purpose, the ordinance should be given its proper effect.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 248-251; Dec. Dig. § 111.*]

3. MUNICIPAL CORPORATIONS (§ 120*)—ORDINANCES—PRESUMPTION OF VALIDITY.

Ordinances should be construed with reference to existing controlling law, and it must be assumed that a valid ordinance was intended, where there is nothing to indicate a distinct purpose to violate the law in adopting the ordinance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 275; Dec. Dig. § 120.*]

4. QUO WARRANTO (§ 51*)—REPLICATION—GENERAL DENIAL OF PERFORMANCE OF CONDITIONS PRECEDENT.

A replication that merely denies the averments in the return to a writ of quo warranto, that the respondent has substantially complied with the terms of the ordinance under which a franchise is used, is a violation of the statute forbidding a general denial of general averments of performance of conditions precedent.

[Ed. Note.—For other cases, see *Quo Warranto*, Dec. Dig. § 51.*]

5. WATERS AND WATER COURSES (§ 182*)—PUBLIC WATER SUPPLY—REGULATION—CONSTITUTIONAL PROVISIONS.

The provision of the state Constitution that "the Legislature is invested with full power to pass laws for the correction of abuses and to prevent unjust discrimination and excessive charges by persons or corporations engaged as common carriers in transporting persons and property, or performing other service of a public nature; and shall provide for enforcing such laws by adequate penalties or forfeitures," is applicable to waterworks companies engaged in furnishing water to a city and its inhabitants.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 182.*]

6. MANDAMUS (§ 133*)—ACTS OF CORPORATIONS—PUBLIC SERVICE—REGULATION.

It is the duty of a company engaged in rendering service of a public nature to a city and its inhabitants to comply with all the reasonable requirements of the city in its lawful supervision and regulation of the service, and prompt compliance with such reasonable requirements may be enforced by mandamus.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 268; Dec. Dig. § 133.*]

7. MANDAMUS (§ 133*)—PUBLIC UTILITY CORPORATIONS—REGULATION.

The policy of the law is to require by mandatory process the performance by public utility corporations of their duties to the public, and in proper cases to withdraw by judicial procedure franchises that are being abused.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 268; Dec. Dig. § 133.*]

8. CORPORATIONS (§ 597*)—PUBLIC UTILITY CORPORATIONS—FORFEITURE OF FRANCHISES.

Franchises granted for useful public purposes will not in general be withdrawn by forfeiture, except for abuses of such a nature as injuriously affect the public welfare or as violate the law or contract obligations contained in the grant.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 2395; Dec. Dig. § 597.*]

9. COURTS (§ 206*)—SUPREME COURT—ORIGINAL JURISDICTION.

Where the statutes afford adequate proceedings for determining whether franchises have been abused and should be forfeited, the Supreme Court will not ordinarily determine such questions, where the initial right to use the franchise appears, and no good cause is shown for trying complicated issues of fact in the Supreme Court rather than in proceedings specially provided for in local courts with jury trials.

[Ed. Note.—For other cases, see *Courts*, Dec. Dig. § 206.*]

(Syllabus by the Court.)

In Banc. Original quo warranto proceedings by the State, on relation of W. H. Ellis, Attorney General, against the Tampa Waterworks Company. Relator filed several replications to the return of respondent, and respondent demurred thereto. Demurrers overruled.

Glen & Himes, for relator. Sparkman & Carter and P. O. Knight, for respondent.

WHITFIELD, J. At the instance of the Attorney General, a writ of quo warranto issued from this court commanding the Tampa Waterworks Company to show by what warrant or authority it has used, and does use, the privilege and franchise of using the public streets of the city of Tampa by maintaining and operating a system of pipes, mains, and hydrants therein for the distribution and supply of water to the city of Tampa and the inhabitants thereof for public and private uses. To this writ the respondent made return, and a demurrer thereto was overruled with leave to plead. State ex rel. Attorney General v. Tampa Waterworks Co., 56 Fla. —, 47 South. 358.

The relator has filed several replications

to the return of the respondents, and the replications have been demurred to.

The first replication alleges that the ordinances of the city of Tampa under which the franchise is exercised by the respondent are void because no notice of intention to levy a tax for the purpose specified in the ordinance was ever published, as required by chapter 3605, p. 45, Acts 1885, and that a subsequent ordinance of the city of Tampa, whereby a modification of previous ordinances was undertaken, is void because the ordinance was never submitted to a vote of the freeholders of the city, as provided by chapter 4166, p. 94, Acts 1893.

As stated in the former opinion, the expressed purpose of the ordinance contract under which the franchise is being exercised is to secure to the city of Tampa and its inhabitants an abundant supply of good water for all purposes. Notwithstanding the terms of the contract, the service and the rate of charge are subject to regulation by law under the Constitution. If the provision contained in the ordinance "that a sufficient tax shall be levied and collected annually," or other provision for tax levies or appropriations, be void because notice of intention to levy a tax not published, and if the attempted amendment of the contract be void because it was not submitted to a vote of the freeholders of the city, the provisions as to levying a tax and the amendment may be eliminated without affecting the usefulness of the ordinance for the purpose designed and without destroying the franchise granted to use the streets for a waterworks system to furnish the desired adequate supply of good water. See *State ex rel. Lamar v. Dillon*, 42 Fla. 95, 28 South. 781; *City of Tampa v. Salomonson*, 35 Fla. 446, 17 South. 581. The contract as made by the ordinance is subject to the regulation authorized by law. It must be assumed that a valid ordinance was intended. The ordinance must be construed with reference to existing controlling law. There is nothing to indicate a distinct purpose to violate the law in adopting the ordinance.

The second replication in effect denies the averments in the return that the respondent has substantially complied with the terms of the ordinance under which the franchise is used. This replication is a violation of the statute forbidding a general denial of general averments of performance of conditions precedent. Section 1436, Gen. St. 1906.

The third and fourth replications specifically allege many important particulars wherein the respondent has failed to comply with the requirements of the ordinance under which the respondent enjoys the franchise.

In additional replications the relator alleges particulars wherein the respondent has not complied with the requirements of

the city as to laying water mains and furnishing fire protection, and as to making reports of service rendered the individual patrons of the respondent under the franchise rights given by the city to respondent.

It is the duty of the respondent to comply with all the reasonable requirements of the city in its supervision and regulation of the service rendered by the respondent to the public, and prompt compliance with such reasonable requirements may be enforced by mandamus. Besides this, the terms of the ordinance contract provide that, upon default of the respondent in any of the conditions of the ordinance, it shall become null and void. This forfeiture may be enforced by proper judicial proceedings provided for that purpose. Section 30 of article 16 of the Constitution expressly provides that: "The Legislature is invested with full power to pass laws for the correction of abuses and to prevent unjust discrimination and excessive charges by persons or corporations engaged as common carriers in transporting persons and property, or performing other service of a public nature; and shall provide for enforcing such laws by adequate penalties or forfeitures." This provision is applicable to waterworks companies engaged in rendering the public service here shown. *City of Tampa v. Tampa Waterworks Co.*, 45 Fla. 600, 34 South. 631; *Id.*, 199 U. S. 241, 28 Sup. Ct. 23, 50 L. Ed. 170; 6 Current Law, 1872. The statute authorizes the city to regulate the rates for furnishing water to the public. See chapter 5070, p. 240, Acts 1901 (section 1099, Gen. St. 1906).

Apparently in obedience to the above constitutional mandate, the Legislature has made specific provision for proceedings in the circuit court by jury trials to determine questions as to the forfeiture of franchises received from municipalities for the use of its streets. Section 1024 et seq., Gen. St. 1906. This remedy may be only cumulative, but it appears to be adequate and expeditious. It is expressly provided for by the Constitution, and it contemplates a trial where facts can be conveniently determined in the first instance in the locality where the franchise is being exercised. The Legislature gives the right to a jury trial.

While the Constitution authorizes this court to issue writs of quo warranto, it also specially requires the Legislature to provide for enforcing laws relative to the regulation of public service corporations, and this the Legislature has in some measure at least done in the statute above referred to. The circuit court also has jurisdiction in quo warranto proceedings.

The writ in this case was issued at the instance of the Attorney General to test the existence of the franchise right, and that has been determined in favor of the respondent. The replication presents grave questions of serious dereliction of duty by

the respondent that, if proven, may warrant a forfeiture of the franchise right, and the power of this court to determine those questions is not denied or even doubted; but as the Legislature, pursuant to express command of the Constitution, has provided an adequate remedy for acts of forfeiture in such cases, it is proper that the tribunal affording such adequate remedy should be resorted to in the first instance, at least in the absence of a showing of special reasons why in this proceeding intricate questions of fact should be determined here with no procedure provided for that purpose. The policy of the law is to require by mandatory process the performance by public utility corporations of their duties to the public, and in proper cases to withdraw by judicial procedure franchises that are being abused; but franchises granted for useful public purposes will not in general be withdrawn by forfeiture except for abuses of such a nature as injuriously affect the public welfare or as violate the law or contract obligations contained in the grant.

The abuses alleged in the replications here are admitted by the demurrer for the purpose of testing the sufficiency of the pleading. The acts and omissions alleged appear to be within reasonable requirements for proper regulation and supervision as authorized by the statute, to the end that a service adequate to meet the reasonable demands of the public may be rendered without unjust discrimination and for only a reasonable compensation as contemplated by law. It is, therefore, the duty of the respondent to comply with the requirements, and such duty may be enforced by appropriate judicial process. In case of gross or wilful or persistent refusals or failures to comply with the lawful requirements of the city, the statute apparently affords adequate remedy in cases covered by it for withdrawing the franchise right granted by the city.

The demurrers to the replications, except the first and second, are overruled at the cost of the respondent; but, in view of the issues of fact tendered, the expense and inconvenience and lack of prescribed procedure for trying the issues here, and the apparent adequate and expeditious remedy afforded by the statute in the trial of such issues of fact in the circuit court in the locality where the franchise is being exercised, the Attorney General may desire to ask for a discontinuance of this proceeding with leave to the city of Tampa to take appropriate action to enforce its rights in the premises in the circuit court.

TAYLOR, COCKRELL, HOCKER, and PARKHILL, JJ., concur.

SHACKLEFORD, C. J., disqualified.

On Rehearing.

PER CURIAM. Upon application for rehearing the opinion heretofore filed upon the demurrer to the replications is modified, so as to state that the failure of the respondent to comply with the ordinance, requiring reports of service rendered to individual patrons of the respondent under the franchise rights given by the city to respondent as alleged in the second additional replication, does not appear to be a ground of forfeiture. This duty of the respondent may be enforced by mandamus. As a result of this the demurrers to the first, second, and second additional replications are sustained, and the demurrers to the other replications are overruled. A rehearing is denied.

This disposition of the cause leaves the remaining issues tendered purely issues of fact in the trial of which the parties have in the circuit court the right to a trial by jury, and inasmuch as such issues can be far more conveniently, economically, and effectually tried and disposed of in the circuit court, the said cause is hereby dismissed from this court, but without prejudice to the right of the relator or of the municipality of the city of Tampa to proceed against the respondent in the circuit court for Hillsborough county for relief by mandamus or by quo warranto, or under the provisions of the statute in such cases provided, as may be advised, to enforce alleged duties of the respondent or to test the question of forfeiture of its franchise by non-user or misuser; the state of Florida to pay the cost of this proceeding here.

Orders to be entered accordingly.

WHITFIELD, C. J., and TAYLOR, HOCKER, JJ., and JOHN W. MALONE, Circuit Judge (sitting in the place of SCHACKLEFORD, J., disqualified), concur.

COCKRELL, J., concurs except as to the dismissal.

PARKHILL, J., absent on account of illness.

(57 Fla. 347)

BOARD OF PUBLIC INSTRUCTION FOR SANTA ROSA COUNTY v. CROOM, State Comptroller, et al.

(Supreme Court of Florida, Division B. Dec. 19, 1908. On Rehearing, Feb. 3, 1909.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 19*)— STATE SCHOOL FUNDS—APPORTIONMENT AND DISTRIBUTION—CONSTITUTIONAL LAW.

Section 7, art. 12, of the Constitution of Florida of 1885, as amended, provides for the apportionment and distribution of the state school fund therein authorized to be made by law, and contemplates only an apportionment and distribution upon the basis of counties as units of such apportionment and distribution,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and not upon the basis of particular schools as such units; and inasmuch as section 1, c. 5381, p. 32, Laws 1905, undertakes to make certain schools in the state with an average attendance of 80 per cent. the beneficiaries of the act, the said act of the Legislature is unconstitutional.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 34, 37; Dec. Dig. § 19.*]

2. SUPPORT OF PUBLIC SCHOOLS.

Quære, whether under the Constitution the Legislature has authority to distribute the general revenue fund, or any part of it, for the support and maintenance of public free schools?

(Syllabus by the Court.)

Appeal from Circuit Court, Leon County; John W. Malone, Judge.

Bill by the Board of Public Instruction for the County of Santa Rosa against A. C. Croom, State Comptroller, and W. V. Knott, State Treasurer. Decree for defendants, and plaintiff appeals. Affirmed.

Maxwell & Wilson and W. B. Farley, for appellant. W. H. Ellis, Atty. Gen., and D. A. Simmons, for appellees.

HOCKER, J. On the 18th of October, 1908, the appellant, the board of public instruction for Santa Rosa county, filed an amended bill against A. C. Croom, Comptroller, and W. V. Knott, Treasurer, of the state of Florida, in the circuit court of Leon county, seeking to enjoin them from paying out money from the general revenue fund of the state in satisfaction of certain claims against the state, claiming that the public schools of Santa Rosa and other counties were entitled to priority of payment from said fund in aid of public schools, which had become entitled to such aid by compliance with the terms of chapter 5381, p. 32, of the Laws 1905. The bill names specifically the schools in Santa Rosa county, which had complied with the terms of the act and were entitled to such aid, and alleged that the Comptroller had refused to draw warrants on the Treasurer for the sums of money which were due. On a hearing the judge of the circuit court denied the temporary injunction, and an appeal to this court was taken from this order.

Appellees attack the constitutionality of chapter 5381, p. 32, Laws 1905, upon which this suit is based. Sections 1 and 2 of said act are as follows:

"Section 1. That every public school in this state, maintaining an average daily attendance of eighty (80) per centum of the total number of pupils enrolled in such school, during the regular term as now provided for by law, shall receive aid from the state in a sum sufficient in each case to maintain such school for two (2) months in addition to the regular term of such school: Provided, that no school now or hereafter receiving aid from the state under the provisions of chapter 5206 of the Laws of Flor-

ida shall be entitled to the benefits of this act.

"Sec. 2. In order to receive aid as provided in section one (1) of this act the county superintendent of public instruction of the county in which the school or schools entitled to receive same may be located shall within ten (10) days of the expiration of the regular term of such school file with the State Board of Education a certified copy of the reports of such school showing the average daily attendance, upon such form as may be prescribed by the State Board of Education. Upon receipt of such report the State Board of Education, if satisfied that all conditions have been fully complied with, shall make requisition upon the State Comptroller for the amount due such school under the provisions of this act."

Article 12 of the Constitution of 1885 deals with the subject of education. We quote the following sections:

"Section 1. The Legislature shall provide for a uniform system of public free schools, and shall provide for the liberal maintenance of the same."

"Sec. 4. The state school fund, the interest of which shall be exclusively applied to the support and maintenance of public free schools, shall be derived from the following sources:

"The proceeds of all lands that have been or may hereafter be granted to the state by the United States for public school purposes.

"Donations to the state when the purpose is not specified.

"Appropriations by the state.

"The proceeds of escheated property or forfeitures.

"Twenty-five per cent. of the sales of public lands which are now or may hereafter be owned by the state.

"Sec. 5. The principal of the state school fund shall remain sacred and inviolate.

"Sec. 6. A special tax of one mill on the dollar of all taxable property in the state, in addition to the other means provided, shall be levied and apportioned annually for the support and maintenance of public free schools.

"Sec. 7. Provision shall be made by law for the apportionment and distribution of the interest on the state school fund, and all other means provided, including the special tax, for the support and maintenance of public free schools among the several counties of the state in proportion to the average attendance upon schools in the said counties respectively.

"Sec. 8. Each county shall be required to assess and collect annually for the support of public free schools herein, a tax of not less than three (3) mills, nor more than seven (7) mills on the dollar, of all taxable property in the same.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"Sec. 9. The county school fund shall consist, in addition to the tax provided for in section 8 of this article, of the proportion of the interest of the state school fund and of the one mill state tax apportioned to the county; the net proceeds of all fines collected under the penal laws of the state within the county; all capitation taxes collected within the county; and shall be disbursed by the county board of public instruction solely for the maintenance and support of public free schools."

Section 10 provides for the division of the counties into school districts, etc., and for levying and collecting a district school tax of three mills on the dollar; and section 11 provides that an incorporated town or city may constitute a school district, and how the money raised by section 11 may be expended.

We are of opinion that under section 7 of article 12 the apportionment and distribution of the state school fund therein authorized to be made by law contemplates only an apportionment and distribution upon the basis of counties as units of such apportionment and distribution, and not upon the basis of particular schools as such units. This section expressly says that such fund, which includes all the sources of that fund, shall be apportioned and distributed for the support and maintenance of public free schools among the several counties of the state in proportion to the average attendance upon schools in the said counties, respectively. The first section of the act of 1905 (chapter 5381, p. 32) plainly ignores the provision of the Constitution, and undertakes to make certain schools in the state with an average daily attendance of 80 per cent. the beneficiaries of the act, whereas the Constitution contemplates that the counties, respectively, shall be the recipients of the fund. For this reason we think that chapter 5381, p. 32, of the Laws of 1905, is clearly unconstitutional.

We deem it proper also to say, without meaning to express a positive opinion, we have serious doubt whether under the Constitution the Legislature has authority to distribute the general revenue fund, or any part of it, for the support and maintenance of public free schools.

The order is affirmed.

TAYLOR and PARKHILL, JJ., concur.

SHACKLEFORD, C. J., and COCKRELL and WHITEFIELD, JJ., concur in the opinion.

On Rehearing.

PER CURIAM. A rehearing was granted in this case, and upon a full consideration of

the subject the opinion heretofore filed is confirmed. The order appealed from is affirmed. All concur.

FERRY PASS INSPECTORS' & SHIPPERS' ASS'N v. WHITE'S RIVER INSPECTORS' & SHIPPERS' ASS'N.

(Supreme Court of Florida, Division A. Feb. 2, 1909.)

1. NAVIGABLE WATERS (§ 36*) — OWNERSHIP OF LANDS UNDER WATER.

The state by virtue of its sovereignty holds in trust for all the inhabitants of the state the title to the lands under the navigable waters within the state, including the shore or space between high and low water marks.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 184; Dec. Dig. § 36.*]

2. NAVIGABLE WATERS (§ 39*) — RIPARIAN RIGHTS.

The common-law rights of riparian owners with reference to navigable waters are incident to the ownership of the uplands that extend to high-water mark.

[Ed. Note.—For other cases, see Navigable Waters, Dec. Dig. § 39.*]

3. NAVIGABLE WATERS (§ 39*) — RIPARIAN RIGHTS.

Riparian owners have no exclusive right to navigation in or commerce upon a navigable stream opposite the riparian holdings, and have no right to so use the water or land under it as to obstruct or unreasonably impede lawful navigation and commerce by others, or so as to unlawfully burden or monopolize navigation or commerce. The exclusive rights of a riparian owner are such as are necessary for the use and enjoyment of his abutting property and the business lawfully conducted thereon; and these rights may not be so exercised as to injure others in their lawful rights.

[Ed. Note.—For other cases, see Navigable Waters, Dec. Dig. § 39.*]

4. NAVIGABLE WATERS (§ 16*)—NAVIGATION.

The rights of the public in navigable streams for purposes of navigation are to use the waters and the shores to high-water mark in a proper manner for transporting persons and property thereon subject to controlling provisions and principles of law. The right of navigation should be so exercised as not to infringe upon the lawful rights of others.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 43-49; Dec. Dig. § 16.*]

5. NAVIGABLE WATERS (§ 39*) — RIPARIAN RIGHTS.

A riparian owner may use the navigable waters and the lands thereunder opposite his land for purposes of navigation and of conducting commerce or business thereon, but such right is only concurrent with that of other inhabitants of the state, and must be exercised subject to the rights of others.

[Ed. Note.—For other cases, see Navigable Waters, Dec. Dig. § 39.*]

6. NAVIGABLE WATERS (§ 39*) — RIPARIAN RIGHTS—INJUNCTION.

A riparian owner has a right to enjoin in a proper proceeding the unlawful use of the public waters or the land thereunder including the shore which is a part of the bed, when such unlawful use operates as a special injury to such riparian owner in the use and enjoyment of his riparian lands.

[Ed. Note.—For other cases, see Navigable Waters, Dec. Dig. § 39.*]

7. NAVIGABLE WATERS (§ 39*) — RIPARIAN RIGHTS—INJUNCTION.

Where the waters of a navigable river are so used as to deprive a riparian holder of all access to the river from the land or to the land from the river, or so as to injure the benefits and enjoyment of the riparian land or the business thereon, such use may be enjoined.

[Ed. Note.—For other cases, see *Navigable Waters*, Dec. Dig. § 39.*]

(Syllabus by the Court.)

Appeal from Circuit Court, Escambia County; J. Emmet Wolfe, Judge.

Bill by the Ferry Pass Inspectors' & Shippers' Association against the White's River Inspectors' & Shippers' Association. Decree for defendant, and complainant appeals. Reversed and remanded.

Blount & Blount & Carter, for appellant. Maxwell & Reeves, for appellee.

WHITFIELD, C. J. The bill of complaint alleges that the appellant is the holder of certain described lands fronting on, extending to, and bounded by a certain navigable river in this state; that complainant is engaged in the business, in and on said river and its shores, of inspecting timber and logs and shipping timber, and in said business employs the use of long stretches of the shore of said river for the purpose of tying logs and timber, in order to handle, boom, preserve, and inspect the same; that the defendant is conducting a like business, and has, without the permission or license of the complainant, taken and retains possession of all the river front opposite the described lands, and has stretched and stretches along the whole of the said river front and the shores thereof timbers held by it for booming and inspection, and has thus deprived the complainant of all access to the said river front from the river, and of access to the river from said river front, and of all opportunity of conducting its business by the use of the river and river front and shores mentioned; that defendant asserts that it has a right to use the said river front and shores as long as it may please without the permission or consent of the complainant, and announces that it will continue to use them as aforesaid, and to deprive the complainant of access to the river and the shores at and along the said front and shores, and thus injure its business aforesaid. The prayer is that the court may declare that the complainant has the right of access for the conduct of its business aforesaid to the said river front, to the shores of said river from the river, and to the river from the said front and shores, and to use the said front and shores for its said business, and to enjoin and restrain the defendant, its servants, agents, and employes from in anywise hindering, impeding, or preventing such access and use, and for general relief. An answer

in which was incorporated a demurrer was presented. On hearing the demurrer was sustained and complainant given 10 days to amend, in default of which the bill stands dismissed. On appeal the order sustaining the demurrer is assigned as error.

It appears that both the complainant and the defendant were incorporated to do business in and on the stated river and its shores by inspecting and shipping timber and logs floated down the stream on the way to market. This authority does not empower either corporation to engage in an unlawful business or to invade the rights of each other or of any one else. The right to engage in the designated business is contingent upon the business being lawfully authorized and lawfully conducted with reference to the rights of all parties affected by the business. See *State v. Tampa Waterworks Co.*, 56 Fla. —, 47 South. 358.

The state by virtue of its sovereignty holds in trust for all the inhabitants of the state the title to the lands under the navigable waters within the state including the shore or space between high and low water marks. *State v. Gerbing*, 56 Fla. —, 47 South. 353. It is not claimed by either party that the state has in any way granted the rights asserted in this proceeding, even if such a grant may lawfully be made by the state. No question is presented as to the authority of Congress in the use of the navigable streams.

Riparian rights are incident to the ownership of lands contiguous to and bordering on navigable waters. The common-law rights of riparian owners with reference to the navigable waters are incident to the ownership of the uplands that extend to high-water mark. The shore or space between high and low water mark is a part of the bed of navigable waters, the title to which is in the state in trust for the public. If the owner of land has title to high-water mark, his land borders on the water, since the shore to high-water mark is a part of the bed of the waters; and, if it is a navigable waterway, he has as incident to such title the riparian rights accorded by the common law to such an owner. *Mitchell v. Lea Lumber Co.*, 43 Wzsh. 195, 86 Pac. 405, 9 L. R. A. (N. S.) 900; 10 Am. & Eng. Ann. Cas. 231; *Mobile Dry-Docks Co. v. City of Mobile*, 146 Ala. 198, 40 South. 205, 3 L. R. A. (N. S.) 822, 9 Am. & Eng. Ann. Cas. 1229, and authorities cited; *State ex rel. Denny v. Bridges*, 19 Wash. 44, 52 Pac. 326, 40 L. R. A. 593, and authorities cited; 1 *Farnham on Waters*, p. 178 et seq.; *Yates v. Milwaukee*, 10 Wall. 497, 19 L. Ed. 984, 1 Am. & Eng. Ann. Cas. 184, note.

Among the common-law rights of those who own land bordering on navigable waters apart from rights of alluvion and dereliction

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

are the right of access to the water from the land for navigation and other purposes expressed or implied by law, the right to a reasonable use of the water for domestic purposes, the right to the flow of the water without serious interruption by upper or lower riparian owners or others, the right to have the water kept free from pollution, the right to protect the abutting property from trespass and from injury by the improper use of the water for navigation or other purposes, the right to prevent obstruction to navigation or an unlawful use of the water or of the shore or bed that specially injures the riparian owner in the use of his property, the right to use the water in common with the public for navigation, fishing, and other purposes in which the public has an interest. Subject to the superior rights of the public as to navigation and commerce, and to the concurrent rights of the public as to fishing and bathing and the like, a riparian owner may erect upon the bed and shores adjacent to his riparian holdings bath houses, wharves, or other structures to facilitate his business or pleasure; but these privileges are subject to the rights of the public to be enforced by proper public authority or by individuals who are specially and unlawfully injured. Riparian owners have no exclusive right to navigation in or commerce upon a navigable stream opposite the riparian holdings, and have no right to so use the water or land under it as to obstruct or unreasonably impede lawful navigation and commerce by others, or so as to unlawfully burden or monopolize navigation or commerce. The exclusive rights of a riparian owner are such as are necessary for the use and enjoyment of his abutting property and the business lawfully conducted thereon; and these rights may not be so exercised as to injure others in their lawful rights. *Rumsey v. New York & New England R. Co.*, 133 N. Y. 79, 30 N. E. 654, 15 L. R. A. 618, 28 Am. St. Rep. 600; *Lorman v. Benson*, 8 Mich. 18, 77 Am. Dec. 435; *Case v. Toftus* (C. C.) 14 Sawy. 213, 39 Fed. 730, 5 L. R. A. 684; *Hartman v. Treslise*, 36 Colo. 146, 84 Pac. 685, 4 L. R. A. (N. S.) 872; *State v. Black River Phosphate Co.*, 32 Fla. 82, 13 South. 640, 21 L. R. A. 189. The rights conferred upon riparian owners by the act of 1856 (Laws 1856, p. 25, c. 791 [sections 643, 644, Gen. St. 1906]) are not involved in this proceeding. See *Waverly Water Front Imp. & Dev. Co. v. White*, 97 Va. 176, 33 S. E. 634, 45 L. R. A. 227.

The rights of the public in navigable streams for purposes of navigation are to use the waters and the shores to high-water mark in a proper manner for transporting persons and property thereon subject to controlling provisions and principles of law. The right of navigation should be so used and enjoyed as not to infringe upon the lawful rights of others. All inhabitants of the

state have concurrent rights to navigate and to transport property in the public waters of the state. As to mere navigation in and commerce upon the public waters, riparian owners as such have no rights superior to other inhabitants of the state. A riparian owner may use the navigable waters and the lands thereunder opposite his land for purposes of navigation and of conducting commerce or business thereon, but such right is only concurrent with that of other inhabitants of the state, and must be exercised subject to the rights of others. See 1 *Farnham on Waters*, p. 131 et seq. The right of access to the waters from the riparian lands may in general be exclusive in the owner of such lands, but as to the use of the navigable waters and the lands thereunder, including the shore, the rights of riparian owners and of others of the public are concurrent, and subject to applicable rules of law. A riparian owner has a right to enjoin in a proper proceeding the unlawful use of the public waters or the land thereunder including the shore which is a part of the bed, when such unlawful use operates as a special injury to such riparian owner in the use and enjoyment of his riparian lands. *Lyon v. Wardens, etc., of Fishmonger's Co.*, etc., 1 L. R. App. Cases, 662; 1 *Farnham on Waters*, §§ 27, 32, 34, 79, 113 et seq.; 24 Am. & Eng. Enc. Law (2d Ed.) 979; 25 Cyc. 1568. In the absence of a valid statute providing otherwise, the injury must relate to riparian lands or business conducted thereon, and not to business conducted on the waters by virtue only of the right of navigation. It is not essential that the unlawful use of the waters or the land thereunder be in actual contact with the lands of the riparian owner, if the lawful use and enjoyment of the riparian holdings are in fact appreciably injured as the proximate result of such unlawful use of the waters or the lands thereunder. See *White River Log. & Booming Co. v. Nelson*, 45 Mich. 578, 8 N. W. 587, 909; *French v. Connecticut River Lumber Co.*, 145 Mass. 261, 14 N. E. 113. In the absence of a valid grant from the state, no riparian owner or other person has an exclusive right to do business upon public waters of the state whether such waters are in front of the land of the riparian owner or not. As the shore or space between high and low water marks is a part of the bed of the navigable waters, one who holds to high-water mark is a riparian owner, and, as such, has common-law riparian rights as incidents to his title to the abutting lands.

While the complainant and the defendant in common with all other inhabitants of the state have a right to use the waters of the navigable stream and the lands thereunder including the shore or space between high and low water mark for purposes of navigation and the transportation of logs thereover, neither the complainant nor the defendant has such right to the exclusion of

its lawful exercise by the other or by any other inhabitant of the state. If the defendant in fact so uses the water or the land thereunder including the shore, as to deprive the complainant of all access to the river from its lands or to its lands from the river or to injure the complainant in the use and enjoyment of his riparian land or the business thereon, the defendant may be enjoined from a continuance of such wrong; but the complainant has no exclusive right to use the waters or shore for its business. If the defendant obstructs the mere right of navigation with no special injury to the complainant's riparian property, the remedy is by public officials. The prayer of the bill of complaint appears to contemplate the enforcement of an exclusive right of the complainant to the use of the waters and shore opposite its land for the conduct of its business; and, as the complainant has no such exclusive right, the particular and entire relief as prayed should not be granted. There may, however, under the allegations of the bill of complaint, be properly granted some relief against a total exclusion of the riparian owner from access to his lands, and the demurrer should not have been sustained. See *San Francisco Sav. Union v. R. G. R. Petroleum & Mining Co.*, 144 Cal. 134, 77 Pac. 823, 66 L. R. A. 242, 103 Am. St. Rep. 72, 1 Am. & Eng. Ann. Cases, 182, and authorities cited; *Middleton v. Flat River Booming Co.*, 27 Mich. 533; *McCloskey v. Pacific Coast Co.*, 160 Fed. 794, 87 C. C. A. 568; *Columbia Canning Co. v. Hampton*, 161 Fed. 60, 88 C. C. A. 224. Any further proceedings should be in accordance with the principles herein stated.

The decree is reversed and the cause is remanded.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

(123 La.)

No. 17,134.

SITMAN & BURTON v. LINDSEY.

LINDSEY v. SITMAN & BURTON et al.
(Supreme Court of Louisiana. Dec. 14, 1908.
Rehearing Denied March 1, 1909.)

SALES (§ 174*)—ACTIONS FOR NONPERFORMANCE OF CONTRACT—ACTION BY BUYER IN DEFAULT.

Where a buyer of lumber failed to pay for it as provided by the contract, and the seller stopped delivering after endeavoring in vain to collect the overdue payments, the buyer could not recover damages for the seller's refusal to further perform, since, under Civ. Code, art. 1913, a party cannot claim damages for the non-performance of a contract as to which he himself is in default.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 434; Dec. Dig. § 174.*]

Appeal from Twenty-Fifth Judicial District Court, Parish of St. Helena; Clay Elliott, Judge.

Action by Sitman & Burton against Hollis W. Lindsey, consolidated with counter suit by Hollis W. Lindsey against Sitman & Burton and another. Judgment for Lindsey, and Sitman & Burton appeal. Affirmed.

Reid, Purser & Reid, for appellants. William Hutchinson McClendon and Isaac Dickson Wall, for appellee Lindsey.

PROVOSTY, J. The defendant Lindsey, owner of timber lands, entered into a contract with plaintiffs by which he agreed to sell his timber to them at \$6 per thousand, and bound himself to deliver the timber at a sawmill to be established on the lands; the logs to be cut in such lengths as plaintiffs might designate, and to be measured and paid for weekly. Plaintiffs were slow in their payments. By October 26th, three months after the commencement of operations, defendant had to accept their note at six months for \$500 in lieu of cash. By November 6th the debt had increased by \$1,095.67, making, with the note, a total of \$1,595.67. Defendant needed money for going on with the delivery, and on November 2d notified plaintiffs that unless some payment was made he would stop delivering. Plaintiffs gave a check. This check was presented several times in vain for payment, and thereupon defendant stopped delivering; and plaintiffs served upon him peremptory demand to continue, and, upon his failure to do so, brought this suit. Defendant filed a counter suit for the amount due. The two suits were consolidated. There was judgment as prayed.

We think this judgment was correct. Plaintiffs were themselves in default, and therefore in no position to put defendant in default. Plainly a party cannot claim damages for a default which his own default has caused, or for the nonperformance of a contract with reference to which he himself is in default. Civ. Code, art. 1913.

The learned counsel for the plaintiffs argue that defendant was first in default by failing to observe the requirement of the contract in reference to the length of the logs; that he simply ignored their instructions in that regard; that they constantly complained, and only consented to receive the logs on his promise to do better in future; that their own default in payment was due to this fault of defendant, because, by not getting the logs in the lengths in which they needed them, they were deprived of the opportunity of filling orders for lumber which would have supplied them with all the money required for the payments to defendant.

This argument is without merit. The remedy of plaintiffs was to put defendant regu-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

larly in default. Instead of this, they accepted his promises and condoned his fault.

The surety of plaintiffs is a party to the counter suit. The suit against the surety is not before this court, and we say nothing with regard to it.

Judgment affirmed.

(123 La.)

No. 17,273.

SCHEUERMANN v. MONARCH FRUIT CO.

(Supreme Court of Louisiana. Jan. 18, 1909.
Rehearing Denied March 1, 1909.)

1. SALES (§ 230*)—PROPERTY SUBJECT.

Where the owner and shipper has parted with his control of the goods, and cannot change their destination, his creditors cannot attach them.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 230.*]

2. CARRIERS (§ 58*)—TRANSFER OF BILL OF LADING.

The transfer by indorsement of a bill of lading to shipper's order vests the title to the goods in the transferee as purchaser or pledgee, as the case may be.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 179-190; Dec. Dig. § 58.*]

3. CARRIERS (§ 56*)—BILL OF LADING—TRANSFER — VALIDITY — "NEGOTIABLE INSTRUMENT."

A bill of lading is a "negotiable instrument" by virtue of Act No. 150, p. 193, of 1868, and as such may be transferred for an antecedent or pre-existing debt, or for any consideration sufficient to support a simple contract. Act No. 64, p. 152, of 1904 (Negotiable Instrument Law) § 24. A bill of lading, like any other negotiable credit, may be pledged by indorsement and delivery to secure any lawful obligation. Civ. Code, arts. 3136, 3158.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 168; Dec. Dig. § 56.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4767-4770; vol. 8, p. 7731.]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Thomas C. W. Ellis, Judge.

Action by George Scheuermann against the Monarch Fruit Company. The First National Bank of Fresno intervenes, and the Morgan's Louisiana & Texas Railroad & Steamship Company was garnished. Judgment for plaintiff, and intervener appeals. Reversed, and suit dismissed, with directions.

Meyer Samuel Dreifus, for appellant. Lyle Saxon, for appellee Scheuermann. John Marshall Quintero, for curator ad hoc. Denegre & Blair and Victor Leovy, for appellee Morgan's Louisiana & Texas R. R. & S. S. Co.

LAND, J. Plaintiff sued the Monarch Fruit Company for \$2,040 damages for breach of contract to ship and deliver a first-class car of London layer raisins, and caused to be attached a car of raisins that had been shipped by defendant company to the city of

New Orleans under a bill of lading to shipper's order. The bill of lading was attached to a sight draft on the plaintiff for \$2,290.72, drawn by the defendant company to the order of the First National Bank of Fresno, Cal. The bill of lading and the draft were also seized under the attachment.

A curator ad hoc was appointed by the court to represent the defendant, and later a curator ad hoc was appointed to represent the First National Bank of Fresno, Cal.

The car of raisins was sold at public auction by order of court.

The bank filed a petition of intervention and third opposition, alleging that it was owner of the said draft and bill of lading, that the same were not subject to attachment, and prayed for judgment accordingly, and further decreeing that the aforesaid draft and bill of lading be restored to the petitioner, with reservation of its rights to claim damages sustained by reason of the wrongful seizure of said property.

For answer to this intervention and third opposition the plaintiff, after pleading the general issue, averred that the bank was acting only as the agent of the defendant in collecting said draft with bill of lading attached, and that the property attached and sold belonged to the defendant company.

The curator ad hoc appointed to represent the defendant company for answer to plaintiff's petition pleaded a general denial.

Morgan's Louisiana & Texas Railroad & Steamship Company by intervention and third opposition asserted a carrier's lien and privilege for freight and storage to the amount of \$578.22.

The case was tried, and there was judgment in favor of the plaintiff and the railroad company, decreeing that the plaintiff by virtue of his attachment was entitled to receive the proceeds of the sale of the raisins, to wit, \$1,425.10, after first paying the railroad company the sum of \$578.22, and the costs of the sheriff incurred.

The bank has appealed, and the contention in this court has been narrowed down to the issues presented by its intervention and third opposition.

C. A. Pawley, manager of the defendant company, testified that the draft in question was discounted by the First National Bank of Fresno, Cal., and the Monarch Fruit Company received credit for the full face value of the same; that the bill of lading referred to was indorsed and delivered to the bank as collateral security for the payment of said draft and any other indebtedness due the bank from the Monarch Fruit Company; that there was no understanding that the draft, if not paid, would be returned to said company, or that its account would be debited at any time with the amount thereof; that it was the understanding that the bank

would hold the company responsible as drawer of the draft, and would probably have the right to charge it back, which has been done, but it was also the distinct understanding at the time that the bill of lading was not only for security for the draft, but also for any other indebtedness of the company to the bank; that at the time such indebtedness was large, and so continued, and is now largely in excess of the amount of said draft; and that the draft was not taken for collection.

O. J. Woodward, president of the bank, testified substantially to the same state of facts, and especially that the draft was not taken for collection, and that the bill of lading was indorsed, delivered, and received as general security for any indebtedness due the bank from the company. The same witness testified that at the time the draft was taken and credited to the company the latter owed a balance of \$14,800, exclusive of interest, and now owes a balance of \$29,000 to the bank.

E. A. Walrond, cashier of the bank, in his deposition corroborated the statements of the aforesaid witnesses, and testified that the bank purchased the draft in the usual course of business for its full face value, advanced by depositing the same to the credit of the Monarch Fruit Company, taking as security therefor the bill of lading, which was attached to said draft and indorsed and delivered to the bank at the same time, which bill of lading was also held as security for any other indebtedness due from the company to the bank. This witness further testified that at the time the draft was executed and delivered to the bank the Monarch Fruit Company was indebted to the bank in a sum exceeding \$14,000, and has ever since and at all times been so indebted in a sum not less than \$10,000.

The contention of the plaintiff is that the bank was not the owner of the draft, but was a mere agent for collection. We do not think so. The evidence is to the contrary. By crediting the Monarch Fruit Company with the face value of the draft, the bank thereby acquired the ownership of the paper by purchase. Such a credit on deposit account is equivalent to a payment. The only liability of the Monarch Fruit Company resulting from this transaction was its contingent liability as drawer. After the dishonor of the draft, the bank charged its face value to the deposit account of the drawer. This operated a payment of the draft by the drawer to the payee and holder, and a cancellation of the instrument.

But the uncontradicted evidence shows that the bill of lading was indorsed and delivered to the bank, not only as collateral security for the payment of the draft, but also as security for any and all indebtedness that might be due to the bank by the Monarch

Fruit Company. A pledge may be given to secure any lawful obligation. Civ. Code, art. 3136.

Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration. Any consideration sufficient to support a simple contract, or an antecedent or pre-existing debt, constitutes value. Act No. 64, p. 152, of 1904, § 24.

Bills of lading are "negotiable by indorsement in blank or by special indorsement, in the same manner and to the same extent as bills of exchange and promissory notes." Act No. 150, p. 194, of 1868, § 9; *Hardie & Co. v. V., S. & P. Ry. Co.*, 118 La. 253, 42 South. 793. Whatever difference of opinion there may be as to the extent of such negotiability, there is none as to the proposition that a bill of lading represents the goods in the hands of the common carrier, and that the transfer of the bill of lading by the shipper vests the title to the goods in the purchaser or pledgee for value. In *Chopin v. Clark*, 31 La. Ann. 846, the consignee refused to accept the consignment, and to pay the draft, with bill of lading attached, which had been transferred to a bank, and attached the goods for a balance due by the shipper. The bank intervened.

The court held that the delivery of the bill of lading vested the title and possession in the bank, which thereby acquired a pledge on the goods; citing *National Bank of Green Bay v. Dearborn*, 115 Mass. 229, 15 Am. Rep. 92, to the effect that in such a case the title remains in the consignor or his transferee.

In the case at bar there was no particular consignee, as the goods were deliverable to shipper's order. The intervening bank held the bill of lading, and the title to the goods as pledgee. The owner had parted with his control over the goods, and could not change their destination. In such a case the creditors of the owner cannot attach. *Davenport, Tutrix, v. Adler & Co.*, 52 La. Ann. 269, 26 South. 836.

It is therefore ordered that the judgment below be reversed, and it is now ordered that plaintiff's suit and attachment be dismissed, with costs reserving the right of the First National Bank of Fresno, Cal., to sue for and recover whatever damages it may have sustained by reason of said attachment; and it is further ordered that said bank do recover and receive the proceeds of the sale of the property attached in this suit and now in the hands of the sheriff, to wit, the sum of \$1,425.10, less costs incurred by the sheriff in selling said property, and less the sum of \$578.22, hereby adjudged to be paid out of said fund to the Morgan's Louisiana & Texas Railroad & Steamship Company.

It is further ordered that the fee of J. Marshall Quintero, curator ad hoc, be taxed at \$25, and the fee of M. Dreifus, curator ad

hoc, be taxed at \$25, and that said fees and all other costs, except those of sale, be paid by the plaintiff.

(22 La. 61)

No. 17,380.

DREIFUS v. COLONIAL BANK & TRUST CO.

(Supreme Court of Louisiana. Jan. 18, 1909.
On Rehearing, March 1, 1909.)

1. CORPORATIONS (§ 201*)—STOCKHOLDERS—MANAGEMENT OF CORPORATE AFFAIRS—INTERFERENCE BY COURT.

In a contest among shareholders of a corporation over the management of its affairs, the corporate charter is the law under which they must proceed, and the majority must control, and such control will not be interfered with by the courts, unless the majority does something it has no right to do.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 765, 766, 774, 775; Dec. Dig. § 201.*]

2. BANKS AND BANKING (§ 71*)—INSOLVENCY—RIGHT TO APPOINT LIQUIDATORS.

Where the charter of a bank gives the right to the shareholders to control the liquidation of the bank, the officers of the bank, including the board of directors, are without authority to surrender such right, and a request by the shareholders, made to the court, to confirm their action in appointing liquidators, is not a renunciation of their right to select liquidators, but is an affirmance of it.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 143; Dec. Dig. § 71.*]

3. BANKS AND BANKING (§ 71*)—DISSOLUTION—ELECTION OF LIQUIDATORS.

Rev. St. § 687, provides that stockholders at a general meeting convened for that purpose may dissolve the corporation with the assent of three-fourths of the stock represented at such meeting. The articles of incorporation of a bank provided that "said association may be dissolved with the assent of two-thirds of the capital stock represented at a general meeting of the stockholders convened for that purpose." Held, that the election of liquidators of a bank by all the stockholders present at a stockholders' meeting is not invalid, because the election was not supported by three-fourths of the entire stock.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 143; Dec. Dig. § 71.*]

Appeal from Civil District Court, Parish of Orleans; John St. Paul, Judge.

In the matter of the liquidation of the Colonial Bank & Trust Company. Application of Meyer S. Drefus to have receivers appointed for such company. From an order appointing two receivers, defendant and the liquidators appeal. Reversed.

Meyer Samuel Drefus, in pro per. Henry L. Favrot and Dart & Kernan, for appellants Colonial Bank & Trust Co., and others. Dart & Kernan, for appellant German-American Savings Bank & Trust Co. Titche & Rogers and Lazarus, Michel & Lazarus, for appellees.

PROVOSTY, J. The defendant bank was organized in December, 1905, with a paid-up

capital of \$240,000, divided into 24,000 shares. It went safely through the late financial crisis; but in the last days of September and first days of October, 1908, a sort of silent run began upon it, caused by a suit for the appointment of a receiver. Instituted against another bank with which there had been a rumor of its intention to consolidate. This run was met at first in the ordinary course by the calling in of loans; but, the strain proving too great, the president of the bank had recourse to the German-American Savings Bank & Trust Company. An agreement was entered into by the two banks according to which the affairs of the embarrassed bank should be liquidated, and for that purpose the other bank should lend the money necessary to pay the deposits, and should act as liquidator, in consideration of a fee of \$7,500. Formal resolutions were passed by the boards of directors of the institutions authorizing this contract to be entered into. This was on October 7, 1908. In the case of the defendant bank the resolutions provided for the calling "of a meeting of the stockholders in accordance with the terms of the charter for November 12, 1908, between the hours of 12 m. and 3 o'clock p. m. for the purpose of

"First. Voting upon the affairs of the Colonial Bank & Trust Company, to liquidate.

"Second. Electing liquidators, in accordance with the terms of the charter.

"Third. For such other business as may come before the meeting."

One of the stipulations of the contract was that the loans to be made under it should be secured by the pledge of whatever part of the collaterals contained in the portfolio of the Colonial the German-American might select and require, and in addition by mortgage on the bank building of the Colonial.

The contract was signed on October 8th. The first loan under it was made on October 10th, and was for \$6,000. Other loans followed as needed. As each new loan was made, the note executed for the preceding loan was taken up and a new note executed for the total debt. There had been loaned in this way \$105,000, when, on November 5, 1908, information came to the officers of the Colonial Bank that two of the stockholders of the bank were about to apply to the courts for the appointment of a receiver. These stockholders had had an accountant go over the books of the bank. For this examination, we may mention, in passing, the defendant bank had afforded every facility to this accountant. To forestall this application for a receiver, the officers of the defendant bank had recourse to a friendly suit. They procured another stockholder to file a petition asking for the appointment of a liquidator, and, at the same time, filed an answer consenting to the appointment, and asking that the German-American Savings Bank & Trust

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Company be appointed; and the court made an order accordingly. This friendly suit was in pursuance of a resolution of the board of directors, declaring that they—

"recognize the necessity of the immediate liquidation of the affairs of this bank, and consent to the appointment of a liquidator, and ask that the German-American Savings Bank & Trust Company be appointed as liquidator."

On the same day, November 5th, the same two stockholders filed in the same suit a petition asking that the defendant bank show cause why a receiver should not be appointed.

The allegations of this hostile petition are, in substance, that the officers of the defendant bank are jeopardizing the rights of the stockholders and creditors of the bank by mismanaging its affairs and committing ultra vires acts, misusing and misapplying its funds, and that the purpose of the friendly suit is to secure the appointment of "a friendly and complacent liquidator, so as to stifle all investigation of the conduct of said bank and its officers," and that the appointment of said liquidator is null, because made without notice to the creditors, and before the suit had been allotted to the proper division of the court.

By way of specification of the charge of mismanagement and misapplication of funds, it is alleged that the officers and directors have combined and confederated to loan the entire funds of the bank to themselves and those allied to them in business or in family.

On November 11th, the same two stockholders applied for an injunction to prevent the meeting of stockholders from taking place; but the judge refused to grant same.

One of the said two stockholders owns 216, and the other 185 shares, out of the 24,000 shares of the stock of the bank. The remainder of the 24,000 shares is distributed among several hundred persons.

On the 12th the stockholders' meeting took place in due course, and by a vote of 13,765 to 0 the following resolution was adopted:

"Resolved, that the Colonial Bank & Trust Company be liquidated; that J. N. Roussel, John U. Adams, and A. J. Stallings be selected liquidators in accordance with article 9 of the charter; that their bond be fixed at \$5,000 each; that the civil district court for this parish be required to confirm the election of the above-named liquidators; and that the German-American Savings Bank & Trust Company be elected as trustee for the liquidators."

On the next day, the 13th, the three liquidators thus elected presented a petition in the same suit, reciting all that had taken place, and annexing the resolution of the meeting of stockholders, and alleging that in view of the litigation now pending they thought it advisable to submit the proceedings to the court and to ask to have their appointment recognized, and, if necessary, confirmed by proper action of the court. They alleged that they had agreed to serve without compensation, and would do so if confirmed, and were willing to recognize the agreements theretofore entered into with the German-

American Savings Bank & Trust Company. The petition concluded with a prayer that the petitioners be—

"allowed to qualify and be sworn as liquidators of the said Colonial Bank & Trust Company in accordance with law and with the terms of their election as such, and that the court confirm them in the positions to which they were respectively elected as aforesaid, and receive their bonds and take all further steps necessary to protect them in the rights conferred upon them by the stockholders."

To the request of this petition the two hostile stockholders on November 16th filed an opposition. The grounds of this opposition are:

First. That the defendant bank—

"having submitted itself to the jurisdiction of the court by asking for a receiver to liquidate its affairs, has surrendered whatever rights it had under its charter to a liquidation independently of this court."

Second. That the action of the meeting of stockholders for liquidation, and appointing the three liquidators, is null, because not concurred in by two-thirds of the entire stock of the bank.

Fourth. That the object of said meeting was to secure the selection of receivers friendly to the officers whose actions and administration it is the purpose of the present proceeding to investigate, and that said meeting was so conducted as to carry out that object; it having been controlled by said officers.

The lower court set aside the order, made in limine, appointing the German-American Bank liquidator, and appointed two receivers. From this judgment a suspensive appeal was taken. During these judicial proceedings the liquidation of the bank has gone on.

The bank is solvent, and this is a contest between shareholders over the control of the liquidation of the bank. In a contest between the shareholders of a corporation over the management of its affairs, it is elementary that the charter, which is a contract between the shareholders, is the law of the case, and that the voice of the majority must prevail, and that the courts will not interfere in the family fight unless the majority are doing something they have no right to do. *Trisconi v. Winship*, 43 La. Ann. 49, 9 South. 29, 26 Am. St. Rep. 175. In *Russell v. Ice Co.*, 118 La. 446, 43 South. 46, this court said:

"As against a stockholder, the majority of the stockholders have the absolute right to liquidate the affairs of the corporation in accordance with the charter."

In *State v. Herdic Co.*, 35 Ann. 246, the evidence having shown that the corporation was solvent, this court said:

"Even if the charter of the corporation could have been properly forfeited for the special cause assigned, we see no reason why the liquidators appointed by the corporation should not be permitted to wind up its affairs."

In the instant case the majority of the stockholders have done absolutely nothing to oppress the minority, or that they did not have the perfect right to do under the charter. The only thing they have done has been to elect three liquidators to liquidate the affairs of the bank, all in exact and strict conformity with the charter. The assumption that these liquidators will not do their duty is pure assumption. Nothing is said against their competency or fitness. They have not heretofore had any connection with the management of the affairs of the bank, though we do not know that it would necessarily make any difference if they had.

The contention that by submitting itself to the jurisdiction of the court the defendant bank has surrendered whatever right it had to a liquidation independently of the court is without merit. The officers of the bank, including the board of directors, were utterly without authority to surrender the right which the shareholders have under the charter to control the liquidation of the bank (*La. Savings Bank Case*, 35 La. Ann. 196); and the request which the shareholders have made to the court to confirm their action, far from being a renunciation of their right to select these liquidators, would seem to be, on the contrary, an affirmation of it. See, in that connection, *Liquidation of Grant & Jung*, 51 La. Ann. 1259, 1260, 26 South. 97; *Sanitary Association in Liquidation*, 105 La. 177, 29 South. 337, 83 Am. St. Rep. 230; *Russell v. Ice Co.*, 118 La. 446, 43 South. 44.

The contention that the election of the three liquidators is null, because the vote required for a dissolution of the corporation and the appointment of liquidators is three-fourths of the entire stock, and not merely of the stock represented at the meeting, is in direct opposition to the charter (article 4) and to the statute (section 687, Rev. St.), which provide (quoting the statute) that:

"It shall be lawful for the stockholders, at a general meeting convened for that purpose, to dissolve the corporation with the assent of three-fourths of the stock represented at such meeting."

Three-fourths of the stock represented at the meeting means three-fourths of the stock represented at the meeting, and not three-fourths of the entire stock.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be set aside, and that there be judgment confirming as liquidators of the defendant bank the three persons elected to that office at the meeting of shareholders of November 12, 1908, and authorizing them to take charge of the affairs of the defendant bank after they shall have qualified by taking oath and giving bond as provided in said resolution, and condemning the opponents, Joseph Rittenberg and Alfred Hurwitz, in solido, to pay the costs of this proceeding, less the

costs incurred before the filing of their first petition.

BREAUX, C. J., concurs in the decree.

On Rehearing.

PER CURIAM. The opinion holds that the requisite majority for the voluntary dissolution of the corporation is three-fourths of the stock represented at the meeting of stockholders required to be called for the purpose of considering the question of dissolution. Counsel in their application for rehearing insist upon their contention that the requisite majority is three-fourths of the entire stock. The question depends upon the proper interpretation of section 687, Rev. St., and article 9 of the charter of the corporation. These read as follows:

"Sec. 687. It shall be lawful for the stockholders, at a general meeting convened for that purpose, to dissolve the corporation with the assent of three-fourths of the stock represented at such meeting."

"Art. 9. Said association may be dissolved with the assent of two-thirds of the capital stock, represented at a general meeting of the stockholders convened for that purpose."

It is seen that the interpretation adopted in the opinion accords with the plain reading of the text, namely, three-fourths of the stock represented at such meeting, not of the entire stock. It also accords with the rationale of the matter. The idea is to let the question be determined by those who participate in the meeting, and not by those who stay away. This is a fundamental principle in the law of elections. Cyc. and A. & E. E. of Law, vol. "Elections." Under stress of this principle, this court has held that authority to a municipality to levy taxes "by a vote of the majority of the taxpayers" meant a majority of those voting at the election. *Citizens v. Williams*, 49 La. Ann. 422, 21 South. 647, 37 L. R. A. 761; *Taxpayers v. Police Jury*, 52 La. Ann. 458, 27 South. 102. Counsel's interpretation violates this principle, and would attribute the same potency to an uncast vote as to a vote actually cast.

Counsel say that the phrase "represented at such meeting" was added to section 687, and the word "represented," to article 9, for the purpose of imposing the requirement that those voting for the dissolution should be present or represented at the meeting. The answer is that, by requiring the voting to be at a meeting, the statute and the article, by necessary and clear implication, require that those voting should be present at the meeting (since none can vote at a meeting who are not present or represented at it); and hence an express injunction to that effect was wholly unnecessary, so much so, indeed, that to have added it would have been almost foolish, pretty much on a par with adding permission to go into the water after giving permission to go in swimming. This will clearly appear if we consider that,

even if said phrase were out of article 9, a stockholder would as little think of voting for dissolution without being present or represented at the meeting as one would think of going in swimming without going into the water.

The meaning contended for by counsel would be much more nearly expressed if the said phrase in the one case, and the said word in the other, were stricken out. We should then have "two-thirds of the stock," instead of, as now, "two-thirds of the stock represented," etc. It can hardly be said, therefore, that said phrase and said word were added for bringing out the meaning contended for by counsel. They were added for expressing a meaning different from that which would have been expressed if they had not been added.

The great stress counsel now lay upon the punctuation of article 9—the comma between "stock" and "represented"—is an after thought. So little importance did they attach to this punctuation in the submission of the case that they did not call attention to it, and, indeed, printed article 9 in their brief without it. Their argument on punctuation is inapplicable to section 687, and, admittedly, if section 687 does not require two-thirds of the entire stock, neither does article 9.

One other contention of counsel in their application for a rehearing calls for attention. The opponents have been condemned to pay all costs accrued from and after the filing of their opposition. This was done on the theory that the necessary effect of the judgment is to reject their opposition, and throw upon them, as a consequence, the burden of all the costs it has occasioned. The decree is somewhat broader than this, and should be amended accordingly.

The judgment heretofore handed down is therefore amended, so that the costs which the opponents, Joseph Rittenberg and Alfred Hurwitz, are condemned to pay, are the costs of appeal and all those costs of the lower court which would not have been incurred if their opposition had not been filed.

As thus amended, the said judgment is affirmed, and a rehearing is refused.

(123 La. 71)

No. 17,193.

Succession of FRIGALO et ux.
(Supreme Court of Louisiana. Jan. 18, 1909.
Rehearing Denied March 1, 1909.)

TAXATION (§ 873*)—INHERITANCE TAX—EXEMPTIONS—RELATIONSHIP OF PARTIES.

It being admitted that the adopted children now before the court were not related by blood to the person from whom they inherit, they are neither ascendants nor collaterals, and, as they inherit under the law, they are not strangers to the estate, from which it follows that, if the inheritance falling to them is liable to taxation under Act No. 45, p. 102, of 1904, and Act

No. 109, p. 173, of 1906, it must be as an inheritance falling to persons who by law (Rev. Civ. Code, art. 214) are given the status of descendants, and as thus classified it is not liable to the tax, because it is of less value than \$10,000.

[Ed. Note.—For other cases, see Taxation Cent. Dig. § 1689; Dec. Dig. § 873.*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; John St. Paul, Judge.

Contest by Dauphin and Augustin Frigalo of the right of the State to collect a 5 per cent. inheritance tax upon an inheritance of less than \$10,000 falling to them from their adoptive mother, Catherine Frigalo. From the judgment, Thomas Connell, ex officio collector of inheritance taxes, appeals. Affirmed.

Mark Mayo Boatner, for appellant. Kosuth V. Richard, for appellee.

MONROE, J. Dauphin and Augustin Frigalo contest the right of the state to collect a tax of 5 per cent. upon an inheritance of less than \$10,000 falling to them from their adoptive mother, Catherine (Christian) Frigalo. Part of the property so inherited consists of real estate, which, though assessed for 1906 and 1907 at \$1,300, is valued, for the purposes of the inventory in the succession, at \$2,500. It is admitted that the state taxes on said real estate, for the years 1883 to 1892, inclusive, have not been paid, and, on the other hand, that the adoptive father of the contestants acquired the property in 1905, and that all taxes assessed against it since that time have been paid. It is further admitted that the contestants have inherited (together) property, other than the real estate, of the value of \$732.70, upon which no taxes have been paid. It is also admitted that the contestants are not related by blood to the person from whom they inherit. Counsel have argued the questions: (1) Are inheritances of less than \$10,000, falling to adopted children, liable to an inheritance tax? (2) Can real estate be said to have borne its "just proportion of taxes" when it has heretofore been assessed for less than the amount at which it is appraised in the succession of the late owner? (3) Can real estate be said to have borne its "just proportion of taxes" when it appears that the late owner acquired it in 1906 and paid all the taxes assessed against it thereafter, but that the state taxes for the years 1883 to 1892, inclusive, were not paid by the then owner. The decision of these questions is controlled by the following provisions of law, constitutional and statutory, to wit:

Constitution:

"Art. 235. The Legislature shall have power to levy * * * a tax upon all inheritances, legacies and donations: Provided, no direct inheritance, or donation, to an ascendant or descendant, below \$10,000 in amount or value shall be so taxed; provided, further, that no

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

such tax shall exceed 3 per cent. for direct inheritances and donations to ascendants and descendants, and 10 per cent. for collateral inheritances and donations to collaterals and strangers; provided, bequests to educational, religious, or charitable institutions shall be exempt from this tax.

"Art. 236. The tax provided for in the preceding article shall not be enforced when the property donated or inherited shall have borne its just proportion of taxes, prior to the time of such donation or inheritance."

Revised Civil Code:

"Art. 214. Any person may adopt another as his child, except those illegitimate children whom the law prohibits him from acknowledging, but such adoption shall not interfere with the rights of forced heirs.

"The person adopting must be, at least, forty years old, and must be, at least, fifteen years older than the person adopted.

"The person adopted shall have all the rights of a legitimate child in the estate of the person adopting him, except as above stated," etc.

Act No. 45, p. 102, of 1904, reads (in part):

"That there is now, and shall hereafter be, levied * * * a tax on all inheritances, legacies and donations, provided no direct inheritance, or donation, to an ascendant or descendant, below \$10,000 in amount or value, shall be so taxed; a special inheritance tax, of three per cent., on direct inheritances and donations to ascendants or descendants, and ten per cent. for collateral inheritances and donations to collaterals or strangers, provided bequests to educational, religious or charitable institutions shall be exempt from this tax, and provided, further, that this tax shall not be enforced when the property donated or inherited shall have borne its just proportion of taxes, prior to the time of such donation or inheritance."

The concluding section of this statute repeals "all laws contrary thereto and in conflict with the same."

Act No. 109, p. 173, of 1906, reads (in part) as follows:

"Section 1. * * * That there is now, and shall hereafter be, levied * * * on all inheritances, legacies and other donations *mortis causa*, to, or in favor of, direct descendants or ascendants of the decedent, a tax of two per centum, and on all such inheritances or dispositions to, or in favor of, collateral relatives of the deceased, or strangers, a tax of five per centum, on the amount of the actual cash value thereof at the time of the death of the decedent.

"Sec. 2. * * * That the said tax shall not be imposed in the following cases:

"(a) On any inheritance, legacy, or other donation *mortis causa*, to, or in favor of, any ascendant or descendant of the decedent below \$10,000 in amount or value.

"(b) On any legacy, or donation *mortis causa*, to, or in favor of, an educational, religious or charitable institution.

"(c) When the property inherited, bequeathed, or donated shall have borne its just proportion of taxes prior to the time of such donation, bequest or inheritance."

This act does not refer to the act of 1904, and contains no repealing clause, but it purports to cover the whole subject legislated upon, and may, therefore, be regarded as a substitute for the act of 1904.

It will be observed that the language of

the Constitution is not mandatory, except in so far as it prohibits the taxing of inheritances falling to ascendants or descendants of less value than \$10,000, the taxing of bequests to educational, etc., institutions, the imposition of the inheritance tax upon property which has borne its just proportion of taxes, and the imposition of such tax in excess of 3 per cent. upon inheritances falling to ascendants or descendants, or in excess of 10 per cent. upon inheritances falling to collaterals or strangers. In other words, the matter of the imposition of the tax is left to the discretion of the Legislature, subject to the restrictions imposed in the two articles quoted, and by other provisions of the Constitution relating to uniformity of taxation, etc. The Legislature might, therefore, have imposed no tax on inheritances, and in fact imposed none until 1904, some six years after the adoption of the Constitution, or it might, perhaps, have imposed the tax on one class of inheritances without imposing it upon others. It will also be observed that, in the exercise of the power conferred on it, and to give effect to the two articles of the Constitution here in question, the Legislature has levied a tax upon inheritances falling to four classes of persons, viz., ascendants, descendants, collaterals, and strangers; the exemptions provided by the Constitution (including that of inheritances of less than \$10,000 falling to ascendants or descendants) being duly provided for. It is admitted, as we have seen, that the contestants now before the court were not related by blood to the decedent from whom they inherit, so that they are neither ascendants nor collaterals. On the other hand, as they are legal heirs of the decedent, it is clear that they are not strangers to her estate. It follows, therefore, that if the inheritance here in question falls within the operation of the law upon which the state relies it must be as an inheritance falling to persons who by law (Rev. Civ. Code, art. 214) are given the status of descendants. But, as thus classified, the inheritance is not liable to the tax, because it is of less value than \$10,000.

The judge *a quo* seems to have found that the inheritance was liable to taxation, either as falling to collaterals or strangers, but deducted from the amount which might otherwise have been awarded the proportion attributable to the real estate (which, we assume, was found to have borne its just proportion of taxes), and gave judgment for a balance of the \$36.00, with interest. The *ex officio* collector of inheritance taxes appealed, but the heirs did not appeal, nor did they answer the appeal or pray for an amendment of the judgment. From the view that we have taken the other questions which have been argued are eliminated from this case.

Judgment affirmed.

(123 La.)

No. 17,358.

**BOARD OF COM'RS FOR BAYOU TERRE
AUX BOEUF DRAINAGE DIST.
v. BAKER.**

(Supreme Court of Louisiana. Nov. 30, 1908.
On Rehearing, March 1, 1909.)

1. DRAINS (§ 75*)—POWER TO ORDER AND DIRECT ELECTIONS—WHO HAS.

Under article 281 of the Constitution, as amended, the authority to determine whether the power to order and direct the conduct of the special drainage tax elections contemplated by the article shall be vested in the police juries or the boards of commissioners of drainage districts is left with the General Assembly.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 72; Dec. Dig. § 75.*]

2. DRAINS (§ 67*)—POWER TO ORDER AND DIRECT ELECTIONS—WHO HAS.

The power to order and direct the conduct of the special drainage tax elections, contemplated by article 281 of the Constitution, as amended, is vested by Act No. 114, p. 178, of 1900, in the police juries, and the provisions of that act upon that subject have not been repealed by Acts Nos. 145, 159, pp. 248, 293, of 1902, or No. 135, p. 225, of 1906.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 73; Dec. Dig. § 67.*]

3. DRAINS (§ 67*)—PROCEEDINGS FOR ESTABLISHMENT—VALIDATION.

The provision, in the amendment to article 281 of the Constitution proposed by Act No. 300, p. 450, of 1908, and adopted in November, 1908, validating "contributions and acreage taxes heretofore authorized by a vote of a majority, in number and amount, of the property tax payers, qualified to vote . . . in drainage districts," is a re-enactment of the provision contained in the amendment proposed by Act No. 122, p. 207, of 1906, and adopted in November, 1906. It finds no application in a case in which it appears that a majority in amount of the qualified electors referred to did not, and does not appear that a majority in number did, participate in the election.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 73; Dec. Dig. § 67.*]

4. DRAINS (§ 19*)—INDEBTEDNESS—RIGHT TO INCUR.

Article 281 of the Constitution authorizes drainage districts, upon the vote of the qualified taxpayers, to incur debt and issue bonds therefor, upon the basis of an ad valorem tax (to which all taxable property is liable), not exceeding 5 mills on the dollar, to the extent of one-tenth of the assessed value of the property in such districts, respectively. The article also authorizes such districts, on the same condition, to incur debt and issue bonds therefor, upon the basis of a specific tax on land, not exceeding 25 cents per acre, up to such amount as may be paid from the proceeds of the tax levied, the limit of time for which the taxes may be levied and during which the bonds may run being fixed in both cases at 40 years.

Held: A debt, which, by reason of excess in amount, cannot be incurred upon either of the bases thus provided, cannot be incurred upon the theory that the two bases may be combined for its support, so that the debtors of the ad valorem and of the specific taxes, respectively, will be bound, each class, for the whole; and a person who has agreed to buy bonds, to be issued by a board of commissioners of a drainage district, cannot be held to his agreement upon the basis of a tender of bonds predicated on such theory.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 13; Dec. Dig. § 19.*]

On Rehearing.

5. AMICUS CURIAE (§ 3*)—REHEARING—RIGHT TO.

An amicus curiae has no standing in court to apply for a rehearing.

[Ed. Note.—For other cases, see Amicus Curiae, Cent. Dig. § 5; Dec. Dig. § 3.*]

6. APPEAL AND ERROR (§ 831*)—REHEARING—RIGHT TO GRANT—EXPIRATION OF TIME.

Conceding that the Supreme Court can ex proprio motu grant a rehearing, it cannot be exercised after the legal delays for a rehearing have expired.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3212; Dec. Dig. § 831.*]

(Syllabus by the Court.)

Appeal from the Twenty-Ninth Judicial District Court, Parish of St. Bernard; Nemours Henry Nunez, Judge.

Specific performance by the Board of Commissioners for the Bayou Terre aux Boeuf Drainage District against Earl R. Baker. Judgment for plaintiff, and defendant appeals. Reversed, and suit dismissed.

Fernando Estopinal, for appellant. Henry L. Favrot and Nemours Henry Nunez, for appellee. William Milton Murphy, McCoy, Moss & Knox, and William Champion Caruth, amici curiae.

Statement of the Case.

MONROE, J. Plaintiff sues to enforce specific compliance with a contract whereby defendant agreed to buy at par 180 of its bonds, of \$500 each. Defendant admits that he agreed to buy valid bonds issued by plaintiff, to the number and at the price stated in the petition, and expresses his willingness to accept and pay for such bonds, but he alleges that the bonds which have been tendered to him, though of the denomination and at the price agreed on, are not valid bonds, for the reasons:

1. That the special election purporting to have approved of the organization of the board of commissioners of the Bayou Terre aux Boeuf drainage district and to have authorized the issuance of the bonds in question and the levy and collection of a tax and of forced contributions for their payment was held by the order and under the direction of the police jury, whereas, under article 281 of the Constitution, and Act No. 145, p. 248, of 1902, and Act No. 159, p. 293, of 1902, as amended by Act No. 135, p. 225, of 1906, the authority to order and direct such election is vested in the board of drainage commissioners.

2. That the amount of bonds issued exceeds one-tenth of the assessed valuation of the property of the drainage district, in violation of article 281 of the Constitution.

Opinion.

1. In the matter of Mayor and Board v. New Iberia Drainage District, 106 La. 651, 31 South. 305, this court was called on to

determine whether the power to order and direct elections such as that here in question was vested in the police juries or the boards of drainage commissioners, and, construing the legislation on the subject up to and inclusive of the year 1900, held that the controlling law was Act No. 114, p. 178, of 1900, which was then the latest enactment, and which confers such power on the police juries in specific terms.

In June of this year the case of *Esteves v. Board of Commissioners, etc.*, 121 La. 991, 46 South. 992 (in which the present plaintiff was defendant), was decided, the court holding that a special election held under article 281, by order and under the direction of the plaintiff, was illegal, and that the power to order and direct such election is vested in the police jury, affirming, in that respect, the decision in *Mayor and Board v. New Iberia Drainage District*, above referred to. Counsel for defendant, however, say that the acts of 1902 and 1906, set up in the answer, were not in existence when the first case was decided, and were not sufficiently considered in the last case, and that those acts, in effect, repeal Act No. 114 of 1900. Counsel also invokes "the spirit" of article 281 of the Constitution, as sustaining the proposition that the power to order and direct special elections, to be held under its authority, is vested in the boards of drainage commissioners.

The proposition last stated was carefully considered in the case of *Mayor and Board v. New Iberia Drainage District*, and the conclusion was reached that, whilst it may be conceded that the drainage district is to have an autonomy of its own, and is to exercise such powers as may be specifically granted to it, the determination of the question, by whom shall the power to order and direct the special elections contemplated by article 281 of the Constitution be exercised, is left by that article to the discretion of the Legislature.

It is true that the article in question has been amended, first, in 1906, pursuant to Act No. 122, p. 207, of that year, and again in November of 1908, by the adoption of the amendment proposed by Act No. 300, p. 450, of the session of 1908. But neither of the amendments denies to the General Assembly the authority which otherwise it possesses of determining in whom the power to order and to direct the details of the elections contemplated by article 281 shall be vested. As to that question, therefore, the matter stands as it did when the opinion in the *New Iberia Drainage District Case* was handed down, and we adhere to the view expressed in that opinion.

Inquiring, now, whether there is anything in the statutory law enacted in 1902 or 1906 which takes from the police juries the power, with respect to the ordering and directing of the elections in question, which was vested in them by Act No. 114 of 1900, we

find as follows: Act No. 145 of 1902 purports to be an amendment of Act No. 5, p. 7, of the Extra Session of 1899, the first section of which last-mentioned act provides that:

"Municipal corporations, parishes and drainage districts, * * * when so petitioned * * *, may submit to a vote * * * propositions to incur debt," etc.

But, whatever force there might at any time have been in the suggestion that the right to submit the "propositions" in question to a vote carries with it the authority to order and direct the conduct of the election at which such vote is to be taken, the matter was set at rest by Act No. 114 of 1900, which, as we have found, specifically and in unmistakable terms conferred that authority on the municipal corporations and the police juries, and this court, prior to the passage of Act No. 145 of 1902, had recognized the police jury as the "governing body" of the parish in which the drainage district may be organized. Bearing those facts in mind, it will be found that Act No. 145 of 1902, purporting, as we have said, to amend the act of 1899, does not refer to the act of 1900, and its first section (being an amendment and re-enactment of the first section of Act No. 5 of 1899) provides that:

"Municipal corporations, parishes and drainage districts * * * when, in the opinion of the governing body of such municipal corporation, parish, or drainage district, such action is necessary, or, when petitioned * * * may submit to the vote * * * propositions to incur debt," etc.

which appears to be a recognition of the construction which this court had placed upon the then existing law. Apart from that, and dealing with the matter as though the act of 1900 had not been passed, it can hardly be denied that, in the ordinary acceptance of the term, for the administration of civil and criminal justice, and for the exercise of political and governmental power in general, the police jury is, and the board of drainage commissioners is not, the "governing body" of the parish, and that its jurisdiction, as such, extends to all parts of the parish save to such municipalities in the parish as may be subject by law to other control, and save such specific control as may be vested by law in other state agencies. Elsewhere, the act under consideration uses the expression, "authorities ordering the election," but we find in it nothing that we can construe as operating a repeal of the plain provisions of Act No. 114 of 1900, conferring the power here in question on the police juries.

Act No. 159 of 1902 purports to be an amendment of Act No. 12, p. 12, of 1900 (which latter act was held, in the *New Iberia Drainage Case*, to have been repealed by Act No. 114 of 1900, in so far as the two were in conflict).

It authorizes the police juries to divide

ber and amount, of the property tax payers, qualified to vote under the laws of this state at elections held in drainage districts organized under existing laws, are hereby ratified and confirmed, and their validity shall not be questioned."

It is sufficient to say that the provision thus quoted (which is a mere re-enactment of a provision already in the Constitution) purports to validate only those contributions and taxes "which have been authorized by a vote of a majority, in number and amount, of the property tax payers qualified to vote" etc., and that in this case we know that a majority in amount of the taxpayers did not participate in the election, and the indications are that a majority in number did not so participate. The case being with defendant, it is ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that there now be judgment rejecting the demand of the plaintiff, and dismissing this suit at its cost in both courts.

On Rehearing.

NICHOLLS, J. On the day fixed for this rehearing, opposition was made to the reopening of the case on the ground that at the date it was granted the original decree had become final and the appeal had passed out of the jurisdiction of the Supreme Court; that that decree had been acquiesced in by both the plaintiff and the defendant; and that the rehearing was granted at the instance of an *amicus curiæ* who had no capacity to apply for it.

The original decree was rendered on the 30th of November, 1908, the application for a rehearing made on December 10, 1908, and the rehearing granted on January 18, 1909. The decree was at that time, under Act No. 223, p. 341, of 1908, final. The order of this court of the 18th of January, 1909, was therefore improvidently granted. It is suggested that, although an *amicus curiæ* has no standing to apply for a rehearing (*Life Association of America v. Hall*, 33 La. Ann. 57), yet the court had itself had authority, *ex proprio motu*, to order a rehearing. Assuming that such an authority existed in the court, that authority, to be legal, would necessarily have to be exercised before the original decree had become final. We have no alternative but to set aside the order of the 18th of January, 1909.

For the reasons herein assigned, it is ordered, adjudged, and decreed that the order of this court of the 18th of January, 1909, granting a rehearing herein, be and the same is hereby set aside as having been improvidently granted, and that the original decree herein rendered be, and it is hereby, reinstated and made the judgment of this court.

BIRMINGHAM WATERWORKS CO. v. STATE.

(Supreme Court of Alabama. Feb. 4, 1909.)

1. DISTRICT AND PROSECUTING ATTORNEYS (§ 5*)—SOLICITOR'S FEES—"NOT OTHERWISE PROVIDED FOR."

Code 1896, § 4561, provides for a solicitor's fee of \$50 for securing the conviction of any corporation for violating any law of the state, and another section authorizes a fee of \$7.50 for each conviction of a misdemeanor not otherwise provided for. *Held* that, since section 5388 makes the willful obstruction of a public road a misdemeanor, but affixes no penalty, the offense is one "not otherwise provided for," for which the solicitor's fee is but \$7.50.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 18-20; Dec. Dig. § 5.*]

2. CONSTITUTIONAL LAW (§ 250*)—EQUALITY—CLASSIFICATION.

While the state may classify offenses according to their nature and affix penalties according to its discretion, such classification, in order to save the act from violating the equality clause of the Constitution, must rest on some reasonable difference in relation to which the classification is proposed.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 711, 712; Dec. Dig. § 250.*]

3. CONSTITUTIONAL LAW (§ 250*)—EQUALITY—PENALTIES.

Code 1896, § 4561, declaring that a solicitor's fee of \$50 shall be taxed for securing the conviction of any corporation for violating any law of the state, and providing in another section that a solicitor's fee of \$7.50 shall be taxed for each conviction of a misdemeanor not otherwise provided for, is invalid as an unjust discrimination against corporations, except as to offenses peculiar to them.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 711, 712; Dec. Dig. § 250.*]

Appeal from Shelby County Court; A. P. Longshore, Judge.

The Birmingham Waterworks Company was convicted of the misdemeanor of obstructing a public road, and from an order overruling its motion to retax costs it appeals. Reversed and remanded.

London & Flitts, for appellant. Alexander M. Garber, Atty. Gen., for the State.

SIMPSON, J. The appellant was convicted of the misdemeanor of obstructing a public road. The appeal is from the decision of the court overruling a motion to retax the costs.

The costs against the corporation were taxed at \$50, under section 4561 of the Code of 1896, which provided for a solicitor's fee of \$50 "for securing the conviction of any corporation for violating any law of the state." Another clause of the same section provided for a solicitor's fee of \$7.50 "for each conviction of a misdemeanor, not otherwise provided for," and appellant insists that said section 4561 is unconstitutional, in that it places a heavier penalty on corporations

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

than on individuals convicted of a misdemeanor.

Section 5388 of the Code of 1896 made the willful obstruction of a public road a misdemeanor, but affixed no penalty; and as this offense is "not otherwise provided for," the solicitor's fee is only \$7.50. The solicitor's fee which is taxed against a defendant is a part of the penalty which he pays. Corporations are persons, within the meaning of the Constitution. *Santa Clara Co. v. So. Pac. R. R.*, 118 U. S. 394, 6 Sup. Ct. 1132, 30 L. Ed. 118; *Mo. Pac. Ry. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; *Gulf, etc., Ry. v. Ellis*, 165 U. S. 150, 154, 17 Sup. Ct. 255, 41 L. Ed. 666.

It needs no argument to show that, if a greater penalty is inflicted upon one person than upon another for the commission of the same offense, such person so discriminated against is denied that equal protection of the laws, which is the spirit of our Constitutions, state and federal, and which has been specially formulated in the fourteenth amendment to the Constitution of the United States. It is true that the state may classify offenses according to their nature, and affix penalties according to its discretion; but the Supreme Court of the United States has said that "classification cannot be made arbitrarily," but must "rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without a just basis." *Gulf, etc., Ry. v. Ellis*, 165 U. S. 150, 155, 17 Sup. Ct. 255, 257, 41 L. Ed. 666.

Our own court has held that a statute which authorized the taxing of an attorney's fee against railroads in stock claim cases was unconstitutional; the court saying: "A law which would require all farmers who raise cotton to pay such a fee, in cases where cotton was the subject-matter of litigation and the owners of this staple were parties to the suit, would be so discriminating in its nature as to appear manifestly unconstitutional; and one which should confine the tax alone to physicians, or merchants, or ministers of the gospel, would be glaring in its obnoxious repugnancy to these cardinal principles of free government which are found incorporated, perhaps, in the Bill of Rights of every state Constitution of the various commonwealths of the American government." *S. & N. Ala. R. R. v. Morris*, 65 Ala. 193, 200. Again, an act which gave to the parent a right of action against "an incorporated company or private association of persons" for the death of a minor child was held unconstitutional, as discriminating between said corporations or associations and individuals; the court (referring to the fourteenth amendment to the Constitution of the United States and to certain sections in our own Constitution) saying: "The sum of these

provisions is that no burden can be imposed on one class of persons, natural or artificial, which is not, in like conditions, imposed on all other classes." *Smith v. L. & N. R. R.*, 75 Ala. 449, 451. It was also held that an act which inflicted a penalty upon an individual banker for discounting paper at a usurious rate of interest, and did not inflict the same penalty on a corporation for the same offense, was unconstitutional. *Carter Bros. & Co. v. Coleman et al.*, 84 Ala. 256, 259, 4 South. 151.

It is suggested by the Attorney General that this classification is justifiable, because a corporation cannot be confined in prison or sentenced to hard labor for the county. We do not think this is sufficient reason for the discrimination. The act requires the \$50 to be taxed in all cases, however trivial, and, besides, if it should be desired to imprison any one (which is seldom the case in this class of cases), the officer or agent who places the obstruction is liable to prosecution. To construe the act as applicable to all cases in which a corporation is convicted would render it unconstitutional. Hence, we hold that it is applicable only to the class of offenses peculiar to corporations.

The judgment of the court is reversed, and the cause remanded.

Reversed and remanded.

TYSON, O. J., and DENSON and MAY-FIELD, JJ., concur.

(160 Ala. 253)

ANNISTON CITY LAND CO. v. STATE.

(Supreme Court of Alabama. Feb. 18, 1909.)

1. CONSTITUTIONAL LAW (§ 33*) — SELF-EXECUTING PROVISIONS.

Const. 1901, § 91, exempting from taxation lots in incorporated cities and towns, etc., when "used" exclusively for religious worship, for schools, and for purely charitable purposes, is self-executing.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 34; Dec. Dig. § 33.*]

2. TAXATION (§ 242*) — EXEMPTIONS—SCHOOL PROPERTY.

Under Const. 1901, § 91, exempting from taxation lots in incorporated cities used exclusively for schools, a tract of land, with buildings thereon, located in the city and used as a boarding school for young ladies, was exempt.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 394-403; Dec. Dig. § 242.*]

3. TAXATION (§ 197*) — EXEMPTIONS—CONSTITUTIONAL PROVISIONS—STATUTES.

Const. 1901, § 91, exempts from taxation certain lots in incorporated cities and towns, when used exclusively for school purposes; and Code 1907, § 2061, declares that such property shall be exempt when it is "owned and used by the person to whom it is assessed, exclusively for schools." *Held*, that since, under the constitutional provision, the exemption depended entirely on the use to which the property was devoted, section 2061 was ineffective, in so far as it related to real property and at-

tempted to add the ownership of the property to the conditions of exemption.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 197.*]

4. TAXATION (§ 197*)—EXEMPTION—PERSONAL PROPERTY.

Since the Constitution makes no provision for the exemption of personal property used for school purposes from taxation, Code 1907, § 2061, declaring that such property shall be exempt only when "owned and used for school purposes by the person to whom it is assessed," is valid.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 197.*]

Appeal from Circuit Court, Calhoun County; John Pelham, Judge.

Proceedings for the assessment of back taxes against certain land belonging to the Anniston City Land Company. From a judgment subjecting the land to taxation, the land company appeals. Reversed and remanded.

Blackwell & Agee, for appellant. Alexander M. Garber, Atty. Gen., Thomas W. Martin, Asst. Atty. Gen., and W. P. Acker, for the State.

DENSON, J. On October 4, 1906, the commissioners' court of Calhoun county fixed the value of certain property of the Anniston City Land Company for taxation as follows: Block 145, known as the "Anniston Inn Block," with buildings thereon, at \$25,000, for each of the years 1903 to 1906, inclusive. Furniture at \$1,000, for each of the years 1903 to 1906, inclusive. Lot 14, in block 22, with the building thereon, known as the "Sixteenth Street School," at \$750, for each of the years 1902 to 1906, inclusive. From this assessment and valuation the land company appealed to the circuit court (Code 1896, § 3979; Code 1907, § 2148), and from the judgment in that court rendered against it this appeal has been taken.

It was agreed in the circuit court that the values of the property were, for the periods embraced in the assessment, as stated above. It was also agreed that the assessment of said property as an escape and for the year 1906 was in due form, and that the only questions involved on the appeal in the circuit court were: First, whether said property, or any part thereof, was exempt from taxation; second, if the property was not exempt, had the taxes been paid for all, or certain of said years? The evidence in the circuit court showed that block 145, for each of said years 1903 to 1906, inclusive, had been assessed as follows: "Block 145, that part not exempt, \$1,000." It was also shown that lot 14, in block 22, had been listed for the years 1901 to 1906, inclusive, as follows: "Block 22, lot 14, exempt."

The appellant was the owner of all of said property during said years, and is yet the owner thereof. The testimony showed that for each of the years 1901 to 1906, in-

clusive, block 145 and the building thereon, known as the "Anniston Inn," in the city of Anniston, had been leased by the appellant to Dr. Owens and others for school purposes; that therein was conducted a boarding school for young ladies, which use had obtained during each of said years, and that in conjunction with the boarding school there was a day school; that such school was known as "Anniston College for Young Ladies," and was open from the early fall until late in the spring, as was usual and customary with schools in that section of the country. It was also shown that said property was not used for any other than school purposes; that the inn itself covered one acre of land, and that the whole block upon which it was located contained four acres; that the building on lot 14, block 22, was built about 15 years ago, was adapted to school purposes, had never been used for any other purpose, occupied land in area less than one acre, and, during the years 1901 to 1906, inclusive, had been leased by the appellant to the city of Anniston for a public school building. The testimony also showed that said leases were for a substantial money consideration and that the appellant had no interest in the schools.

Was the property subject to taxation, or, to put it differently, was the property, or any part thereof, on account of the use to which it was put by the lessees, exempt from taxation? The "universal rule of construction is that exemptions from taxation, whether statutory or constitutional, are to be strictly construed, against the exemption and in favor of the right to tax, and that no person or property is to be exempted unless the intention to exempt such person or property clearly appears in some statute or constitutional provision. The relinquishment or curtailment of the power of taxation is never presumed." Gray, *Lim. of Taxing Power*, p. 655, § 1321, and cases cited in note 53 to the text, among them being that of *Stein v. Mobile*, 17 Ala. 234, 239. In the case last cited this court, through Dargan C. J., gave expression to the rule in this language: "The right of taxation is essential to the existence of all governments, * * * and it is never to be presumed that this right is abandoned or surrendered unless it clearly appears that such was the intention." 1 *Cooley on Taxation* (3d Ed.) p. 356, and cases cited in note 2 to the text. "Most exemptions from taxation belong to classes which it has been the policy of the various states to exempt from the beginning. These customary exemptions all have some well-understood basis. It has been the policy of the country to encourage education in all its aspects, and property used for educational purposes is generally, within certain limitations, exempt." Gray, *Lim. of Taxing Power*, §§ 1324, 1325.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Exemption is here claimed by the owner of the property under section 91 of the Constitution of 1901, which is a rescript of section 52, art. 4, of the Constitution of 1875 with the last clause thereof eliminated. Section 91 is self-executing, and proprio vigore exempts from taxation lots in incorporated cities or towns, or within one mile of any city or town, to the extent of one acre, with the buildings thereon, "when the same are used exclusively for religious worship, for schools, or for purposes purely charitable." The precise question here to be determined has never been adjudicated by this court; but fortunately the path before us is not an entirely untraveled one in other jurisdictions. The Constitution of the state of Kansas contains a provision in this language: "All property used exclusively for state, * * * literary, educational, scientific, religious, benevolent, and charitable purposes * * * shall be exempt from taxation." The court of last resort in that state, construing the provision and speaking through Brewer, J., said: "To bring this property within the terms of the section quoted, it must be used exclusively for literary and educational purposes. This involves three things: First, that the property is used; second, that it is used for educational purposes; and, third, that it is used for no other purpose. * * * Nor is ownership evidence of use. * * * This is too plain to need either argument or illustration. If the framers of the Constitution had intended to exempt all property belonging to literary and charitable institutions from taxation, the language employed would have been very different." *Washburn College v. Shawnee County*, 8 Kan. 344. Again, in the case of *St. Mary's College v. Crowl*, 10 Kan. 442, the same provision of the Kansas Constitution was before the Supreme Court of that state for construction; and the court used this significant language: "It is solely the use of the property which determines whether the property is exempt or not. *Washburn College v. Shawnee County*, 8 Kan. 344. It makes no difference who owns the property, nor who uses it. Property used exclusively for educational purposes is exempt, whoever may own it, or whoever may use it."

It is true that the facts of these two cases, respectively, show that the title to the property was in the party claiming the exemption; but this, we think, does not necessarily weaken the cases as authority in the case at bar, for the reason that the court, in both, brought pointedly into view the principle that "exclusive use," irrespective of ownership, was the test of the right of exemption. We do not stand alone in this construction of these decisions. In the case of *Scott v. Society of Russian Israelites*, 59 Neb. 571, 81 N. W. 624, the Supreme Court of Nebraska took the same view of them. There the property claimed as exempt was owned by one Bowman, who had leased it to the society for a money consideration, and upon the further

consideration that the society would pay the taxes during the lease term. The property was used exclusively for religious purposes. The statute under which the exemption was claimed was in this language: "The following property shall be exempt from taxation in this state: First, the property of the state, counties, and municipal corporations, both real and personal; second, such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery, and charitable purposes." Construing the statute, the court said: "The language of the provisions quoted is plain. There is exempt from taxation all property used exclusively for religious purposes. It is the exclusive use for the purpose named which determines whether the property is subject to the burden of taxation or not." The cases from the Kansas court, above referred to, are cited, among others, in support of the holding. The court further said: "To hold that a religious society must be the absolute owner of the property occupied or used by it exclusively for church purposes, to create the exemption, would be to inject words into * * * the statute which are not therein written. This we have no power to do." A provision of the Ohio Constitution, similar to section 91 of our own, was construed by the Supreme Court of that state in this language: "The exemption of burying grounds, houses used exclusively for public worship, and institutions of purely public charity does not depend on the ownership of the property. The uses that such property subserves constitute the ground for its exemption." *Gerke v. Purcell*, 25 Ohio St. 229.

The foregoing cases are the only ones we have found which had under consideration laws similar in verblage to our own. Upon the foregoing considerations it is manifest that section 91 of the Constitution makes use of the property, irrespective of ownership, the test of the right of exemption from taxation, and that, under the Constitution, in order to be exempt, it is only necessary that the property shall be situate in a city or a town, shall not exceed in area the limitation fixed by the Constitution, and that it shall be used directly and exclusively for schools. The cases cited in appellee's brief, when examined, will be found to involve the construction of laws dissimilar to ours, in that exclusive use is not by them constituted the only criterion of exemption. Therefore they are not in point.

Section 3907 of the Code of 1896, as amended by the act of March 5, 1901 (Acts 1900-01, p. 2598), being section 2061 of the present Code, adds to the conditions of exemption ownership of the property. In other words, according to the amendment, the property, to be exempt, must be owned and used by the person to whom it is assessed exclusively for schools. The Constitution being self-executing and mandatory, it is obvious that it was beyond legislative competency to add

ownership as a prerequisite to exemption from taxation, and that in this respect the statute is ineffective, in so far as it bears upon real property, to accomplish the purpose of its enactment. There is high authority holding that the use of a school building in the vacation period, in the summer, as a boarding house, is not a waiver or forfeiture of exemption from taxation. *Temple Grave Seminary v. Cramer*, 98 N. Y. 121; *St. Mary's Church v. Tripp*, 14 R. I. 307. But we need not commit ourselves to this holding, as we do not regard the evidence in this record as showing that there was any diversion of the use of the Anniston Inn from school purposes during the vacation period.

The Constitution makes no provision for the exemption of personal property used for school purposes from taxation, and therefore the added condition of ownership, under the statute, is valid as to personal property; but, to authorize the exemption of personal property, ownership, and exclusive use must concur. In this view, the exemption of personal property claimed was properly adjudged against the appellant.

Upon the facts as disclosed by the record, and in the light of the foregoing discussion, we reach the conclusion that the exemptions should have been allowed as to the realty.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

(159 Ala. 51)

TANNEHILL v. STATE.

(Supreme Court of Alabama. Feb. 2, 1909.)

CRIMINAL LAW (§ 723*)—ARGUMENT OF COUNSEL.

Where accused, a negro, sought to prove an alibi by one white man and three negroes, it was reversible error for the solicitor, in argument to the jury, to state that an acquittal on such testimony would remove expectation of ever convicting another negro, and that negroes always get up an alibi and prove it by perjured testimony of their race.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1676; Dec. Dig. § 723.*]

Appeal from Circuit Court, Shelby County; A. H. Alston, Judge.

Sam Tannehill was convicted of murder in the second degree, and he appeals. Reversed and remanded.

F. S. Ferguson, for appellant. Alexander M. Garber, Atty. Gen., and Borden H. Burr, Sol., for the State.

SIMPSON, J. The appellant was convicted of the crime of murder in the second degree, and sentenced to 30 years in the penitentiary.

The defendant, who is a colored man, sought to prove an alibi, and, to prove the same, examined one white man and three

colored men. The solicitor, in closing his argument to the jury, said: "The only defense to these confessions of the defendant, with the corroborating facts shown by Mr. McBride and Mr. Martin, is the alibi set up by a lot of negro witnesses. Why, gentlemen, if you acquit this man on such an alibi as this, you can never expect to convict another negro of crime in this country. You know the negro race—how they stick up to each other when accused of crime, and that they will always get up an alibi, prove it by perjured testimony of their own color, and get their accused companion clear if they can." Counsel for defendant excepted to these remarks, and moved the court to exclude same from the jury.

It is the duty of the court to see that the defendant is tried according to the law and the evidence, free from any appeal to prejudice or other improper motive, and this duty is emphasized when a colored man is placed upon trial before a jury of white men. Courts in some other jurisdictions have held, on what seems to be good reason, that the injury done by such remarks cannot even be atoned by the retraction or the ruling out of the remarks; but at least it is error, as held by our own courts, for such remarks, stating facts that are not in evidence before the jury, to be allowed. *Florence Cotton & Iron Co. v. Field*, 104 Ala. 472, 490, 16 South. 538; *Anderson v. State*, 104 Ala. 84, 87, 16 South. 108; *Dollar v. State*, 99 Ala. 236, 237, 13 South. 575; *Wolfe v. Minnis*, 74 Ala. 386, 389; *E. T. V. & Ga. R. v. Bayliss*, 75 Ala. 406, 470; *Sullivan v. State*, 66 Ala. 48, 50, 51; *Quinn v. People*, 123 Ill. 333, 15 N. E. 46.

The judgment of the court is reversed, and the cause remanded.

Reversed and remanded.

TYSON, C. J., and DENSON and MAYFIELD, JJ., concur.

(159 Ala. 444)

GULF YELLOW PINE LUMBER CO. v. CHAPMAN & CO.

(Supreme Court of Alabama. Feb. 4, 1909.)

CORPORATIONS (§ 382*)—ULTRA VIRES ACTS—GUARANTY.

Charter power of a lumber corporation to operate a commissary, to buy and sell goods, and to purchase for cash or credit, was ancillary to its main business of lumbering and milling, and did not authorize the corporation to buy goods for another, or become surety or guarantor for another; and hence the act of the general manager in promising to pay for goods sold to a boarding house keeper was ultra vires, though the corporation was indirectly benefited, in that the boarding house afforded its employees a place to board.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1515, 1517, 1518, 1536; Dec. Dig. § 382.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Circuit Court, Geneva County; H. A. Pearce, Judge.

Action by Chapman & Co. against the Gulf Yellow Pine Lumber Company. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

W. O. Mulkey, for appellant. W. R. Chapman, for appellees.

DOWDELL, J. This suit is against a private corporation organized under the general statute. The complaint is on the common counts. Among other pleas filed are those setting up the statute of frauds and ultra vires. The evidence without conflict showed that the goods, wares, and merchandise, for the price of which the suit was brought, were sold and delivered to one Lord to furnish and maintain a boarding house conducted by said Lord, and in which the defendant corporation had no interest, and all of which was known to the plaintiffs at the time of the sale and delivery of the goods.

The defendant corporation under its charter powers was at the time engaged in the lumber and milling business, and in connection therewith carried on, under its charter powers, a commissary; but none of the goods so sold went into said commissary, nor in any way were used by the defendant. The plaintiffs declined and refused to sell to Lord when he applied to purchase the goods, and not until one Flowers, the general manager of the defendant corporation, promised the plaintiffs that the defendant would pay for them, did they sell. The charter provision in reference to the commissary authorized the corporation "to operate and maintain a commissary or storehouse, to engage in the buying and sale of goods, wares, and merchandise, and to purchase for either cash or credit, as it may deem proper." Manifestly this power was intended as ancillary to its main business of lumbering and milling, and in no sense was it contemplated as an authorization to purchase goods for another, or to become surety or guarantor for another. Clearly the act of Flowers, the general manager, in promising to pay for the goods sold and delivered to Lord was an ultra vires contract, and the fact that the plaintiffs would not have delivered the goods to Lord, but for the promise of Flowers that the defendant would pay for the same, and the further fact that the defendant was indirectly benefited, in that the boarding house run by Lord afforded the defendant's employees a place to board, cannot alter the case. The benefits to the corporation in such a case are not such as would raise up an estoppel as to liability.

Our conclusion is that the trial court erred in giving the general charge for the plaintiffs, and in refusing a like one to the defendant. *Greene's Brice's Ultra Vires*, p. 252; *Lime Works v. Dismukes*, 87 Ala. 344,

6 South. 122, 5 L. R. A. 100; *Steiner & Lobeman v. Steiner Lumber Co.*, 120 Ala. 128, 28 South. 494.

Reversed and remanded.

SIMPSON, ANDERSON, and DENSON, JJ., concur.

McLEMORE v. CITY OF WEST END.

(Supreme Court of Alabama. Feb. 2, 1909.)

1. MUNICIPAL CORPORATIONS (§ 757*)—STREETS—DUTY TO REPAIR.

A city must keep its streets to their full width in reasonably safe repair.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1591; Dec. Dig. § 757.*]

2. MUNICIPAL CORPORATIONS (§ 800*)—TORTS—DEFECTIVE STREETS—INJURIES—PROXIMATE CAUSE.

If a city negligently fails to repair its streets, it is liable for injuries caused thereby, if the injury would not have occurred but for the defect and the person injured is not negligent, even though the injury would probably not have happened, except for an intervening or concurring cause for which neither party is responsible, such as a horse becoming unmanageable from fright at an obstruction.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1671; Dec. Dig. § 800.*]

3. PLEADING (§ 248*)—AMENDMENT—NEW CAUSE OF ACTION.

The amendment of a complaint, alleging that defendant city negligently allowed a wire fence to be maintained in a street and that plaintiff was injured while riding along the street by his horse becoming unmanageable and running into the fence, by substituting the word "frightened" for the word "unmanageable," did not substitute an entirely new cause of action, and was proper.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 686, 709; Dec. Dig. § 248.*]

Tyson, C. J., and Dowdell and Simpson, JJ., dissenting.

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

Action by G. B. McLemore against the City of West End. From a judgment for defendant on demurrer to the complaint, plaintiff appeals. Reversed and remanded.

The sixth amendment, alluded to in the opinion, is an amendment to the third count of the complaint by striking therefrom the word "unmanageable," where it occurs therein, and inserting in lieu thereof the word "frightened." The other pleadings and the rulings thereon sufficiently appear in the opinion.

B. M. Allen, for appellant. C. B. Powell, for appellee.

DENSON, J. The original complaint contained four counts, in which it was averred, in varying form, that the duty rested upon the city of West End, a municipal corporation, to keep its streets in reasonably safe

condition; that it had negligently allowed a wire fence to be maintained in a street of the city; and that the plaintiff, while riding on horseback along the street, was injured, by his horse becoming unmanageable and running into the fence, throwing the plaintiff, breaking his leg, and otherwise injuring him. The general issue was pleaded; and after the introduction of some of plaintiff's evidence, which tended to show that his horse, at the point described in the complaint, became frightened, and unmanageable by reason of fright, and by coming into contact with the fence was thrown, falling upon the ground, and upon or against plaintiff's leg, breaking it, plaintiff amended his complaint by averring that the horse fell against the fence, and in falling fell upon the plaintiff's leg, and further offered to amend the third count by striking out the word "unmanageable" and inserting in lieu thereof the word "frightened." The court, upon the motion of defendant, struck this latter amendment from the file as a departure from the original complaint. The plaintiff excepted to this ruling, and then, with leave of the court, amended the third count by adding, after the word "unmanageable," where it occurs in said count, the words "by reason of fright." The defendant demurred to the complaint as amended, upon the grounds that the complaint set up a new cause of action, that the fence being out in the street was not the proximate cause of the injuries complained of, and that the complaint failed to show any duty upon the part of the defendant in relation to the fence. The demurrers were sustained, and, the plaintiff declining to plead further, judgment was rendered for the defendant.

The duty of municipal corporations to keep their streets and sidewalks in a reasonably safe state of repair for public use is too well established to admit of further controversy; and this duty extends to the whole width of these public thoroughfares. *City Council of Montgomery v. Reese*, 146 Ala. 410, 40 South. 760. If a municipality has been negligent in the discharge of such a duty, and the person injured is not at fault, it is liable (according to the weight of authority) where the injury would not have occurred but for the obstruction or defect. It cannot excuse its culpability by saying that the injury possibly, or even probably, would not have happened but for the intervention of a concurring cause, such as a horse becoming unmanageable through fright, for which neither party is responsible. *Elliott on Streets*, § 615, and authorities there cited; *Ring v. City of Cohoes*, 77 N. Y. 88, 33 Am. Rep. 574. The rulings upon the demurrers to the complaint are opposed to these principles, and must work a reversal of the judgment of the court below.

The court erred, also, in striking the "sixth

amendment" to the complaint. It did not create an entirely new cause of action, as is assumed by the motion, and was clearly admissible.

Reversed and remanded.

ANDERSON, McCLELLAN, and MAYFIELD, JJ., concur. TYSON, O. J., and DOWDELL and SIMPSON, JJ., dissent.

(159 Ala. 186)

SLOSS-SHEFFIELD STEEL & IRON CO. v. CHAMBLEE

(Supreme Court of Alabama. Jan. 1, 1909.
On Rehearing, Feb. 18, 1909.)

MASTER AND SERVANT (§ 256*)—PLEADING—DECLARATION—SUFFICIENCY.

A complaint that defendant was operating a coal mine, that on a certain day, while plaintiff was in pursuance of said employment in the service and employment of defendant and engaged in and about said business of defendant, while riding on the tram car of said defendant, the wire broke and he was injured, was not demurrable as failing to show that the injury was received while plaintiff was performing duties in accordance with his service or employment, or was injured while in performance of duties which he was employed to do.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 256.*]

Dowdell, C. J., and Simpson and Anderson, JJ., dissenting.

Appeal from City Court of Birmingham; H. A. Sharpe, Judge.

Action by Dan Chamblee against the Sloss-Sheffield Steel & Iron Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The amended complaint was in the following language: "The plaintiff claims of the defendant \$3,000 as damages, for that heretofore, to wit, on the 5th day of January, 1906, the defendant was operating a coal mine, known as the 'Bessie Coal Mine,' in Jefferson county, Ala.; that on said day while plaintiff was, in pursuance to said employment, in the service and employment of defendant, and engaged in and about said business of defendant, while riding on the tram car of said defendant, which was being lowered in said mine by means of a wire rope or cable, said wire rope or cable broke and gave way, and as a proximate consequence thereof plaintiff fell or was cast from said car, and his right eye and other parts of his body were bruised, cut, and otherwise injured, and his left hip, foot, and knee permanently injured, and he lost much time from his work, and suffered much mental anguish and physical pain; and plaintiff alleges that said wire rope or cable broke or gave way as aforesaid, and plaintiff suffered such injuries and damages, by reason of and as a proximate consequence of a defect in the condition of the ways, works, machinery, or plant used in or connected with the said

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

business of the defendant, which said defect arose from, or had not been discovered or remedied owing to, the negligence of the defendant, or of some person in the service or employment of defendant and intrusted by it with the duty of seeing that said ways, works, machinery, or plant were in proper condition. Said wire rope or cable was old, worn, cracked, rusty, weak, insecure, or otherwise defective."

The following demurrers were filed to this complaint: "(1) It fails to show the said injury was received while plaintiff was performing his duties under his service or employment. (2) It does not aver that plaintiff was injured while in the performance of the duties which he was employed to do. (3) It does not show that defendant violated any duties it owed to plaintiff. (4) The alleged defect is not sufficiently set forth in the complaint."

There was judgment for plaintiff in the sum of \$250.

Tillman, Grubb, Bradley & Morrow, for appellant. Joseph T. Collins, Jr., for appellee.

SIMPSON, J. This action was brought by the appellee against the appellant to recover damages for an injury claimed to have been received by the plaintiff by the breaking of a wire rope while the plaintiff was at work in a coal mine belonging to the defendant.

The first assignments insisted on relate to the overruling of demurrers to the complaint as amended. Said complaint states only inferentially that the plaintiff was employed at all, and only that he was "engaged in or about said business of the defendant." It does not state that he was engaged in or about the "particular service" required by his employment. This court has said that under our statute the party claiming damages must be an employé, at the time of the injury, by contract, express or implied, binding on defendant, and the injury must be received while rendering the service required by the particular employment. *Ga. Pac. R. R. v. Propst*, 85 Ala. 203, 205, 4 South. 711. This point was not presented by demurrer in the case of *Birmingham Rolling Mill Co. v. Rockhold*, 143 Ala. 115, 42 South. 96. The court erred in overruling said demurrer.

There was no error in the refusal of the court to give the fourth charge requested by the defendant. There was testimony tending to show that it was a part of the duties of the plaintiff to ride down with the empty cars, and the mere fact that he had been out of the mine for the purpose of getting his dinner did not change the fact that he was on duty in going down with the empty cars afterward. *Birmingham Rolling Mill Co. v. Rockhold*, 143 Ala. 116 (7th h. n.), 127, 42 South. 96.

The remark quoted by counsel for appellant, from the case of *Wilson v. L. & N. R. Co.*, 85 Ala. 273, 4 South. 701, referred to the question of contributory negligence of an employé in descending from the top of a car for his own purpose, and not for any necessary purpose, by way that was obviously dangerous, when there was a safe way open to him.

The judgment of the court is reversed, and the cause remanded.

DOWDELL, ANDERSON, and DENSON, JJ., concur.

On Rehearing.

PER CURIAM. The majority of the court, consisting of **DENSON, McCLELLAN, MAYFIELD, and SAYRE, JJ.**, hold that the amended count was sufficient. The case is accordingly affirmed.

DOWDELL, C. J., and SIMPSON and ANDERSON, JJ., dissent.

(159 Ala. 621)

FOSTER et al. v. CARLISLE et al.

(Supreme Court of Alabama. Jan. 21, 1909.

Rehearing Denied Feb. 16, 1909.)

1. **EVIDENCE (§ 460*)—PAROL EVIDENCE AFFECTING WRITINGS—DEEDS—DESCRIPTION OF PREMISES.**

A description of the lot conveyed as commencing at a point on "P. or F. street, running thence south along said P. street to the two-story house on lot owned by H.," and fixing the southwest corner of the lot at the corner of the "two-story house on lot owned by H.," being unambiguous, cannot be contradicted by parol evidence that such corner of the lot was 12 feet north of such corner of the building.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 460.*]

2. **EVIDENCE (§ 390*)—DECLARATIONS—DECLARATIONS OF GRANTOR.**

Declarations of grantor, at the time of the deed to grantee, that it erroneously embraced a 12-foot strip on one side of the lot conveyed, are inadmissible to contradict the description in the deed.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 390.*]

Appeal from Circuit Court, Bullock County; A. A. Evans, Judge.

Ejectment by R. M. Foster and others, executors, against George Carlisle and others, for a 12-foot strip of land. Judgment for defendants, and plaintiffs appeal. Reversed and remanded.

Most of the facts appear in the opinion. Assignment of error 3 is as follows: "(3) In permitting the appellees to ask the witness J. P. Radford the following question, found on page 19 of the record, to wit: 'Tell the jury what was the southern boundary line of the Chappell mill lot at the time Mr. Chappell owned it and conveyed it to you and your brothers, and also during the time

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

you and your brother, C. R. Radford, owned it." The fourth assignment of error is the answer to this question, to wit, that it was at a point 12 feet north of the Holmes building. The declarations referred to were those contained in the testimony of J. P. Radford, as follows: That at the time he and his brother, C. R. Radford, obtained the deed, a copy of which is attached, being the deed from H. C. Chappell and wife to him, Chappell told them there was a mistake in the description of said lot as contained in said deed, and that said deed described said lot as commencing at a point on Prairie street, and running thence south along said Prairie street to the two-story house on the lot owned by Holmes, and thence east to Mrs. Riley's lot, when there was in fact a space of about 12 feet immediately north of the Holmes building, and extending in an easterly direction, the length of the Holmes lot, which he (Chappell) did not claim—and the same statement by the witness Radford to Dr. Foster.

J. D. Norman and R. E. L. Cope, for appellants. D. S. Bethune and E. L. Blue, for appellees.

McCLELLAN, J. The contest in this controversy involved the inquiry whether a certain strip of land in Union Springs, described in the complaint, belonged to the "Chappell mill lot," as plaintiffs contended, or to the "R. R. Holmes lot," as the defendants contended. The issue was one to be controlled by finding of fact. The errors assigned all relate to rulings of the court admitting testimony.

J. P. Radford was examined as a witness for the defendants. He was one of the grantees in the deed conveying the "Chappell mill lot" from Chappell to the Radfords. This deed described the property conveyed as commencing at a point on "Prairie or Foster street, * * * running thence south along said Prairie street to the two-story house on lot owned by R. R. Holmes. * * *" The remaining parts of the description are not presently important, except in the respect that, according to the deed, the "southwest corner" of the Chappell mill lot is fixed at the corner of the "two-story house on lot owned by R. R. Holmes." J. P. Radford was asked by defendants this question: "Where was the southwest corner of the Chappell mill lot at the time Mr. H. C. Chappell sold and conveyed it to you and C. R. Radford?" The plaintiffs objected to the question upon the grounds (1) that it sought by parol testimony to alter, vary, or explain the unambiguous language of the deed from Chappell to the Radfords; (2) that it was illegal. The witness, the objection being overruled, testified that the mentioned corner of the "Chappell mill lot" was at a point 12 feet north of the north-

west corner of the Holmes building. The plaintiffs' motion to exclude the answer, upon the grounds stated, was denied.

It is well settled that, where the description of property in a deed is unambiguous, parol evidence is not admissible to show a different subject-matter of conveyance to that and as described; but, if the description is ambiguous—may be referred to different properties—among other proper evidences of ambiguity, parol evidence is admissible to identify the property intended to be conveyed. *Jones on Ev.* (2d Ed.) § 485; *Id.* (1st Ed.) § 496, and citations in notes; 17 Cyc. p. 616 et seq., and notes; *Griffin v. Hall*, 115 Ala. 482, 22 South. 162; *Chambers v. Ringstaff*, 69 Ala. 140; *Gullmartin v. Wood*, 76 Ala. 204. The description in the quoted deed is entirely unequivocal and unambiguous in its designation of the corner of the Chappell mill lot at the northwest corner of the Holmes building. The answer of the witness clearly contradicts this part of the description of the property purported to be conveyed. There is no room for cavil on that score. He was permitted to assert that the south terminus of the line stipulated in the deed was 12 feet north of the point to which the deed declared it to go.

The rulings assailed by assignments of error 3 and 4 are well taken, under the principle before stated, and on authorities in that connection cited.

The admission of declarations of grantors Chappell and Radford, respectively, to the witness Radford and Dr. Foster, respectively, to the effect that the deed from Chappell erroneously embraced a strip 12 feet south of the Chappell mill lot, was error. Those declarations were contradictory, as appears from their face, of the description borne by the deed referred to.

For the errors indicated, the judgment is reversed, and the cause is remanded.

Reversed and remanded.

TYSON, C. J., and DOWDELL and ANDERSON, JJ., concur.

(159 Ala. 668)

FOSTER et al. v. REDDICK.

(Supreme Court of Alabama. Jan. 21, 1909.
Rehearing Denied Feb. 5, 1909.)

Appeal from Circuit Court, Bullock County;
A. A. Evans, Judge.

Ejectment by R. M. Foster and others, as executors, against J. H. Reddick. Judgment for defendant, and plaintiffs appeal. Reversed and remanded.

J. D. Norman, for appellants. D. S. Bethune and E. L. Blue, for appellee.

DOWDELL, J. Reversed and remanded, on the authority of *Foster et al. v. George Carlisle et al.*, 48 South. 665.

(159 Ala. 406)

CARROLL v. BURGIN et al.(Supreme Court of Alabama. Jan. 15, 1909.
Rehearing Denied Feb. 18, 1909.)**1. SHERIFFS AND CONSTABLES (§ 163*) — BONDS—DEFENSES.**

A defendant in detinue, holding the property under a forthcoming bond requiring the delivery of the property to plaintiff if cast in the suit, was cast in the suit, and tendered the property to a deputy of the sheriff, who refused to receive it, and thereby the property was lost to plaintiff. *Held*, in an action by plaintiff on the sheriff's bond for such refusal, it was a defense to the action that the defendant tendered to plaintiff after tendering to the deputy, and that plaintiff refused the same, where the only damage claimed was the loss of the property.

[Ed. Note.—For other case, see *Sheriffs and Constables*, Dec. Dig. § 163.*]

2. SHERIFFS AND CONSTABLES (§ 157*)—LIABILITY ON BOND—TERMINATION OF OFFICE.

Code 1907, §§ 3778, 3783, require a sheriff seizing property in detinue to deliver it to defendant on the giving of a forthcoming bond conditioned, if cast in the suit, to deliver the property to plaintiff; and if the defendant fails to so deliver it up the sheriff is required to make return of that fact on the bond. Code 1907, § 1549, requires the retiring sheriff to turn over such bond to his successor. *Held*, that a sheriff did not breach his bond by refusing to receive, after his term of office had expired, property tendered by a defendant in detinue holding under a forthcoming bond and cast in the suit.

[Ed. Note.—For other case, see *Sheriffs and Constables*, Dec. Dig. § 157.*]

3. SHERIFFS AND CONSTABLES (§ 163*)—LIABILITY ON BOND—DEFENSES.

Held, also, that the fact that defendant in the detinue suit offered to deliver the property to an attorney of record for the plaintiff and that he refused to receive it was not a defense to the action on the bond, since defendant under the bond was bound to deliver it to plaintiff.

[Ed. Note.—For other case, see *Sheriffs and Constables*, Dec. Dig. § 163.*]

Appeal from City Court of Bessemer; William Jackson, Judge.

Action by W. T. Carroll against J. B. Burgin and others, on a bond. From a judgment for defendants, plaintiff appeals. Reversed, and cause remanded.

Pinkney Scott, for appellant. Tillman, Grubb, Bradley & Morrow, for appellees.

SIMPSON, J. The suit in this case was brought by the appellant against the appellees, as principal and sureties on the bond made by said Burgin as sheriff of Jefferson county. The breaches of the bond alleged relate to a suit in detinue for the recovery of two mules, commenced September 27, 1906. The property sued for was taken into the custody of the sheriff, and on October 3, 1906, delivered to the defendant on the execution of a forthcoming bond. On December 13, 1906, judgment was rendered for the plaintiff. It is assigned as a breach of the condition of the bond of said sheriff that "he failed to accept the property from the said James Barbour, the defendant in said detinue suit, the same having been tendered to

Rush Randall, deputy sheriff, and acting for him, within 30 days from the rendition of the judgment against the defendant as aforesaid, and restore the property to the plaintiff, as it was his duty to do." The second plea set up the fact that "said Andrew W. Burgin was not sheriff of Jefferson county at the time of the alleged breach of said official bond." Demurrers were interposed to said second plea, and overruled.

The first assignment insisted on is to the overruling of said demurrer, and it is contended that said plea is not a sufficient answer to said count. The cases relied upon for this contention are *Bruilster v. Gavin et al.*, 127 Ala. 317, 28 South. 410, and *Ryan v. Couch*, 66 Ala. 244. In those cases it was held that a sheriff who had levied a writ of attachment, and to whom a venditioni exponas had been issued, was the proper party to make the sale, even though his term of office had expired; and the same principle was applied where the sheriff had, during his term of office, levied an execution. The reason upon which these decisions rest is that "by the levy of the writ upon chattels the officer acquires a special property therein" (*Bruilster Case*, 127 Ala. 319, 28 South. 410), or that "he acquired a special property in the personal property levied on under the writ" (*Ryan Case*, 66 Ala. 249). That principle has no application to the present case, in which the property had been turned over to the defendant in the case, on the execution of a bond according to section 3778, Code of 1907, under which it was his duty, if he was cast in the suit, to "within 30 days deliver the property to the plaintiff" and pay his costs, etc.; and, if he failed to do so, the only duty of the sheriff was to "upon the bond make return of the fact of such failure." Section 3783, Code of 1907. This bond was simply one of the papers which it was the duty of the retiring sheriff to turn over to his successor. Section 1549, Code of 1907. When that was done, his responsibility ceased, and he had no right to receive the property. There was no error in overruling the demurrer to the second plea.

The other breach of the bond insisted on is that the sheriff failed to accept the mules when tendered to his deputy by the defendant (the principal in the forthcoming bond), after judgment had been rendered in favor of the plaintiff, "wherefore the plaintiff lost said property." In reply to this defendant's fifth plea is "that the said Barbour [the defendant in detinue] tendered and offered to deliver said property to the plaintiff, after tendering the same to Rush Randall, and within 30 days from and after the rendition of said judgment in favor of the plaintiff against said Barbour, and that the plaintiff failed or refused to accept or receive the same." Appellant claims that it was the duty of the sheriff to receive the property and turn

it over to him, and that it is no answer to the breach assigned to allege that the property was tendered to the plaintiff within the time prescribed by the statute. It will be noticed that the only damage claimed is for the loss of the property. As before stated, the condition of the bond is that the defendant will "deliver the property to the plaintiff" (section 3780, Code of 1907); and, while it may be true that, if the property is tendered to the sheriff, it would be his duty to take it and turn it over to the plaintiff, it is difficult to see how the plaintiff could be damaged, in the loss of the property, by the sheriff's act, when the property was tendered to him in accordance with the conditions of the bond, and he refused to receive it. The case of *Jesse French, etc., Co. v. Bradley* was an action by a party who had given the bond to supersede an execution; the gravamen of the action being that the property was delivered or tendered to the sheriff, and he, in place of returning that fact, as required by the statute, returned the bond as forfeited in toto. 143 Ala. 530, 535, 39 South. 47. There was no error in overruling the demurrer to the fifth plea.

The sixth plea offers, as a defense, the fact that the defendant in the detinue suit offered to deliver said property to Pinkney Scott as attorney for the plaintiff (he being the attorney of record for the plaintiff) within the 30 days prescribed by the statute, and that said Scott refused or failed to accept the same. This plea was demurred to, and the demurrer overruled. The insistence is that this was error, because the attorney was not obliged to receive the property for his client. While it is held that an attorney who sues for money due his client has authority to receive the money, and a tender to him is equal to a tender to the client (4 Cyc. 940, 947-949; 28 Am. & Eng. Ency. Law, 36; *Jackson v. Crafts*, 18 Johns. [N. Y.] 110; *Salter v. Shore*, 60 Minn. 483, 62 N. W. 1126; *Frazier v. Parks*, Adm'r, 56 Ala. 363), yet we cannot say that a tender to the attorney of property which the defendant had obligated himself to deliver to the client would satisfy the bond.

For the same reason, that part of the oral charge excepted to was erroneous.

The judgment of the court is reversed, and the cause remanded.

HARALSON, DOWDELL, and DENSON, JJ., concur.

(159 Ala. 68)

SMITH v. STATE.

(Supreme Court of Alabama. Feb. 4, 1909.)

1. WITNESSES (§ 345*)—CREDIBILITY.

Where, in a trial for unlawfully selling intoxicating liquor, a witness for the state testified that he bought whisky from defendant on a certain day in June, an objection to a question

asked the witness on cross-examination as to whether he had not himself been arrested for selling whisky about the 1st of June was properly sustained.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1126, 1127; Dec. Dig. § 345.*]

2. CRIMINAL LAW (§ 1170*)—APPEAL AND ERROR—HARMLESS ERROR.

Error in sustaining an objection to a question asked a witness was not prejudicial to accused, where the subsequent testimony of the witness fully answered the question.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3148; Dec. Dig. § 1170.*]

3. WITNESSES (§ 345*)—CREDIBILITY—CONVICTION OF CRIME.

Under Code 1907, § 4008, providing that no objection must be allowed to the competency of a witness because of his conviction for any crime except perjury or subornation of perjury, but, if he has been convicted of a crime involving moral turpitude, the objection goes to his credibility, and section 4009, providing that a witness may be examined touching his conviction for crime, the state was properly permitted, in a trial for unlawfully selling intoxicating liquor, to ask defendant's witness if he had not served a term in the penitentiary, what he was sent there for, and, on the witness answering for murder, to ask him how long he stayed there.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1126, 1127; Dec. Dig. § 345.*]

4. CRIMINAL LAW (§ 789*)—INSTRUCTIONS—REASONABLE DOUBT.

In a trial for unlawfully selling intoxicating liquor, a charge, "You cannot convict a man on any sort of evidence, but the law itself demands that the proof must show beyond all reasonable doubt that defendant is guilty as charged, else you should acquit him," was properly refused; the first statement thereof being misleading.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1906, 1907; Dec. Dig. § 789.*]

Appeal from Circuit Court, Randolph County; S. L. Brewer, Judge.

John Smith was convicted of unlawfully selling liquor, and appeals. Affirmed.

The witness Ford, in answer to the question as to whom he was working for in the case, stated that he was a marshal of Roanoke and working in the interest of the Law and Order League of the county, and as marshal desired to see the law in force. The state was permitted to ask the witness Coffield, "You have served a term in the penitentiary, haven't you, Isam?" and his answer thereto was that he had. To the question, "What was you sent to the penitentiary for?" came the answer, "For murder," and to the question, "How long did you stay in the penitentiary?" was the answer, "Six and a half years." The following charge was refused to the defendant: "I charge you, gentlemen of the jury, that you cannot convict a man on any sort of evidence; but the law itself demands that the proof must show beyond all reasonable doubt that the defendant at the bar is guilty as charged, else you should acquit him."

Hooten & Overton, for appellant. Alexander M. Garber, Atty. Gen., for the State.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

DENSON, J. The defendant was indicted, tried, and convicted for selling liquor in violation of the prohibition law in Randolph county. McKissick, the principal witness for the state, testified that he bought a quart of whiskey from the defendant on Tuesday after the first Sunday in June, and for it paid him \$1. On cross-examination this witness was asked this question: "You were arrested for selling whiskey in Roanoke about the 1st of June yourself, weren't you?" The court sustained the solicitor's objection to the question. In this ruling there was no error. *Smith's Case*, 129 Ala. 89, 29 South. 699, 87 Am. St. Rep. 47; *Gordon's Case*, 140 Ala. 29, 36 South. 1009; *Wilkerson's Case*, 140 Ala. 165, 37 South. 265; *Williams' Case*, 144 Ala. 14, 40 South. 405.

If the court erred in sustaining the state's objection to the question asked witness Ford, "Who are you at work for in this case?" the error was without injury, as the subsequent testimony of this witness is a full answer to the question.

No error is involved in the rulings of the court overruling objections made to questions propounded to defendant's witness Cofield by the state. *Castleberry's Case*, 135 Ala. 24, 33 South. 431; Code 1907, §§ 4008, 4009, and cases cited under those sections.

The charge refused to defendant is confusing and misleading in its first statement, and was properly refused.

There is no error in the record, and the judgment of conviction is affirmed.

Affirmed.

TYSON, C. J., and SIMPSON and MAYFIELD, JJ., concur.

(159 Ala. 506)

BYRD v. HICKMAN.

(Supreme Court of Alabama. Feb. 18, 1909.)

FRAUDS, STATUTE OF (§ 23*)—PROMISE TO PAY—DEBT OF ANOTHER—CONSIDERATION—FORBEARANCE.

A promise to pay another's debt, for no other consideration than the creditor's forbearance to sue the original debtor, is a collateral undertaking within the statute of frauds, and not an original obligation by the promisor.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 18; Dec. Dig. § 23.*]

Dowdell, C. J., and Simpson, J., dissenting.

Appeal from Geneva County Court; A. E. Pace, Special Judge.

Action by P. N. Hickman against R. E. Byrd. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

C. D. Carmichael, for appellant. W. O. Mulkey, for appellee.

MCCLELLAN, J. The plaintiff (appellee) as a witness thus states the alleged engagement between himself and the defendant, Byrd, upon which is predicated his complaint,

composed of a common count and one averring liability arising from the special promise: "I held a note and mortgage on Mrs. M. J. M. Lewis, executed by her and her husband to me for a loan of money to Mrs. Lewis, executed on the 6th day of March, 1906, for \$120.70 and due the 1st of October, 1906." After telephonic inquiry and negotiations, there being no writing in the premises, between plaintiff and defendant, in which plaintiff declared that he could not wait on the mortgagees another year, plaintiff, testifying, proceeds: " * * * Defendant resumed his conversation with me, * * * and said that if I could wait on the Lewises for said amount until January 1, 1907, and look to the Lewises for the interest between October 1st and January 1st, he would take the matter up on January 1st. I then said, 'On your promise to pay it on January 1st I will wait.' To this defendant said to me, 'All right,' and we each rang off. * * * " There was testimony introduced the tendency of which was to show that defendant, prior to the quoted agreement, induced Mrs. Lewis to pay him \$75 on her indebtedness to him on the assurance that he would help her pay the debt to plaintiff when it matured. The court, however, at the instance of the defendant, instructed the jury specially that they could not predicate a finding for plaintiff upon the promise alleged to have been made by defendant to Mrs. Lewis. The statute of frauds (Code 1896, § 2152, subd. 3) was pleaded, and was, in our opinion, sustained, as appears from the quotation from the testimony of the plaintiff himself, in the light of the status created by the giving of the special instruction referred to. It is unnecessary for us to enter upon any extended discussion of this phase of our statute of frauds. It will suffice here to briefly state the reason for the conclusion just announced.

The only question, in this aspect of the case, is: Was the agreement detailed by plaintiff within the statute; or, more minutely stated, was it a new and independent agreement, between plaintiff and defendant, based upon a new and independent consideration, to which the payment of the Lewis debt was a mere incident? If it was not a new and independent agreement, the statute is offended in the failure to reduce it to writing as the statute requires. It is perfectly evident that the Lewis obligation was not discharged, or the debtors released, in any sense; for the agreement detailed prescribed that plaintiff should look to the debtors for the interest on the debt in the interim between October 1st and January 1st. And it is just as evident that the only consideration to support the agreement, between plaintiff and defendant, to pay the Lewis debt, was the forbearance by plaintiff to enforce payment of his debt against the debtors until January

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

1st. That such a forbearance is a consideration capable of supporting a contract to pay another's debt, and also that a contract to pay another's debt importing that consideration only is within, and, if not in requisite writing, condemned by, the statute of frauds, was expressly decided by this court in *Westmoreland v. Porter*, 75 Ala. 452. Therein it is said: "While the forbearance of a creditor to enforce his demand is undoubtedly a sufficient consideration for the guaranty of the debt of another, yet it is precisely one of that class of considerations which is required by the statute to be expressed in the written agreement, and is uniformly held not to take the defendant's promise out of the influence of the statute." *Musick v. Musick*, 7 Mo. 495; *Hilton v. Dinsmore*, 21 Me. 410; *Martin v. Black*, 21 Ala. 721. Such a forbearance does not evidence a new and independent contract from that of the original obligation to the creditor. It is a mere collateral undertaking to pay the debt of Lewis in this instance, and hence within the statute.

As indicated, we take no account, in attaining the conclusion stated, of the alleged promise, both affirmed and denied in the testimony, of the defendant to Mrs. Lewis. See *Hilton v. Dinsmore*, 21 Me. 410; *Browne's St. Frauds*, § 187, § 212, and notes.

The judgment is reversed, and the cause is remanded.

Reversed and remanded.

ANDERSON, DENSON, and SAYRE, JJ., concur. DOWDELL, C. J., and SIMPSON, J., dissent.

(159 Ala. 101)

HALLMARK v. STATE.

(Supreme Court of Alabama. Feb. 3, 1909.)

INTOXICATING LIQUORS (§ 238*)—EVIDENCE—QUESTION FOR JURY.

On a prosecution for unlawfully giving away intoxicating liquor, the question of defendant's guilt held one for the jury.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 324-330; Dec. Dig. § 238.*]

Appeal from Circuit Court, St. Clair County; John W. Inzer, Judge.

George Hallmark was convicted of giving away intoxicating liquor, and he appeals. Reversed and remanded.

James A. Embry, for appellant. Alexander M. Garber, Atty. Gen., and Thomas W. Martin, Asst. Atty. Gen., for the State.

MAYFIELD, J. The defendant was indicted for giving away or otherwise disposing of spirituous, vinous, or malt liquor. The indictment is based on section 3 of a local prohibition act for St. Clair county (Acts 1894-95, p. 242), which inhibits the sale, giving away, or otherwise disposing of spirituous

and other liquors named. Section 2 of the act prohibits the purchase of liquors for one's self, or as agent for another, or ordering the same, except in certain cases; but it is unnecessary to notice this section, as the indictment did not charge an offense thereunder, and the general affirmative charge given for the state shows the trial and prosecution were under the third section of the act. The charge directs that the jury, if they find the defendant guilty, will impose a fine of not less than \$50 nor more than \$500, which is the penalty provided for violations of the third section of the act; while for violations of the second section a different penalty is imposed.

The only evidence of the state was that of one Ramsey, who testified that on one occasion he went into a packing house at Steele, in St. Clair county, and there found defendant, sitting on some sacks of grain; that defendant said to him, "If you want anything there is some over there," and pointed to a bottle, which was on some sacks of grain a few feet away from defendant; that witness took a drink out of the bottle; that the bottle contained whisky; that he took only the one drink, and went out, leaving the defendant and the bottle in the packing house, exactly as he found them. The venue and time were properly proven. The state then introduced in evidence the local act for that county (Acts 1894-95, p. 242), prohibiting the sale, gift, or otherwise disposing of spirituous liquors, etc., in that county, and rested. The defendant then moved the court to exclude the state's evidence, because it was not sufficient to support a conviction. The court overruled this motion, and the defendant excepted. The defendant then testified, in his own behalf, that the testimony of the witness Ramsey was all true; that the whisky did not belong to witness; that it belonged to one Porter Casey; that he had taken a drink out of it, when he first went into the packing house; that he left the bottle of whisky in the packing house when he went out, and did not know what became of the bottle or the whisky remaining in it when he left it there in the house where he found it. The defendant then rested. This was all the evidence. The court, at the request of the solicitor, gave to the jury the general affirmative charge, with usual hypothesis, against the defendant, and directed the assessment of a fine, in an amount within the maximum and minimum amounts fixed by the statute.

There was no error in the court's declining to exclude the state's evidence. The jury might have inferred a gift, in violation of the statute, from this evidence; but it was clearly reversible error to give the general affirmative charge against the defendant. If he was guilty, it rested in inference from the facts proven by the state; and the defendant's evi-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

dence, if true, certainly tended to rebut the inference of guilt. We do not decide, because not necessary, that the evidence would not support a conviction by the jury, under proper instructions, yet it was certainly meager enough at best for the state for this purpose. It is wholly insufficient to support the general affirmative charge for the state. There was much more reason to support this charge in behalf of the defendant than for the state, though we do not decide that it would have been proper in behalf of the defendant. The jury might have believed that this evidence was only a part of the whole truth, and they might have been justified in inferring the other, from that before them. They might have thought that it was a mere ruse, an artifice, chicane, or finesse, on the part of these two witnesses, and, if so, a conviction might have been justified; but this is the exclusive province of the jury, and not of the court. Suppose A. and B. find C.'s bottle of whisky, and both take a drink out of it; is it possible that the one who found it first, and pointed it out to the other and suggested their taking a drink, is guilty of selling, giving away, or otherwise disposing of liquor, in violation of that statute? We think not.

The judgment must be reversed, and the cause remanded.

Reversed and remanded.

TYSON, C. J., and SIMPSON and DENSON, JJ., concur.

(159 Ala. 108)

HARRIS v. STATE.

(Supreme Court of Alabama. Feb. 18, 1909.)

1. LARCENY (§ 28*) — INFORMATION — SUFFICIENCY.

An affidavit on which conviction of petit larceny was had charged that D., "who had probable cause to believe and does believe, who being duly sworn says that H. and B. did feloniously take and carry away" certain property. Held that, if deficient as to averment of probable cause, it further affirmed the commission of the offense as a fact, and was sufficient.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 58, 59; Dec. Dig. § 28.*]

2. CRIMINAL LAW (§ 1116*)—APPEAL—RECORD—REVIEW.

The grounds of a demurrer to an affidavit not appearing of record, the Supreme Court cannot know that the trial court erred in its ruling thereon.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2924; Dec. Dig. § 1116.*]

3. CRIMINAL LAW (§ 1144*)—APPEAL—PRESUMPTIONS—EVIDENCE.

Where there is no bill of exceptions showing the evidence, it will be presumed that it was sufficient to support the conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3031; Dec. Dig. § 1144.*]

Mayfield, J., dissenting.

Appeal from Criminal Court, Jefferson County; S. L. Weaver, Judge.

John Harris was convicted of petit larceny, and appeals. Affirmed.

Alexander M. Garber, Atty. Gen., for the State.

ANDERSON, J. The affidavit or complaint in this case is sufficient to support a conviction. It is true it does not aver a probable cause, etc.; but it goes further, and affirms the commission of the offense as a fact, thus being stronger than is required by the Constitution and the statute. The affidavit in this case is unlike the one condemned in the Butler Case, 130 Ala. 127, 30 South. 338. There it did not affirm the commission of the offense, etc., as facts, but merely stated that the affiant had reason to believe, etc. The grounds of demurrer not appearing of record, we cannot know that the trial court erred in its rulings thereon.

The cause was tried by the court without a jury. There is no bill of exceptions showing the evidence; hence we cannot know what it was, but must presume that it was sufficient to support the conviction.

We are unable to find any error in the record, and the judgment must be affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON, DENSON, McCLELLAN, and SAYRE, JJ., concur.

MAYFIELD, J. (dissenting). This is an appeal from a conviction of petit larceny. The prosecution and the judgment of conviction are based solely upon an affidavit and warrant. The affidavit is as follows:

"The State of Alabama, Jefferson County. The Criminal Court of Jefferson County. Personally appeared before me, H. B. Abernathy, judge of the inferior court of Birmingham, Ala., in and for said county, Louis R. Dean, who had probable cause to believe and does believe, who being duly sworn says that John Harris and Will Baggett, whose other and further names are unknown to affiant, within twelve months before making this affidavit, in said county did feloniously take and carry away one copper tank, twenty feet of lead pipe, and fourteen brass valves, all being of the aggregate value of twenty-two and 66/100 dollars, the property of Wiley B. Burton, against the peace and dignity of the state of Alabama. Louis R. Dean.

"Subscribed and sworn to before me this 23d day of February, 1908. H. B. Abernathy, Judge of the Inferior Court of Birmingham, Ala."

The process was made returnable to the criminal court of Jefferson county, and was tried by one of the judges of that court without a jury. The defendant demurred to the affidavit, which demurrer was overruled, as is sufficiently shown by the judgment entry; but the demurrer itself is not shown by the transcript. The affidavit was

amended, by consent of the defendant, by striking out the phrase, "twenty feet of lead pipe and fourteen brass valves." One of the defendants demanded a severance, and separate trials were had, resulting in the conviction of both defendants, from which judgments of conviction they appeal.

There is no bill of exceptions, no assignment of errors, and no brief of counsel. No complaint or statement was filed by the solicitor. The judgment must rest solely upon the affidavit set out above. The affidavit is wholly insufficient for such purpose. The statutes of this state prescribe the form and sufficiency of such affidavits, and the one in question does not conform to the requirements. It does not show that the complainant made affidavit or oath, as required by the statute, that he "had probable cause for believing and that he did believe that the offense charged was committed," etc. True, this phrase is in the jurat, but it is a more gratuitous recital of the magistrate before whom the affiant appeared, and who issued the warrant, and it affirmatively appears that the affiant did not make oath to this fact. The affidavit would be in all things sufficient to charge petit larceny, but for the failure to make oath to this statutory requirement. Indeed, the affidavit literally follows the Code form for an indictment for petit larceny; hence, if it were an indictment, it would be sufficient.

It does, in a sense, seem to be extremely technical to hold that an affidavit which follows the Code form for an indictment, is insufficient; yet it is only by virtue of the statute that either the one or the other is sufficient to support a conviction. The statutes prescribe the sufficiency of each, and do not make the form for one sufficient for the other. It appears from the statute that the *sine qua non* of an affidavit to authorize the issue of a warrant, and to support a conviction, is the oath of the affiant that he has probable cause for believing and does believe that a given offense has been committed. The fact that he swears the offense has been committed does not dispense with the necessity of his making oath that he has probable cause for believing and does believe it. This is just as necessary as it is to swear to the identity of the offense or of the person; nor can the recital of the fact by the magistrate, in the jurat, take the place of the oath of the affiant to the fact.

This is clearly shown by comparing the two statutes; one authorizing affidavits and warrants to support prosecutions and convictions for misdemeanors (section 6703 of the Code of 1907), and the other authorizing affidavits and warrants for prosecutions in preliminary proceedings (sections 7585-7587 of the Code). The one requires the affiant to make oath in writing that he has prob-

able cause for believing and does believe, etc., while the latter requires the magistrate, upon complaint being made to him, whether oral or written, that in the opinion of the affiant a given offense has been committed, to examine on oath the affiant and such witnesses as he may propose and take their depositions in writing, and cause the same to be subscribed by them, and if the magistrate be satisfied from these depositions that the offense has been committed, and that there is reasonable ground to believe that the defendant is guilty thereof, he must issue a warrant. In the one case, for prosecutions for misdemeanors in county and inferior criminal courts, the law requires only that the complainant make affidavit that he has probable cause for believing and does believe that the offense named has been committed and that the defendant named is guilty thereof; whereas, in preliminary proceedings, it requires the magistrate to take the oath or deposition in writing of the complainant and of other witnesses named by him, and then if the magistrate is reasonably satisfied from such depositions that the offense complained of has been committed, and that there is reasonable ground to believe that the defendant is guilty thereof, he must issue the warrant.

These two kinds of process—one for instituting prosecutions, in county and other criminal courts, for misdemeanors; the other for instituting preliminary proceedings, usually as to felonies—have been confused, the one often used for the other, or parts of both proceedings combined in one, thus rendering it insufficient for either. In fact, the former is often used for the latter, without any authority of law; and this is a case where there is an apparent attempt to use a part of both for the former, but it is wholly insufficient, and cannot support a conviction. Section 6703, Code; *Butler v. State*, 130 Ala. 127, 30 South. 338; *Miles' Case*, 94 Ala. 106, 11 South. 403; *Johnson's Case*, 82 Ala. 29, 2 South. 466.

(150 Ala. 126)

TYLER v. STATE.

(Supreme Court of Alabama. Feb. 5, 1909.)

STATUTES (§ 13*)—ENACTMENT—VALIDITY.

Under Const. 1901, § 62, requiring the legislative journals to show that a bill was referred to a standing committee of each house, acted upon by such committee, and returned therefrom, Act Nov. 23, 1907 (House Bill No. 37; Gen. Acts, Sp. Sess. 1907, p. 80), is void because the Senate Journal shows that the bill was reported from a committee other than the one to which it was referred.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 10; Dec. Dig. § 13.*]

Appeal from City Court of Bessemer; William Jackson, Judge.

Lon Tyler was convicted of crime, and ap-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

peals. Reversed on rehearing, and defendant discharged.

Pinkney Scott and R. H. Fries, for appellant. Alexander M. Garber, Atty. Gen., for the State.

MCLELLAN, J. On rehearing counsel for appellant for the first time brought to our attention and urged in brief the objection that the act approved November 23, 1907 (Gen. Acts, Sp. Sess. 1907, p. 80), to prohibit the sale or barter or having possession of small deadly weapons of a described character, was not validly enacted, for the reason that the requirements of section 62 of the Constitution of 1901 were not complied with in the passage of the bill through the Senate. Section 62 provides: "No bill shall become a law until it shall have been referred to a standing committee of each house, acted upon by such committee in session, and returned therefrom, which facts shall affirmatively appear upon the journal of each house."

An inspection of the original journal of the Senate shows that this bill (House Bill 37) was regularly referred to the committee on revision of laws and, latterly, that the committee on local legislation reported the same back to the Senate. The status then is that a bill referred to one standing committee of the body is reported from another standing committee to which it does not affirmatively appear, from the Senate Journal, to have been referred. This was a patent failure of observance of section 62; and the consequence necessarily is that the bill was not constitutionally passed, and never became a law. *Walker v. City Council of Montgomery*, 139 Ala. 468, 36 South. 23.

Accordingly, the judgment is reversed, and one will be here entered discharging the defendant, appellant.

TYSON, C. J., and DOWDELL, SIMPSON, ANDERSON, DENSON, and MAYFIELD, JJ., concur.

STEELE v. STATE.

(Supreme Court of Alabama. Feb. 11, 1909.)

1. SALES (§ 462*)—CONDITIONAL SALE—CONTRACT—EXECUTION—ATTESTATION.

A bookkeeper and credit man for vendors, controlling all matters pertaining to a conditional sale, but receiving a salary and having no pecuniary interest in the transaction, is a mere agent, and has no such direct and immediate interest in the contract as to render him incompetent to attest the execution thereof.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 462.*]

2. CONTRACTS (§ 143*)—CONSTRUCTION—CHARACTER OF CONTRACT.

In determining the real character of a contract, courts look to its purpose, rather than to the name given to it by the parties.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 143.*]

3. SALES (§ 484*)—“CONDITIONAL SALE”—REMOVAL BY VENDEE—OFFENSE.

A contract, after reciting that the vendors had "rented" certain furniture to the vendee, provided that the title should remain in the vendors until the purchase money was paid in specified installments, and on default in any payment the vendors reserved the right to take possession without legal process. There was further provision that all payments should be placed to the credit of the vendee as payments on the "lease," or any other goods for which he might owe the vendors by way of open account on any other "lease," and that the vendee was to have no title to the "lease" until his account should be settled in full. *Held*, that the contract was one of "conditional sale," entitling the vendors to the protection afforded by Code 1907, § 7342, making it a crime to remove or sell personal property to hinder or defraud any person who has a valid claim thereto, with knowledge of the existence of such claim.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 484.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1408-1410.]

4. SALES (§ 484*)—CONDITIONAL SALE—REMOVAL BY VENDEE—OFFENSE—"CLAIM."

The word "claim," in Code 1907, § 7342, is used in its popular sense, signifying a right to claim; a just title to something in the possession or at the disposal of another.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 484.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1202-1211; vol. 8, p. 7604.]

5. CRIMINAL LAW (§ 741*)—TRIAL—DIRECTION OF VERDICT.

Where, in a prosecution for removing furniture sold under a contract of conditional sale, in violation of Code 1907, § 7342, the contract was rightfully received in evidence as being within the statute, it was not error to refuse the general affirmative charge, intended to reiterate the objections urged to the contract as evidence.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 741.*]

6. CRIMINAL LAW (§ 805*)—TRIAL—INSTRUCTIONS.

It is proper to refuse unintelligible instructions.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 805.*]

Appeal from City Court of Gadsden; *Alto v. Lee*, Judge.

Sam Steele was convicted of violating section 7342, Code 1907, and he appeals. Affirmed.

The contract is in the following words: "State of Alabama, County of Etowah. Sam Steele has this day rented of Frank & Hagedorne the following property, to wit: Four mattresses, \$10; 3 beds, \$10; 1 table, \$3.50; 1 stove, \$15; 4 springs, \$13.50—of the agreed value of \$51.50, with interest from date, payable \$—— cash, balance at the rate of \$3 per two weeks, which property I agree to keep at No. 22 Lake Front street, in Alabama City, and not to remove the same without the consent of said Frank & Hagedorne. The title to said property shall remain in said Frank & Hagedorne until the whole amount of said lease has been paid. In case I fail to make any payment, the whole amount

shall become due, and they shall have the right to sue and recover the same; and in case I fail to make any of the payments they shall have the right to take possession of the property without legal process, and all payments made shall be applied for the use of said merchandise. I further agree that each and all payments shall be placed to my credit as payment on this lease, or any other goods which I may owe for to said Frank & Hagedorne either by open account or by other lease, and I shall have no title to this lease until my account shall have been settled in full." Then follows the waiver of exemptions and agreement to pay attorney's fees. Signed: "Sam Steele," by mark, and witnessed by Lee Frelbaum. The objections to the introduction of this lease sufficiently appear in the opinion.

The following charges were refused to defendant: (1) General affirmative charge. (2) "The court charges the jury, before you can convict the defendant, the statements show you beyond a reasonable doubt that defendant under a written instrument, lien, contract by law, for rent or advances, or any other lawful or valid claim, verbal or written, with knowledge of the existence thereof for the purpose of hindering or delaying Frank & Hagedorne. (3) When the defendant moved the goods as shows by the evidence, had at the time a purpose to hinder or delay or defraud Frank & Hagedorne."

Cato D. Glover, for appellant. Alexander M. Garber, Atty. Gen., for the State.

SAYRE, J. The defendant was indicted and convicted for removing certain articles of household furniture in violation of section 7342, Code 1907. Defendant had purchased the articles in question from the firm of Frank & Hagedorne, and the relations of the parties in respect to the property were evidenced by a paper writing, signed by the defendant, which, beginning with a recital that the vendors had "rented" the property to defendant, provided that the title to the property should remain in the vendors until the whole amount of the purchase money was paid, the same to be paid in specified installments, and in case there was failure to make any payment the vendors reserved the right to take possession without legal process. There was further provision that all payments should be placed to the credit of defendant as payments on the "lease," as it is in places termed, or any other goods for which he might owe the vendors by way of open account on any other "lease," and that the defendant was to have no title to the "lease" until his account should be settled in full.

Defendant executed the writing by making his mark, which was witnessed by one Frelbaum, who was bookkeeper and credit man for the vendors, and, as the bill of exceptions states, the evidence showed that he controll-

ed all matters pertaining to the sale of the furniture in question, but was a man on salary and had no pecuniary interest in the transaction. The writing was admitted to the consideration of the jury over the objection and exception of the defendant. Frelbaum was a mere agent, and had no such direct and immediate interest in the contract as would render him incompetent to attest the execution of the writing. *Sowell v. Bank of Brewton*, 119 Ala. 92, 24 South. 585.

Other objections to the admission of the writing appear to have proceeded on the idea that the vendors, having retained the legal title, had a general property in the goods, which was the subject of larceny or embezzlement, and no such mere claim as entitled them to the protection afforded by section 7342. In determining the real character of a contract, courts look to its purpose rather than to the name given to it by the parties. The contract in question was a contract of conditional sale, the effort to disguise it as a lease to the contrary notwithstanding. 6 Am. & Eng. Ency. Law, 447. The retention of title by the vendors did not make them the absolute owners of the property. *Bingham v. Vandergrift*, 93 Ala. 283, 9 South. 280. It was, at most, a form of security for the payment of the purchase money. *Tanner v. Hall*, 89 Ala. 628, 7 South. 187. The contract committed the property to the defendant for himself, and not for the vendors. He had the rights of user and enjoyment which are essential characteristics entering into the legal notion of property. The contract did not contemplate a redelivery of the property to the vendors so long as its terms were observed, and its character was fixed upon its execution and delivery. If honestly entered into by the defendant, it did not reserve to the vendors a property right which is protected by the statutes against larceny; nor did it confer possession on the defendant as clerk, agent, servant, or apprentice of vendors, so as to render him amenable to the statute against embezzlement.

The word "claim" in the statute is used in its popular sense, and signifies a right to claim; a just title to something in the possession or at the disposal of another. *Century Dictionary*. In *May v. State*, 115 Ala. 14, 22 South. 611, it was ruled that a mortgagee, after the law day of the mortgage, was a person having a claim to property embraced in the mortgage under a written instrument, within the language of section 3835, Code 1886, now section 7342, Code 1907. Accordingly, we hold that the objection taken by the defendant was not well taken.

The general affirmative charge, refused to the defendant, seems to have been intended to reiterate the objections which had been urged to the writing as evidence. That writing properly admitted, the case was clearly

one for the jury. Two other charges refused, as they appear in the transcript of the record, are unintelligible, and were properly refused.

Affirmed.

DOWDELL, C. J., and ANDERSON, McCLELLAN, and MAYFIELD, JJ., concur.

LONG et al. v. SHEPHERD et al.

(Supreme Court of Alabama. Feb. 9, 1909.)

1. INJUNCTION (§ 172*)—TEMPORARY INJUNCTION—DISSOLUTION ON ANSWER.

The answer having fully denied the equity of the bill for injunction, a temporary injunction was properly dissolved.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 376-383; Dec. Dig. § 172.*]

2. INJUNCTION (§ 76*)—SUBJECTS—PUBLIC OFFICERS—CONTRACTS.

Illegal acts of public officers may be enjoined, but not merely acts of mistaken judgment; and, county commissioners having authority to contract for construction of buildings, fulfillment of the contract could not be enjoined, though it were inexpedient or not so good as they or others could make.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 145; Dec. Dig. § 76.*]

3. COUNTIES (§ 196*)—COMMISSIONERS—CONTRACTS—INJUNCTION BY TAXPAYER.

A citizen and taxpayer could not enjoin payment of claims for extra work by a contractor under a contract with county commissioners providing that no change should be made in the contract except on the order of the commissioners' court, as this provision was for the benefit of the contracting parties, and not for strangers.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 308; Dec. Dig. § 196.*]

4. CONTRACTS (§ 330*)—RIGHTS OF STRANGERS.

If the parties to a contract change it and substitute a new one, a third party or court cannot hold them to the first, though it be in writing and provide that its terms shall not be changed or varied except in writing, and the subsequent contract rest wholly in parol.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1592; Dec. Dig. § 330.*]

Appeal from Chancery Court, Walker County; A. H. Benners, Chancellor.

Suit for injunction by T. L. Long and others against J. W. Shepherd and others. From a decree dissolving temporary injunction, plaintiffs appeal. Affirmed.

A. F. Flite, for appellants. Bankhead & Bankhead, for appellees.

MAYFIELD, J. This appeal is from a decree dissolving a temporary injunction. The impropriety of this decree is the only error assigned. The bill was filed by the appellants, as residents and taxpayers, against the appellees in their official capacity as county commissioners, to enjoin the allowance and payment of claims for extra work performed by the contractor in the construction of a county courthouse. The answer of the respondents denied fully

and particularly every averment of the original and amended bills which could be said to give them equity or to authorize a temporary injunction. We fully agree with and concur in the opinion of the learned chancellor that the injunction should be dissolved.

The original bill was clearly without equity. The amended bill, while it may contain equity, was subject to demurrer; but the sustaining of the demurrer thereto is not assigned as error. The answer having explicitly and fully denied every possible equity of the bill, we think the chancellor properly dissolved the injunction, and, while the chancellor has a large discretion on such hearings, we are not prepared to say it would not have been revisable error to retain this injunction on the showing which appears from this record. Equity will often interpose, in behalf of taxpayers, to restrain illegal acts of public officers under color and claim of official authority, when such acts tend to impair public rights and those of the taxpayers, or will result in irreparable injury to private citizens. But mere negligence of official routine, not gross or wanton, mere mistake or error of judgment, or lack of experience, etc., in the absence of fraud, will not authorize courts of equity to enjoin public officers from doing acts authorized by law, whatever may be the opinion of the court or of the public as to the wisdom of such acts or the mode of doing them. The act sought to be enjoined must be unlawful, or the mode, manner, or extent of its execution must be fraudulent in fact or in law. 1 Spelling, Extraord. Relief, 483-508.

The county commissioners have the undoubted right and power to build county courthouses, and to make contracts therefor, and to pass and allow valid claims of the contractor on such account. This is not only their right, but is their duty, which they can be forced to perform, or for a failure so to do they can be made liable. The fact that they make a contract for buildings, such as courts may think inexpedient or improper, or not as good as they or other persons could make, is no ground to enjoin them from so contracting, or from carrying out a contract which they have made, within the line and scope of their powers and duties. Matkin v. Marengo Co., 137 Ala. 155, 34 South. 171; Hays v. Ahldrich, 115 Ala. 239, 22 South. 465. Of course, if they make an official contract for the purpose of defrauding the public and for their individual benefit, under color of official right and as a cloak to hide fraud, and by virtue of such official contract or act attempt to have public funds applied, not for the use and benefit of the public but for their own personal benefit, or for that of a third party with whom they contract, then a court of equity would enjoin the execution of such a con-

tract, though it was ostensibly for the public good and within the line of their powers and duties. If there can be said to be any such averments in this bill, they are vague and uncertain, and rest largely upon inference; and they were, so far as it was necessary so to do, fully denied by the answer, and there was certainly not sufficient proof otherwise to justify the injunction. *Harrison v. Yerby*, 87 Ala. 185, 6 South. 3.

There was certainly nothing in the contention of the original bill that the contract for the building was in writing and provided that there should be no change or alteration in the plans and specifications or contract except upon the written order of the commissioners' court, and that the contractor had filed a claim with the commissioners' court for a large sum which was claimed for extra work, not provided for in the contract, and for which there had been no written contract, and that such extra work was, therefore, illegal and in violation of the written contract. This provision was for the benefit of the parties thereto, and not for that of strangers. If both parties agree thereto, they may subsequently amend the whole contract, or any particular part, or make a new one in substitution therefor. Such new contract may be oral, as well as in writing. If the parties to a contract change it and substitute a new one, a third party or court cannot hold them to the first, though it be in writing and provide that its terms shall not be changed or varied except in writing, and the subsequent contract rest wholly in parol. If this were not true, and the commissioners' court should make a bad contract, or the architect make a mistake in the specifications, the contract being in writing and providing that neither it nor the specifications should be changed, by writing or otherwise, then there would be no relief from the error, though both the commissioners and contractor be willing and desirous to make correction of the error.

The decree of the chancellor must be affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and McCELLAN, JJ., concur.

(159 Ala. 249)

POSTAL TELEGRAPH CABLE CO. v. BEAL.

(Supreme Court of Alabama. Feb. 4, 1909.)

1. TELEGRAPHS AND TELEPHONES (§ 68*)—TRANSMISSION OF MESSAGES — FAILURE TO DELIVER.

Where a telegram to plaintiff's mother read: "John [plaintiff] badly hurt, wants to see you," etc., it was immaterial whether the relationship between the parties was revealed to defendant telegraph company's agents when the message was delivered: the wording showing the urgency of prompt transmission, and charg-

ing defendant with notice of the relationship, and that as a natural consequence of a failure to deliver it plaintiff would be subjected to physical pain and mental suffering.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 69, 70; Dec. Dig. § 68.*]

2. TELEGRAPHS AND TELEPHONES (§ 67*) — TRANSMISSION OF MESSAGES — FAILURE TO DELIVER—DAMAGES.

Where a message notified defendant telegraph company that plaintiff was badly hurt, carried with it notice that the sendee was plaintiff's mother, and apprised defendant of the necessity of prompt delivery, plaintiff was entitled, in an action for failure to deliver the message, to damages for the pain resulting from the absence of his mother's care while, but for the breach of the contract, she might have been with him.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 67.*]

3. APPEAL AND ERROR (§ 1010*)—JUDGMENT SUPPORTED BY EVIDENCE—CONCLUSIVENESS.

Where a cause was tried by the court and on the testimony of witnesses examined ore tenus, and there was sufficient evidence to support the judgment, it will not be disturbed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

Appeal from Tuscaloosa County Court; Henry B. Foster, Judge.

Action by John Beal, Jr., against the Postal Telegraph Cable Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Vandegraaft & Sprott, for appellant. Henry Fitts, for appellee.

DENSON, J. The plaintiff, while engaged in mining coal near Sydney, Ala., was severely burned in an explosion which occurred in the mine on the 3d day of June, 1907. At 2 p. m. of the following day, at plaintiff's request, William James (through a Mr. Henderson) delivered to the defendant company's telegraph office in the city of Birmingham, Ala., a message to be transmitted to plaintiff's mother, as follows, viz.: "Birmingham, Ala., June 4, '07. Mattie Beal (colored), Tuscaloosa, Ala. John badly hurt wants to see you at Sydney coal mine. [Signed] Wm. James." The toll was paid in Birmingham for the transmission of the message, and the telegram was received by the defendant's operator at Tuscaloosa at 2:06 p. m. the same day it was delivered for transmission at the Birmingham office. As soon as it was received by defendant's operator at Tuscaloosa, he committed it to one of the company's messenger boys to be delivered to the addressee. The messenger made an ineffectual effort to find Mattie Beal, and returned the message to the office about 45 minutes after he received it. Thereupon, and about 4 p. m. of the same day, the operator at Tuscaloosa wired to the sender a service message, to the effect that Mattie Beal could not be found in Tuscaloosa. William James

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

received that message, and mailed to Mattie Beal a special delivery letter, notifying her of plaintiff's condition. This letter Mattie Beal received early on the morning of Thursday, June 6th; and she left Tuscaloosa at 10 o'clock on the same morning, reaching plaintiff's bedside that afternoon, "about two hours by sun," where she found him in a very bad condition—which condition, as the evidence tended to show, was due in large part to lack of some one to nurse him. The evidence tended to show that the telegram was mailed by the operator in Tuscaloosa to the addressee, and that it was received by her husband on the 7th of June. It also showed that the addressee was a negro woman living within the company's delivery limits in Tuscaloosa, and that she had been living there for a period of seven years next before the time hereinbefore referred to. The evidence further tended to show that the messenger boy was derelict in not making delivery of the message, and that, if it had been promptly delivered, plaintiff's mother would probably have reached him on the night of June 4th.

The action is *ex contractu*. Breach of contract, in the failure to deliver with reasonable dispatch, is alleged, and damages are claimed for physical pain and mental anguish, in addition to the toll paid for the transmission of the message. The assignments of error insisted upon relate to rulings of the court on the admissibility of testimony, to the action of the court in rendering judgment for the plaintiff, and to the overruling of defendant's motion for a new trial.

So far as the questions presented for decision are concerned, we are clear in our opinion that whether the relationship between Mattie Beal and the plaintiff was revealed to defendant's agents before or the time the message was delivered for transmission is immaterial, for the reason that the wording of the message was such as to herald its own importance and the urgency of prompt delivery, and charged the defendant company with notice of the relationship that existed between the parties, and, further, that as a natural consequence of a failure to deliver it plaintiff would be subjected to physical pain and mental suffering. *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148; *Western Union Tel. Co. v. Long*, 148 Ala. 202, 41 South. 965; *Western Union Tel. Co. v. Carter*, 85 Tex. 580, 22 S. W. 961, 34 Am. St. Rep. 826; *Western Union Tel. Co. v. Adams*, 75 Tex. 531, 12 S. W. 857, 6 L. R. A. 844, 16 Am. St. Rep. 920; *Western Union Tel. Co. v. Edsall*, 74 Tex. 329, 12 S. W. 41, 15 Am. St. Rep. 835.

The rulings of the court on the admissibil-

ity of testimony are challenged, in brief of appellant's counsel, upon the notion that damages for physical pain are not within the rule of recoverable damages in this cause. It may be conceded that pain, the natural consequence of the injury itself, is not a proper basis for damages; but this is not the precise question here. Our question is: If plaintiff's pain was prolonged or augmented, on account of lack of the attention and soothing care of his mother during a period when, but for the breach of the contract to promptly deliver said message, she could and would have been present to minister to and care for him, should such pain be considered in estimating the amount of plaintiff's damages? The message in so many words notified defendant that the plaintiff was badly hurt; and if, as has been stated, its wording carried with it notice that the sendee was the mother of plaintiff, and also apprised defendant of the necessity of prompt delivery, we cannot see why, if plaintiff's pain might have been soothed or lessened by his mother's care and ministrations during a period when, but for the breach of the contract by the defendant, she might have been with him, such pain should not be said to have been a direct and proximate consequence of the breach of the contract, and within the contemplation of the parties. The court holds that it was, and that it was, consequently, within the rule of recoverable damages. *Western Union Tel. Co. v. Church*, 3 Neb. (Unof.) 22, 90 N. W. 878, 57 L. R. A. 905; *Western Union Tel. Co. v. Cooper*, 71 Tex. 507, 9 S. W. 598, 1 L. R. A. 728, 10 Am. St. Rep. 772. The objections of the defendant to the testimony offered are limited to the grounds of irrelevancy and immateriality. From what we have said above, it follows that they were properly overruled. 3 Brick. Dig. p. 444, § 574.

The other assignments of error insisted upon call in question the judgment of the court rendered in favor of the plaintiff and the order overruling the motion for a new trial. The cause was tried, under the practice act applicable to the Tuscaloosa county court, by the court without the intervention of a jury; and on the testimony of witnesses, who were examined before the court *ore tenus*, we cannot say that the judgment rendered is plainly erroneous. On the contrary, there is sufficient evidence to support the judgment, and we shall, therefore, not disturb it. *Woodrow v. Hawving*, 105 Ala. 240, 16 South. 720. Furthermore, it cannot be said that the motion for a new trial should have been granted.

Let the judgment appealed from be affirmed.

Affirmed.

TYSON, C. J., and SIMPSON and MAY-FIELD, JJ., concur.

WILKINS v. HARDAWAY.

(Supreme Court of Alabama. Feb. 18, 1909.)

1. SPECIFIC PERFORMANCE (§ 114*)—PLEADING—DEMURRER—GROUNDS.

In a suit for the specific performance of a contract to convey a tract of land, the bill is not demurrable on the ground that specific performance would infringe defendant's homestead right, either in the particular tract or in the right of selection from a larger tract, where the bill does not show that the land for which a conveyance is sought is part of defendant's homestead, though it does appear that it is a part of a larger tract owned by defendant, since it will not be assumed that it was a part of defendant's homestead from such fact alone.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 114.*]

2. VENDOR AND PURCHASER (§ 207*)—OPTIONS—CERTAINTY—ASSIGNABILITY.

An option to purchase provided for the conveyance of land lying between normal low-water line on the west bank of a river and a line level with the crest of a dam or dams of such height, and at such location on the river as the purchaser might desire to erect, as such line would meander along the west bank of the river and the north and south lines of such place. The contract provided that the area of the tract referred to should be ascertained before the erection of the dam or dams was begun. Pursuant to the provisions of the contract, after the purchaser designated the height of his dam, a survey was made, and the exact description and area of the tract agreed to be conveyed ascertained. *Held*, that the subject-matter of the contract was rendered certain to every intent, so as to render it assignable.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 207.*]

3. SPECIFIC PERFORMANCE (§ 20*)—CONTRACTS ENFORCEABLE—CERTAINTY.

The mere fact that the contract reposed in the purchaser the right to determine the location of the west line of the tract by the determination of the height of the dam did not render it too uncertain to warrant specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 73, 74; Dec. Dig. § 20.*]

4. SPECIFIC PERFORMANCE (§ 114*)—PLEADING—DEMURRER.

Where the bill for specific performance of the contract averred that pursuant to its provisions the survey was made, and the exact description and area of the tract agreed to be sold ascertained, it was sufficient as against demurrer to show that any uncertainty in the description in the contract was removed.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 114.*]

Denson and Sayre, JJ., dissenting.

Appeal from Chancery Court, Chambers County; W. W. Whiteside, Chancellor.

Bill by B. H. Hardaway against J. C. Wilkins for specific performance of a contract to convey. From a judgment overruling demurrers to the bill, respondent appeals. Affirmed.

The contract referred to is as follows: "This memorandum of agreement, made and entered into this 1st day of March, 1905, between J. C. Wilkins, of the county of Chambers, and state of Alabama, party of

the first part, and S. S. Scott, Jr., in the county of Lee, and state of Alabama, party of the second part, witnesseth: That the party of the first part, for and in consideration of \$1 to him in hand paid, hereby agrees that at any time within six months of this date, at the option of the said party of the second part, and upon further payment by the said party of the second part to the party of the first part of the sum of \$25 per acre, then the party of the first part will execute and deliver to the party of the second part good and sufficient title in fee simple to so much of the land of the said party of the first part as will lie and be between a line at normal low-water line on the west bank of the Tallapoosa river and a line level with the crest of a dam or dams of such height and at such location on said river as the said party of the second part may desire to erect, as the said line would meander along the west bank of said river and the north and south lines of said place; it being understood that the area of the tract referred to will be ascertained before the erection of the dam or dams is begun, and it is further understood that the compensation paid as above shall be full and entire compensation for all right, title, and interest the said party of the first part shall have in or to the bed of the river or creek opposite to said land. The land referred to and in contemplation in this option is bounded as follows: North, James Hamm; east, Tallapoosa river; south, by self, and extending down to lower point of shoals above ferry; west, by self—in Chambers county, Ala." This option was transferred from Scott to Hardaway for a recited consideration, and on September 1, 1905, after the execution of the option, it was extended for six months.

Strother, Hines & Fuller, for appellant.
E. M. Oliver, for appellee.

McCLELLAN, J. Bill for specific performance of contract to convey real estate. The report of the case will contain the instrument exhibited with the bill. Paragraph 4 of the bill, as at present important, is as follows: "Orator further avers that in accordance with the provisions of said contract a survey was made, and the area of the tract agreed to be sold was ascertained to be 11.8 acres. * * * From paragraph 5 of the bill it appears that "the exact description of the lands agreed in said contract to be conveyed, as shown by the survey thereof, is as follows." And it then proceeds with a minute description of the land, and latterly in the paragraph it is stated "that the lands described in this paragraph are the same lands agreed in said contract * * * to be sold, as ascertained by the survey thereof according to the terms of said contract."

It is necessary to note that the appeal is

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

from a decree overruling a demurrer to the bill, the grounds of which will be stated hereafter; the sufficiency of the agreement under the statute of frauds not being among them. Those grounds of the demurrer taking the objection that the specific performance sought would impinge the homestead right, either in the particular tract or in the right of selection thereof from a larger tract, cannot be approved upon the averments of the bill, for the reason that it does not appear therefrom that the 11.8 acres are a part of the homestead of the respondent. It does appear that it is a part of a larger tract owned by respondent; but that may, of course, well be, and yet the 11.8 acreage may not now be, nor ever be selected as a part of, the homestead of respondent. Indeed, he may in fact own, and reside upon, as his homestead, other lands in Chambers county. On this bill we cannot assume the fact necessary to give point to the stated ground of demurrer. *Moses v. McClain*, 82 Ala. 370, 2 South. 741, and *Lyon v. Hardin*, 129 Ala. 643, 29 South. 777, are not authority here, since in those cases it appeared that homestead rights were, in fact, involved.

It appears from the contract that the actual erection of the dam was not necessary to the establishment of the crest thereof as a basis for the west line of the tract to be conveyed. That point of government of the west line was, then, to be ascertained merely by the decision as to the height of the dam. The bill, in paragraph 4, alleges the ascertainment of the area according to the provisions of the contract, and warrants the conclusion that the essential condition—the crest of the dam—to the location of the west line was met by the selection of its location and the determination of its height. Indeed, from the averments of the bill, viz., "that in accordance with the provisions of said contract a survey of said lands was made and the area of the tract agreed to be sold was ascertained to be 11.8 acres," we cannot avoid the conclusion that Scott himself, if his action was essential under the contract, fixed the height of the dam from the crest of which the west line of the tract was to find its basis. If so, the subject-matter of the contract was rendered certain to every intent; and that such a contract is assignable is not to be controverted. *Kerr v. Day*, 14 Pa. 112, 53 Am. Dec. 526; 4 Cyc. p. 20 et seq., and notes; 2 Am. & Eng. Ency. Law (2d Ed.) p. 1044 et seq.

The remaining ground of demurrer is that the contract is too uncertain to be specifically enforced. The argument in support of this ground is predicated upon the fact that the contract reposed in Scott the right to determine the location of the west line of the tract by a determination of the height of the dam, thus, in effect, creating a right of choice or selection in Scott, and not defining such

west line in the instrument itself. We are of the opinion that the stated ground of demurrer was properly overruled.

The bill, for the purposes of the demurrer, as we have indicated before, contains sufficient averments to show that the uncertainty of the west line was rendered certain by the ascertainment of the area agreed to be sold, thus, and necessarily, fixing the basis of such line by a determination of the height to which the dam was desired to be erected. *Fry's Sp. Perf.* § 329; *Jenkins v. Green*, 27 Beavan, 437.

The demurrer was not well taken in any respect, and the decree overruling it must be affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON, ANDERSON, and MAYFIELD, JJ., concur. DENSON and SAYRE, JJ., dissent, and are of the opinion that the objections interposed to the bill raised the question of the statute of frauds.

CITY COUNCIL OF MONTGOMERY v. SHIRLEY.

(Supreme Court of Alabama. Dec. 14, 1908.
Rehearing Denied Feb. 18, 1909.)

1. MUNICIPAL CORPORATIONS (§ 741*)—TORTS—CLAIMS—MUNICIPAL CODE.

Since the Municipal Code (Acts 1907, pp. 790-892) did not become effective, except as its operation was accelerated as provided by section 199, until September, 1908, and section 3, par. 2, provided against any alteration of rights or remedies accruing or existing under prior enactments, a claim against the city of Montgomery for injuries suffered in August, 1907, was properly presented in accordance with the city charter.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1562; Dec. Dig. § 741.*]

2. ACCORD AND SATISFACTION (§ 25*)—PLEA.

A plea of accord and satisfaction, alleging neither promise given, nor acceptance, nor anything parted with in the premises by either party, was demurrable.

[Ed. Note.—For other cases, see *Accord and Satisfaction*, Cent. Dig. §§ 151-161; Dec. Dig. § 25.*]

3. DAMAGES (§ 160*)—PERSONAL INJURIES—PHYSICIAN'S SERVICES.

Where the complaint in an action for injuries averred the incurring of expenses in employing medical aid and buying medicine, evidence of the reasonable value of the services of plaintiff's physician was relevant.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 439, 445; Dec. Dig. § 160.*]

4. APPEAL AND ERROR (§ 242*)—QUESTIONS REVIEWABLE—NECESSITY OF RULING.

Where the trial court, instead of ruling on an objection to the testimony of a physician that he did not consider plaintiff responsible, stated that the witness might give his professional opinion that she was irrational, to which defendant's attorney excepted, the objection would not be reviewed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1421; Dec. Dig. § 242.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

5. TRIAL (§ 76*)—OBJECTIONS TO EVIDENCE—INTERPOSITION—TIME.

It is too late to object to a question after it has been answered.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 185; Dec. Dig. § 76.*]

6. COSTS (§ 277*)—PRIOR SUIT.

It being conceded that the costs of a prior suit which had been dismissed by plaintiff had been "satisfied," the court properly denied a motion to stay the prosecution of a subsequent action because the costs of the former action had not been "paid."

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 1048; Dec. Dig. § 277.*]

7. TRIAL (§ 333*)—VERDICT—CERTAINTY.

Where a verdict recited a finding for plaintiff assessing damages at "3000.00," it was not defective because a dollar mark or the word "dollars" was not supplied.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 786; Dec. Dig. § 333.*]

8. DAMAGES (§ 132*)—PERSONAL INJURIES—EXCESSIVENESS.

Plaintiff was permanently injured in the leg as the result of a defect in a bridge. She suffered great pain and mental distress therefrom, and also loss of earning capacity, and incurred considerable expense for medical aid and medicine. *Held*, that a verdict allowing plaintiff \$3,000 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 377, 378; Dec. Dig. § 132.*]

Appeal from City Court of Montgomery; A. D. Sayre, Judge.

Action by Eliza Shirley against the City Council of Montgomery. Judgment for plaintiff, and defendant appeals. Affirmed.

C. P. McIntyre, for appellant. Hill, Hill & Whiting, for appellee.

McCLELLAN, J. The action is for damages for an injury suffered on account of a defect in a bridge in a public street, which the municipality was bound to keep in repair. Plea 1 proceeds on the theory that the method for the presentation of this claim should have been as is provided in the Municipal Code (Acts 1907, pp. 790 et seq.), a method different from that prescribed in the charter of the city of Montgomery and pursued in this instance. The injury was suffered in August, 1907. We have held that the Municipal Code did not go into effect, except as its operation was accelerated under section 199 of the Municipal Code, until September, 1908. *Ward v. Parker*, 45 South. 655. Independent of this, however, the second paragraph of section 3 of the Municipal Code evidently contemplated no alteration of rights or remedies accruing or existing under enactments in operation before the Municipal Code was enacted. Accordingly the plea was properly stricken on demurrer; and for like reason the demurrers to the complaint were correctly overruled.

Plea A, as originally filed, undertook to set up as an accord executed, or an accord and satisfaction, merely an executory—unexecuted in any respect—agreement to pay the claim of the plaintiff at a certain sum, upon

approval thereof by the city council of Montgomery. No promise was averred to have been given, much less accepted, and nothing was parted with in the premises, by either party. *Cobb v. Malone*, 86 Ala. 571, 574, 6 South. 6; *Smith v. Elrod*, 122 Ala. 269, 24 South. 994, 1 Cyc. pp. 311, 313, 314. The demurrer thereto was, hence, properly sustained. The granting of the motion to exclude all the testimony relating to the alleged settlement before mentioned was without prejudice to the appellant. Amended plea A, then averring tender of the agreed sum and the acceptance of the promise of the city by Calhoun for appellee, is, in these material aspects entirely without support in the evidence.

Each count of the complaint contained, as an element of damages accruing to appellee by reason of her injury, the averment of expenses in employing medical aid and buying medicine. Accordingly it was competent, against the objection that such damages are not claimed, to show by Dr. Montgomery what was a reasonable bill for the services rendered her by him.

During the examination of Dr. Montgomery the bill recites this: "The attorney for the plaintiff asked the following question: 'How long would the irrational spells last? A. It was continual for probably three or four weeks. I did not consider that she was responsible for her actions.' The attorney for the city objected, and moved to exclude the statement that the doctor did not consider her responsible. The court then said: 'I will let him give his professional opinion that she was irrational.' The attorney for the city then and there excepted." We have quoted the bill in this particular to demonstrate that the court never ruled upon the motion to exclude; and hence no ruling for review is presented.

The objection to the question, to Mrs. Griggs, as to plaintiff's health before the injury, was interposed, the record shows, after the witness had answered the question. It was then too late. *Dowling v. State*, 151 Ala. 131, 44 South. 403.

The motion to stay the prosecution of this action, because the cost of a previous action, upon the same cause and against this defendant, which was dismissed by plaintiff, had not been paid, was properly overruled upon the conceded fact that such costs had been satisfied.

The verdict rendered was as follows: "We the jury find for the plaintiff and assess the damages at 3000.00." The judgment rendered was for \$3,000. On motion for new trial it was objected that the verdict was indefinite in the assessment of the amount of the damages; and it is now argued that a dollar mark or the word "dollars" must be supplied, and that without warrant, in order to render

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the verdict sufficiently certain. In the construction of verdicts it was early declared here that "the utmost favor has always been extended to verdicts, and they are not construed strictly, as pleadings are." *Moody v. Keener*, 7 Port. 233. And in *Toulmin v. Lesesne*, 2 Ala. 363, it is said: "Courts will always mold and construe a verdict as to make it legal if possible, and will never give to it the opposite construction, unless forced by the terms in which it is expressed." *McGowan v. Lynch*, 151 Ala. 458, 44 South. 573. In the light of this rule of favor to verdicts, we feel no hesitancy in affirming that the period preceding the two last ciphers in the line of figures written in the verdict was intended by the jury, and must be so construed, as indicating that the figures to the right of the period refer to cents and those to the left to dollars, thus making the verdict for the sum stated in the judgment. Aside, however, from the influence accorded the rule, we think that the method of numerical statement employed by this jury could be sustained by recourse to the common knowledge on the subject. The division of a line of figures by a period or reverse comma are the most common methods of indicating that the figures to the right thereof are cents and those to the left dollars. The amount of the verdict in this case is large and unreasonable, or fair and reasonable, as those conclusions are invited by a belief or disbelief, respectively, of the testimony presented to the jury bearing upon the extent and consequences of the injury suffered. The jury had before them testimony which, if credited, showed a case of permanent injury in the leg, great pain and mental distress endured, loss of earning capacity at least for a period, and considerable expense incurred for medical aid and medicines. Under such circumstances we cannot disturb the jury's finding.

We have considered all the assignments of error insisted upon. There is no prejudicial error in the record, and the judgment is affirmed.

Affirmed.

DOWDELL, ANDERSON, and DENSON, JJ., concur.

(159 Ala. 609)

HAYES v. MARTIN et al.

(Supreme Court of Alabama. Jan. 12, 1909.
Rehearing Denied Feb. 16, 1909.)

1. EJECTMENT (§ 86*)—BURDEN OF PROOF.

Where plaintiff in ejectment relied on a deed describing the land as bounded on one side by a line to be run by a surveyor so as to embrace 10 acres, the surveyor's map, etc., to be recorded as part of the deed, the burden was on plaintiff to show such survey.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 238-245; Dec. Dig. § 86.*]

2. EJECTMENT (§ 93*)—EVIDENCE—SUFFICIENCY.

Evidence in ejectment held to sustain a judgment for defendants.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 93.*]

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

Ejectment by A. W. Hayes against Annie Mae Martin and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Vaughan & Davidson, Smith & Smith, J. T. Ellison, and Daniel Collier, for appellant. H. C. Selheimer and Cabaniss & Bowie, for appellees.

SIMPSON, J. This action is ejectment, brought by the appellant against the appellees, to recover the land described in the amended complaint. The case was tried by the court without a jury, and judgment was rendered in favor of the defendants. The appellant's brief states that "the sole question for decision in this case is whether or not the land sued for was sufficiently described in the conveyance, or made certain by parol evidence."

When this case was before this court at a previous term, the only question was as to the admissibility of the deed from Ware to Armstrong, which is the starting point of the plaintiff's title in the case now under consideration. It will not be here set out in full, as it may be found in that case. The deed was held to be admissible, on the theory that the western side and the southern boundary are definitely described, and the deed contains sufficient directions for the running of the hypotenuse of the triangle; that direction being: "Thence—that is, from the northern limit of the western line—running in a southeasterly direction along and near a ravine on suitable ground for a road (on either side of said ravine), from the said center of said section, in the direction of the Union Passenger Depot in Birmingham, Alabama, to the south boundary line of said last-named forty-acre block, to the point of beginning; but it is agreed that there shall be a survey made of said last-described ten acres of said forty-acre block, and a plat and description furnished by the surveyor who may make the survey, that if more than ten acres are embraced in the said certain ten-acre block, above described and as shown in the above diagram, then so much of the north part thereof be cut off and designated by the surveyor as will leave only ten acres remaining, and the excess over ten acres shall not pass by this conveyance. The surveyor's map and certificate of such survey shall be referred to, recorded, and made a part of this deed." *Hayes v. Martin*, 144 Ala. 532, 40 South. 204. It will be noticed that, according to the directions in said deed, the said line was not necessarily to be a

straight line from point to point, but it was to be run on ground suitable for a road, and not necessarily along the ravine, but near it, and that the surveyor's map and certificate were to be "referred to, recorded, and made a part of this deed." The writer of the deed seems to have been careful to provide for a definite description to be incorporated with the deed.

Without discussing the point as to whether any other mode of proof than that provided in the deed was admissible, or as to whether the true intent of the deed was not that a survey was to be made by agreement, and, when made, was to become a part of the deed, so that, until that was done, or a line had been agreed on or established by acquiescence, the boundary line was not made definite, and the deed was not operative, the burden was at least on the plaintiff to show that a surveyor did, in pursuance of the directions in the deed, make the survey, ascertaining where the ground suitable for a road was, and also ascertaining whether the land thus inclosed contained more than 10 acres, and, if so, ascertaining the northern line to which said 10 acres would extend. This last requisite is important, because, if the line as thus run inclosed more than 10 acres, then that portion of the land taken off to reduce the land conveyed by Ware to 10 acres would be in the apex of the triangle, and it may be that there were still 2 acres, answering to the exception in the deed from Armstrong to McDaniel; but, if the line as run contained exactly 10 acres, then the "two acres off of the north end of the subdivision of ten acres" excepted in said deed would be in the apex, and not in the position described in the complaint.

There is no proof that any survey was made, at the instance of Ware and Armstrong, to establish the boundary line of the land; but one Ray is introduced, who testifies that after Armstrong had conveyed to McDaniel, and while McDaniel was on a trade with Banfill, he made a survey of the land at the instance of McDaniel (Armstrong not being present), and his testimony and diagram, which was made years after the survey, tend to show that there were more than 10 acres in the land laid off. But his diagram shows that there was a parallelogram of 50 acres in Banfill's land, and east of it a triangular piece of 3 acres, conveyed to Ledbetter, and north of this about 2 acres, between the northern line of said 8 acres and the land in the apex reserved by Ware, which might answer to the 2 acres excepted. His testimony is not clear; he frequently saying, "from here to there," etc., without designating on the map just what points are indicated.

On the part of the defendant, W. E. Martin, the husband of defendant, testified to possession by his wife since 1898 and valu-

able improvements made; also that a line drawn from the northwest corner of the 40 to the south boundary, so as to include exactly 10 acres, would be on land suitable for a road, but that a line to the east of that would not be on land suitable for a road. Hayes, the plaintiff, testified that when he first bought the land in suit, without ever having seen it, on information from Martin, he paid taxes for several years on two acres in the apex of the triangle, thinking that it was his land; but afterwards, on information from Ray, he changed his assessment to the land sued for. Carter, a civil engineer, witness on the part of the defendant, testified that he surveyed the land, and attaches two diagrams made by him; one following the lands suitable for a road (which leaves exactly 10 acres in the triangle), and the other, running straight, crossing ravine three times, and being on land not suitable for a road, which would include about 13 acres. A showing, admitted in evidence, was to the effect that two absent witnesses would testify that "they were present when a survey was made by Jas. A. Ray of the 10-acre tract sold by Jas. M. Ware to J. C. Armstrong," and assisted in the survey; that the hypothesis of the triangle was run west of the ravine, on land suitable for a road.

It is apparent from the evidence that inferences might be drawn to the effect that by running the line according to the directions of the deed the triangle would contain only the 10 acres, and, if so, the 2 acres reserved would be in the apex, and not in the shape described in the complaint. Giving to the decision of the court the force and effect of a verdict of a jury, we cannot say that the court erred.

The judgment of the court is affirmed.

HARALSON, ANDERSON, and DENSON, JJ., concur.

(159 Ala. 273.)

BIRMINGHAM ORE & MINING CO. v. GROVER.

(Supreme Court of Alabama. Feb. 4, 1909.)

1. TRESPASS (§ 10*)—INJURIES FROM BLASTING.

If one in blasting throws stones or other substances on the land of another, it constitutes a trespass.

[Ed. Note.—For other cases, see Trespass, Dec. Dig. § 10.*]

2. EXPLOSIVES (§ 12*)—NEGLIGENCE—BURDEN OF PROOF.

As a person has the right to use explosives on his own lands, if injury occurs from such use, the burden is on the person injured to show negligence.

[Ed. Note.—For other cases, see Explosives, Dec. Dig. § 12.*]

3. EXPLOSIVES (§ 12*)—INJURIES FROM BLASTING—DUTY OF USING CARE.

If a person who is blasting on his own land knows, or could by reasonable diligence know,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that another person is in dangerous proximity, it is the duty of the person in charge of the explosive either to use means to prevent the throwing off of missiles or to give warning when the blasting is about to be fired, so that those near may seek a place of safety.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. §§ 9, 10; Dec. Dig. § 12.*]

4. EXPLOSIVES (§ 12*)—INJURIES FROM BLASTING—ACTION—PLEADING.

Though it is not necessary for the complaint for injuries from blasting to allege that defendant had actual knowledge of the proximity of plaintiff at the time, it is necessary to allege that he either knew, or had reason to believe, or could by reasonable diligence have known, that plaintiff was in a position where the missiles from the blasting would probably reach and injure him.

[Ed. Note.—For other cases, see Explosives, Dec. Dig. § 12.*]

Appeal from City Court of Birmingham; H. A. Sharpe, Judge.

Action by Charley Grover against the Birmingham Ore & Mining Company for personal injuries caused by blasting. There was judgment for plaintiff, and defendant appeals. Reversed and remanded.

The counts in the complaint are as follows:

"(1) Plaintiff claims of defendant \$5,000 as damages, for that heretofore, on, to wit, the 26th day of April, 1907, defendant was engaged in the operation of a certain ore mine at or near, to wit, Helen Bess, in Jefferson county, Ala., and had servants in its employment engaged in blasting in and about the operation of its said business at said mine. Plaintiff avers that on said day there was a spur track extending from the main line of the Louisville & Nashville Railroad Company to or into the said ore mine of defendant, along and over which said spur track railroad trains were operated by said Louisville & Nashville Railroad Company, for the purpose of transporting ore from said mine of defendant. Plaintiff avers that on said day he was in the employment of the said Louisville & Nashville Railroad Company as a brakeman, and while in said employment as a brakeman on one of said trains operated by said Louisville & Nashville Railroad Company, along and over said spur track, said train was propelled or run into or to said ore mine of defendant for the purpose aforesaid. Plaintiff avers that said ore was loaded upon said train by the agents of the defendant, and that on said day, while said train upon which plaintiff was a brakeman as aforesaid was at said mine, and while plaintiff was engaged in coupling the cars of said train, one or more of the employes or agents of the defendant, who were at the time engaged in working on top of the cut over said place where plaintiff was engaged as aforesaid, made a blast or fired a shot, and a rock or other hard substance was hurled or thrown by said blast or explosion, striking plaintiff on the head with great force and violence, knocking

him down, and rendering him unconscious, whereby, and as a proximate consequence whereof, plaintiff was rendered sore and sick, and was painfully injured, was for a long time rendered wholly unable to work and earn money, was rendered permanently disabled to work and earn money, was put to great expense for medicine, medical care, and treatment in and about his efforts to heal and cure himself, and suffered great mental and physical pain. Plaintiff avers that said servant or servants of defendant were at said time acting within the line and scope of their employment, and that said shot or blast was fired without notice or warning being given to the plaintiff. Plaintiff further avers that he suffered said injury and sustained said damages by reason and as a proximate consequence of the negligence of defendant in suffering or allowing said blast or shot to be made or fired at a time when plaintiff was engaged as aforesaid at said place, without sufficient notice or warning being given as aforesaid. Hence this suit.

"(2) Plaintiff claims of the defendant \$5,000 as damages, for that heretofore, to wit, on the 26th day of April, 1907, defendant was engaged in the operation of a certain ore mine in Jefferson county, Ala., and on said day plaintiff, who was at said time in the employment of the Louisville & Nashville Railroad Company as a brakeman, was by consent or invitation of the defendant upon the premises where said ore mine was being operated by defendant as aforesaid. Plaintiff avers that, while upon said premises as aforesaid, a certain blast or explosion or shot was made or fired by some person engaged in and about getting out ore for the defendant at its said mine, and a certain rock, missile, or hard substance was by said blast, explosion, or shot hurled with great force and violence, striking plaintiff upon the head, fracturing his skull, and inflicting serious and painful injuries, whereby plaintiff was rendered sore and sick. [Here follows catalogue of injuries as stated in count 1.]"

Demurrers were interposed to count 1 as follows: "(1) It shows no breach of duty owing by defendant to plaintiff. (2) It is vague, indefinite, and uncertain. (3) The facts set forth therein, which are averred to constitute negligence upon the part of defendant are insufficient to show such negligence. (4) It is not shown in said count that defendant, or its servants or employes, acting within the line or scope of their employment, were chargeable with notice that plaintiff was in danger of being struck by a rock from the blast alleged to have been set off. (5) The facts set forth in said count are insufficient to charge defendant with the duty of warning plaintiff that a blast was about to be fired." The same grounds

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

were assigned to the second count, with the following additional ground: "The facts set forth in said count are insufficient to show that the blast alleged to have been the cause of plaintiff's injury was fired at an improper time or without sufficient warning."

Percy & Benners, for appellant. Stallings & Brennen, for appellee.

SIMPSON, J. This suit is by the appellee against the appellant for injuries received from the blasting operations of defendant while the plaintiff was engaged in his employment as a brakeman of the Louisville & Nashville Railroad Company. The first assignment of error insisted on is to the overruling of the demurrer interposed by the defendant to the first count of the complaint. It is urged that, although very general averments of negligence are sufficient, yet, when the pleader undertakes to state facts which are supposed to constitute the negligence, he is limited to the acts set forth, and that the facts set forth in this complaint do not justify the charge of negligence. In the use of explosives it is recognized that if one, in blasting, throws stones, rocks, or other substances on the land of another, it constitutes a trespass. *Bessemer Coal, etc., Co. v. Doak*, 151 Ala. 670, 44 South. 631. It is also recognized that a person has the right to use explosives on his own lands with certain precautions, and when an injury occurs thereon the burden is on the plaintiff to show negligence in the use of the explosives.

We understand, from the allegations of this count, that the plaintiff was on the land of the defendant when the injury was received. If a party who is blasting on his own land knows, or has reason to believe, or could by reasonable diligence know, that any one is in dangerous proximity to the place where the blasting is being done, it is the duty of the person in charge of the explosive either to use means to cover the place, so as to prevent the throwing off of material, or to give warning when the blast is about to be made, in order that those in perilous places may seek a place of safety. *Cameron et al. v. Vangergriff*, 53 Ark. 381, 386, 13 S. W. 1002; *Blackwell v. Moorman & Co.*, 111 N. C. 151, 16 S. E. 12, 17 L. R. A. 729, 32, 32 Am. St. Rep. 786, and note; *Blackwell v. Lynchburg & D. R. R.*, 111 N. C. 151, 16 S. E. 12, 17 L. R. A. 729, 32 Am. St. Rep. 786, 791; *Wright v. Compton*, 53 Ind. 337, 341; *Driscoll v. Newark, etc., Co.*, 37 N. Y. 637, 97 Am. Dec. 761, 763; *Gates v. Latta*, 117 N. C. 189, 23 S. E. 173, 53 Am. St. Rep. 584. "The sufficiency of a complaint, in an action for personal injuries, which undertakes to define the particular negligence which caused the injury, must be tested by the special allegation in that

respect, although the general allegation of negligence would, in the absence of such special allegations, be sufficient to make a prima facie case of negligence." 6 *Thompson on Negligence*, § 7452; *Consumers' Elec., etc., Co. v. Pryor*, 44 Fla. 354, 32 South. 797, 805; *Decatur, etc., Co. v. Mehaffey, Adm'r*, 128 Ala. 242, 253-4, 29 South. 646; *Highland, etc., Co. v. South*, 112 Ala. 642, 650, 20 South. 1003.

While, according to the authorities cited, it is not necessary to aver that the party doing the blasting had actual knowledge of the proximity of the person injured, yet it is necessary to allege that he either knew, or had reason to believe, or could by reasonable diligence have known, that the party injured was in a position where the missiles from the blasting would probably reach and injure him. In this particular said count was demurrable. Consequently the court erred in overruling the demurrer to said first count.

For the same reason the court erred in overruling the demurrer to the second count.

The judgment of the court is reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, ANDERSON, and MAYFIELD, JJ., concur.

(159 Ala. 529)

YORK et al. v. LEVERETT.

(Supreme Court of Alabama. Feb. 4, 1909.)

1. EVIDENCE (§ 18*)—NOMINAL CONSIDERATION—WHAT IS.

Where a court of chancery is asked to set aside a conveyance for fraud, it will take judicial notice that a pecuniary consideration of \$2 for property worth from \$1,500 to \$2,000 is merely nominal.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 18.*]

2. FRAUDULENT CONVEYANCES (§ 76*)—CONSIDERATION—NOMINAL CONSIDERATION.

A deed may be founded on some consideration, and still be technically a voluntary instrument, and when a valuable consideration is necessary to support a deed the bare recital of a nominal pecuniary consideration does not show a valuable consideration; and hence, if the purchaser of land for \$960, who had paid no cash therefor, but had given notes reserving a vendor's lien, subsequently, when insolvent and without having paid the notes, conveyed the land to another on a recited consideration of \$2 for the purpose of hindering and defrauding his creditors and defeating the lien of the notes, his grantee was a mere volunteer, and the deed ineffective so far as the rights of the original purchaser's prior creditors were concerned.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 198; Dec. Dig. § 76.*]

Appeal from Clay County Court; W. J. Pearce, Judge.

Bill by J. M. Leverett against E. York and others to have a deed declared void and to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

have a purchase-money lien declared upon the property conveyed. From a judgment overruling demurrers to the bill, respondents appeal. Affirmed.

The material allegations of the bill are sufficiently stated in the opinion. The bill was filed in the Clay county court, and addressed to Hon. W. J. Pearce, clerk of said court. Clay county forms a part of the Northeastern chancery division, of which Hon. W. W. Whiteside is chancellor. The demurrers filed to the bill are as follows: "(1) It appears from said bill that it was improperly filed in this court. (2) For that it appears from said bill that it should have been filed in the county court of Clay county. (3) For that it appears from said bill that it is not addressed to Hon. W. W. Whiteside, chancellor of the Northeastern chancery division. (4) For that no facts are alleged in said bill showing that said Sam Wallace executed the deed described in the fourth paragraph of said bill with any intent to hinder, delay, or defraud his creditors. (5) For that it does not appear from said bill that the grantee in said deed had any knowledge of said intent on the part of Wallace, if he had the same, or that said deed was accepted by grantee with any knowledge of the grantor's purpose, or any intent on the part of the grantee, that said deed should defraud any one."

Blackwell & Agee, for appellants. Whatley & Cornelius, for appellee.

DENSON, J. On the 2d day of October, 1901, H. W. Armstrong, for the agreed price of \$960, sold and conveyed to Sam Wallace the lands upon which it is sought by this bill to have a vendor's lien declared. The price was not paid in cash; but, by agreement between Armstrong and Wallace, Wallace on that day executed three promissory notes, each in the sum of \$320, in which a vendor's lien is reserved, and payable, respectively, to Jno. S. Armstrong, Mrs. A. J. McClintock, and Mrs. A. I. Miller, children of H. W. Armstrong. The notes were delivered to the payees, and in due course of trade were transferred to J. M. Leverett, the complainant in this bill. On the 22d day of October, 1903, Sam Wallace, without having paid the notes, conveyed the lands to the respondent E. York on a recited consideration of \$2. The bill avers that at the time the deed to York was executed Wallace was insolvent, and that he made the deed with the intent to hinder, delay, and defraud his creditors, and to defeat the lien of the notes, which were given for the purchase money. It is also shown by the bill that the consideration for the land, as set forth in the deed from Wallace to York, was a grossly inadequate price for the property conveyed,

and that the property was reasonably worth \$1,500 or \$2,000.

It seems clear, upon reason and authority, that the averments of the bill place the grantee, York, in the attitude of a mere volunteer, so far as the rights of prior creditors of Wallace are concerned. When a court of chancery is called upon to set aside a conveyance upon the ground of fraud, it takes judicial notice that such a pecuniary consideration as \$2 is merely nominal, when there is a transfer of so much value as in the conveyance under consideration. As was said in the case of *Kinnebrew's Distributees v. Kinnebrew's Adm'rs*, 35 Ala. 628, 637: "It is to be observed that a deed may be founded on some consideration, and yet still come within the technical definition of a voluntary instrument. * * * It is a necessary inference from the authorities that, when a valuable consideration is necessary to support a deed, the bare recital of a nominal pecuniary consideration will not be regarded as evidencing such valuable consideration. This doctrine is not at war with the principle that the smallest actual consideration of benefit to the promisor is sufficient to support a promise." *Goodlett v. Hansel*, 66 Ala. 151, 160. It thus appearing upon the face of the bill that complainant's debt was made prior to the execution of the deed attacked, and was a valid outstanding debt against the grantor at the time the conveyance was made, and that the grantee in that conveyance is a mere volunteer, the bill is sufficient in its averments, so far as the objections made to it by the demurrer are concerned, and the chancellor properly overruled the demurrer. *Klein v. Miller*, 97 Ala. 506, 11 South. 830.

The decree overruling the demurrer is affirmed.

Affirmed.

TYSON, C. J., and SIMPSON and MAYFIELD, JJ., concur.

BERGER et al. v. BUTLER.

(Supreme Court of Alabama. Feb. 4, 1909.)

1. TRUSTS (§ 271½*)—CONSTRUCTION—JURISDICTION OF EQUITY.

The construction of a deed of trust is a proper subject of equitable jurisdiction, both at common law and by statute.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 382; Dec. Dig. § 271½.*]

2. QUIETING TITLE (§ 1*)—EQUITY JURISDICTION.

A bill to quiet title is a proper subject of statutory equitable cognizance.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. § 2; Dec. Dig. § 1.*]

3. EQUITY (§ 148*)—BILL—MULTIFARIOUSNESS.

Where a bill was brought to construe a deed of trust and to quiet title, such reliefs being

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

necessary to each other, the bill was not multifarious.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 341-367; Dec. Dig. § 148.*]

4. QUIETING TITLE (§ 30*)—PROPER PARTIES—INTEREST IN SUBJECT-MATTER.

All parties interested in the subject-matter of a suit in equity to construe a deed of trust and to quiet title were proper parties; and, the court having jurisdiction of them, it was immaterial whether they were complainants or respondents.

[Ed. Note.—For other cases, see Quietting Title, Cent. Dig. §§ 64-66; Dec. Dig. § 30.*]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Bill by D. B. Butler, as trustee, against L. Berger and others, to construe a deed and quiet title. From a decree overruling demurrers to the bill, respondents appeal. Affirmed.

The bill avers that on the 9th day of April, 1903, Mary Tolliver executed and delivered to plaintiff, as trustee, an instrument in writing purporting to convey to complainant, as trustee for certain beneficiaries named therein, all of her property, both real and personal, copy of which is made an exhibit to the bill; that complainant filed said instrument for record, and said instrument was duly recorded. Then follows an allegation that Mary Tolliver, at the time of the execution of said instrument, owned in her own right and was in possession of certain lots and parcels of land set out in the bill. It is then alleged that after the execution of said instrument the complainant took possession of said property as trustee under said instrument, and that he has continuously remained in possession of the same up to the filing of this bill, and that he has continuously remained in possession of the same as such trustee, and is now in possession of the same, and that none of the same has ever been sold or disposed of by the complainant. It is then averred that Mary Tolliver died on the — day of February, 1908. It is then averred that since the execution of said instrument, and both prior to and since the death of Mary Tolliver, he has received and collected the rent of said property, and that said rent has been applied by complainant to the maintenance and support of said Mary Tolliver, and to the maintenance of said property under the authority and direction of said instrument, and that there is no personal property of said estate, and no personal property has come into his hands. It is then alleged that the beneficiaries named in the instrument are insisting that complainant carry out and administer the trust therein created, to sell said real estate and to distribute the funds as directed by the said instrument; but complainant avers that he is unable to carry out said trust and sell said property as directed by said instrument, for the reason that parties other than complainant and the bene-

ficiaries named claim and assert title and ownership in said property. Then follows an averment of the persons who claim some right, title, or interest in the property; and the persons claiming, the lands claimed, and the title by which they are claimed is set out, and it is asserted that the deed executed by Mary Tolliver to complainant, which is made an exhibit to the bill, was not a deed, but only a power of attorney, revocable at the pleasure of the said Mary Tolliver, and the said instrument conveyed no title to said property, and that the same was revoked and annulled by the said Mary Tolliver by the execution by her of said instruments purporting to convey such property to certain respondents, naming them. It is then averred that if the deed to complainant as trustee is a deed, and conveyed title to all of the above-described property, then the subsequent instruments executed by Mary Tolliver and purporting to convey title to the various respondents to the various parcels of land named are null and void, and pass no title to respondents, or either of them, and that said conveyances under which said respondents claim title are a cloud on complainant's trustee, and that by reason thereof complainant is unable to sell said property and administer said estate. The prayer is that the court will decree and adjudge the nature and legal effect of the instrument executed by Mary Tolliver to complainant as trustee on April 9, 1903, and if it be determined that it be a deed, and conveys the property therein described to complainant as trustee, then that the court will direct said respondents to set forth and specify separately and severally their title, claim, interest, or incumbrance on said property, and how and by what instruments the same are derived and created, etc., and that such instruments be declared null and void, and a cloud on complainant, and for general relief. The demurrers attack the bill for that it is filed to compel respondents to propound their title to the lands described, and to quiet title thereto between the parties, but it is not averred that complainant claims to own said lands either in his own right or as personal representative or guardian of others; that it is multifarious, in that it seeks to quiet title to various parcels of land claimed by various respondents separately and severally, and because it joins defendants who are not shown to have a community of interests in any one material subject-matter.

Kennedy & Ballard and Tillman, Grubb, Bradley & Morrow, for appellants. R. B. Smyer, for appellee.

MAYFIELD, J. This is an appeal from the decree of the chancellor overruling demurrers to the bill. The bill was filed by a trustee, praying the court to construe the deed of trust conveying or attempting to convey

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to him, as trustee, certain real estate, and to quiet title to the lands conveyed therein. The beneficiaries under the trust deed, and those claiming or asserting title to respective parts of the lands conveyed, are all made respondents to the bill. The grounds of demurrer insisted upon are multifariousness, misjoinder of respondents, and failure to allege or assert such title to the lands or possession therein as will support the action under the statute to quiet title; and the insistence as to these is very brief and very gentle.

One of the objects of the bill is to construe a deed of trust, which clearly gives equity jurisdiction, at common law and by statute; the other, to quiet title, is clearly of equitable cognizance given by statute in this state. The bill conforms to the law and practice, both at common law and by statute, pertaining to such proceedings in the chancery courts. One of the reliefs is clearly incidental and necessary to the other. All parties interested in the subject-matter of a suit in chancery are proper parties, and it is often immaterial whether they appear as complainants or as respondents, so they are before the court. They were all made parties here. The fact that the various claimants to parts of the lands conveyed by the trust deed claimed title to separate and distinct parts, and not jointly, does not prevent joining all of them as respondents. They all claimed a part of the lands conveyed by the trust deed, which alone would authorize the joining of them as respondents to this action. The bill practically follows the statute as to the character of title and possession which a complainant must have to maintain a bill to quiet title under the statute.

The demurrers were properly overruled, and the decree must be affirmed.

Affirmed.

TYSON, C. J., and SIMPSON and DENSON, JJ., concur.

(159 Ala. 606)

CHAMBERS v. MORRIS.

(Supreme Court of Alabama. Jan. 20, 1909.
Rehearing Denied Feb. 15, 1909.)

1. EVIDENCE (§ 314*)—HEARSAY.

Declarations of the former physician and neighbors of a person that he is dead are hearsay, and inadmissible to prove his death.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1171; Dec. Dig. § 314.*]

2. EVIDENCE (§ 292*)—HEARSAY—PEDIGREE EVIDENCE.

To render a declaration by a member of the family of decedent that he is dead admissible on the theory of pedigree evidence, it must appear, also, that the person making the declaration is dead.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1151; Dec. Dig. § 292.*]

3. EVIDENCE (§ 273*)—ADVERSE POSSESSION—ADMISSIBILITY.

Where, in ejectment, there was evidence for defendant that her possession was adverse, and for plaintiff that such possession was merely permissive, it was competent to prove a statement, by defendant's husband in her presence, that they (meaning defendant and himself) had no home, as it was a circumstance to be considered in determining whether the land had been held adversely or permissively.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1111, 1115; Dec. Dig. § 273; *Adverse Possession, Cent. Dig. § 670.]

4. EJECTMENT (§ 106*)—EVIDENCE—QUESTIONS FOR JURY.

Where, in ejectment, there was evidence of adverse possession, and also that the uncleared land on the tract had been put to such uses as it was susceptible of, in its then state, in the way of firewood, rail timber, etc., it was error to direct a verdict for plaintiff as to the uncleared land on the tract, and the question of whether there had been possession of it should have been left to the jury.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 106.*]

Appeal from Circuit Court, Henry County; A. A. Evans, Judge.

Statutory action in the nature of ejectment by C. V. Morris against Griffin Wiggins and Sub Anthony, who suggested Lecy S. Chambers as landlord, with notice. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

P. A. McDaniel, for appellants. Oates & Oates, for appellee.

DOWDELL, J. The witness John W. Chambers, having testified on his direct examination that one Colin S. Varnum, who had been examined as a witness on a former trial of the case, was dead, was then permitted to testify as to what the said Varnum had sworn on the former trial. On the cross-examination of Chambers he was asked by counsel how he knew that Varnum was dead, in answer to which he said: "I went to Varnum's former home in Houston county, Ala., and he was not there. His family was there, and they told me he was dead, and that he died at the time named. I saw his family physician, who told me that he attended him in his last sickness, and that he (Varnum) was dead. His former neighbors told me that Varnum was dead. I did not see him myself after death, and know that he is dead only from what these persons told me." Thereupon the court, on motion of the plaintiff, excluded all of the testimony of the witness Chambers as to what Varnum swore on the former trial. In this there was no error. Evidence of the declarations of the physician and the neighbors as to the death of Varnum were hearsay, and by no rule of evidence admissible; and to render declarations made by a member of the family of the deceased admissible as to such death, on the theory of pedigree evidence, it must appear, also, that the party

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making the declaration is dead, since, if living, his testimony would be not only obtainable, but the best evidence. *Elder v. State*, 124 Ala. 69, 27 South. 305; *White v. Strother*, 11 Ala. 720; *Jones on Evidence* (2d Ed.) § 318.

There was evidence on the part of the defendant tending to show that her possession of the land was adverse, and evidence on the part of the plaintiff tending to show that the possession of the defendant was merely permissive. In this state of the case it was competent to prove the statement, made by the defendant's husband in her presence, to the effect that they, meaning himself and his wife (the defendant) had no home. It was a circumstance to be considered by the jury in determining whether the land had been held by the defendant adversely or permissively. The court properly admitted this evidence.

As stated above, there was evidence tending to show an adverse possession, and evidence which also tended to show that the uncleared land on the 80-acre tract, to which the defendant set up adverse possession, was put to such uses as it was susceptible of in its then state, in the way of firewood, rail timber, etc., as would go to show actual possession. The court, therefore, erred in giving the general charge requested to find for the plaintiff as to the uncleared land on said 80-acre tract. The question was one that should have been left to the jury.

For the error indicated, the judgment must be reversed, and the cause remanded.

Reversed and remanded.

TYSON, C. J., and ANDERSON and McCLELLAN, JJ., concur.

(159 Ala. 97)

MOORE v. STATE.

(Supreme Court of Alabama. Feb. 4, 1909.)

1. INTOXICATING LIQUORS (§ 238*)—DISTILLING WITHOUT LICENSE—EVIDENCE—QUESTIONS FOR JURY.

In a prosecution for distilling without a license, evidence held sufficient to take to the jury the question of defendant's interest in the distillery.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 238.*]

2. INTOXICATING LIQUORS (§ 236*)—DISTILLING WITHOUT LICENSE—EVIDENCE.

In a prosecution for distilling without a license, evidence held sufficient to support a conviction.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 236.*]

3. CRIMINAL LAW (§ 1169*)—APPEAL—REVIEW—ERROR FAVORABLE TO APPELLANT.

In a prosecution for distilling without a license, the admission of evidence that others than defendant were operating the plant on certain occasions was at most harmless error, being favorable to defendant.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3088, 3089; Dec. Dig. § 1169.*]

4. CRIMINAL LAW (§ 401*)—BEST EVIDENCE—DEED—COLLATERAL ISSUE.

In a prosecution for distilling without a license, a witness may testify that he sold the land on which the distillery was operated to defendant and made him a deed thereto, though the deed is not produced, since the question of title and deed are wholly collateral to the issue.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 884; Dec. Dig. § 401.*]

5. INTOXICATING LIQUORS (§ 239*)—DISTILLING WITHOUT LICENSE—INSTRUCTIONS.

In a prosecution for distilling without a license, a requested charge requiring that it be found that defendant owned an interest in the distillery before he could be convicted was properly refused.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 239.*]

6. INTOXICATING LIQUORS (§ 239*)—DISTILLING WITHOUT LICENSE—INSTRUCTIONS.

In a prosecution for distilling without a license, a requested charge, misleading in that it tended to impress the jury that there must be an acquittal, if defendant did not operate the distillery alone, is properly refused.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 239.*]

Appeal from Circuit Court, Randolph County; S. L. Brower, Judge.

J. T. Moore, alias, etc., was convicted of distilling without a license, and appeals. Affirmed.

The evidence sufficiently appears from the opinion. In its oral charge to the jury the court said: "If you believe beyond a reasonable doubt, from the evidence, that the defendant had any interest in the distillery which was operated in November and December, 1907, and aided in operating a distillery during November and December, 1907, in Randolph county, you will convict the defendant." The following charges were requested by and refused to the defendant: (1) General affirmative charge. (2) "I charge you that, unless you believe from the evidence that the defendant was a party interested in the Roanoke Distilling Company in the year 1907, then you cannot convict the defendant." (3) "I charge you that, unless you believe from the evidence beyond a reasonable doubt that the defendant operated a distillery without a license during the year 1907, then you cannot convict the defendant."

Hooten & Overton, for appellant. Alexander M. Garber, Atty. Gen., for the State.

MAYFIELD, J. The defendant was indicted for distilling without a license and contrary to law. The evidence tended to show that there was a distillery near Roanoke, operated in November and December, 1907; that corn whisky was made there; that the defendant was often seen about the still, and seemed to be superintending it before Christmas. The distillery seems to have been operated under the name of the Roanoke Distilling Company. There was some evidence tending to show that defendant

bought the land upon which the distillery was located, and that he carried the keys to the buildings. It was also in evidence that defendant had stated he and others were interested in the distillery. A great deal of the evidence was to the effect that one Pitts and one Trice were doing most of the work about the still and seemed to be managing it, in November and December, 1907. There was clearly enough evidence to submit the question to the jury as to whether or not the defendant was interested in the operation of this distillery, and there is ample evidence to support the verdict and judgment of conviction. This being true, the general charge in favor of the defendant was properly refused.

There was no error in allowing the witnesses to testify that Pitts and Trice were operating the distillery on certain occasions. No possible harm could come to defendant from this evidence. It affirmatively appears to have been in his favor.

There was no error in allowing the witness Gladney to testify that he had sold the land on which the distillery was located to defendant, and made him a deed thereto. The question of title and deed to this property arising wholly collaterally, as it did, it was unnecessary to produce the deed, or account for its absence, before allowing parol evidence as to the sale of the lot for this purpose. *Garrison v. Glass*, 139 Ala. 512, 36 South. 725; 3 Mayfield's Dig. p. 460, § 480 et seq. While owning the land upon which a distillery is unlawfully operated, and owning an interest in the distillery, standing alone, might not be sufficient to support a conviction for operating it, yet, when taken in connection with the other evidence in this case, it was clearly a proper case for the jury to pass upon the weight and sufficiency of the evidence.

There was clearly no error in that part of the oral charge of the court as to which exception was reserved. This part of the charge of the court was not, as insisted by appellant, instructing the jury that, if they believed from the evidence beyond a reasonable doubt that defendant had an interest in the distillery, they must convict him. The charge required them also to believe from the evidence, beyond a reasonable doubt, that defendant aided in operating the distillery during November and December, 1907, in Randolph county. The charge was entirely too favorable to the defendant; hence he certainly should not be allowed to complain.

The charges requested by the defendant were properly refused. One required the jury to find that defendant owned an interest in the distillery before they could convict. Another was misleading, in that it was calculated to impress the minds of the

jury with the belief that before defendant could be convicted it must appear that he operated the distillery alone; that he aided in the operation, in conjunction with others, would not be sufficient. The others were, in effect, general affirmative charges, which were clearly improper under the evidence.

There being no error in the record, the judgment must be affirmed.

Affirmed.

TYSON, C. J., and SIMPSON and DENSON, JJ., concur.

MADDOX v. STATE.

(159 Ala. 53)

(Supreme Court of Alabama. Feb. 18, 1909.)

1. CRIMINAL LAW (§ 413*)—EVIDENCE—ACTS AND DECLARATIONS OF DEFENDANT.

The conduct, demeanor, and expressions of the accused, at or about the time of the homicide, are matters admissible in evidence against, but not for, him, unless part of the *res gestæ*.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 928-935; Dec. Dig. § 413.*]

2. CRIMINAL LAW (§ 414*)—EVIDENCE—ACTS AND DECLARATIONS OF DEFENDANT — RES GESTÆ.

While the accused cannot prove his own declarations, unless they form a part of the *res gestæ*, if the state introduces his confessions, declarations, or admissions, then he may give in evidence all that he said in connection therewith, and the circumstances attending it; but he cannot make this the basis of showing what he said or did on other occasions.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 936; Dec. Dig. § 414.*]

3. HOMICIDE (§ 158*) — EVIDENCE — ACTS AND DECLARATIONS OF DEFENDANT.

On prosecution for homicide, questions as to whether defendant, after the affray, went home, and got a gun, and came back in 15 or 20 minutes, and answers in the affirmative, and that when defendant returned he told witness to turn deceased loose, or get out of the way, as he was going to shoot deceased, were admissible against defendant.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 293; Dec. Dig. § 158.*]

4. CRIMINAL LAW (§ 364*)—EVIDENCE—ACTS AND DECLARATIONS OF DEFENDANT.

On prosecution for homicide, the state having been permitted to prove that, after the affray, defendant went to his home, returned in a short time with a gun, and stated that he was going to shoot deceased, defendant should have been permitted to prove that at his home, just before he left, he stated that he was going after F. and have him make deceased stop the fuss, as part of the *res gestæ* of that matter, though not a part of the *res gestæ* of the killing.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 808-810; Dec. Dig. § 364.*]

Appeal from Tuscaloosa County Court; Henry B. Foster, Judge.

Collins Maddox was convicted of murder in the second degree, and appeals. Reversed and remanded.

The witness Lucinda Murray, being on the stand, was asked the following questions and made the following answers, to which objections were made and overruled, and to which

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

exceptions were reserved: "(1) State whether Collins Maddox, after the cutting, went home, and got a gun, and came back up there. A. He went home, and got a gun, and came back there, where she and others were with Jesse Davis [the man who was alleged to have been killed by a cut from a knife]. Collins Maddox was gone 15 or 20 minutes before he came back. (2) State what Collins Maddox said when he came back. A. Turn him loose, and I will finish the damn ——." The defendant then asked the witness: "Did not the defendant say, at his house, as he was going out to get his mule, just after the fuss came up down there, that he was going down to Mr. Joe Foster's and get him to have the fuss stopped, or make him stop cutting up?" Objection was sustained to this question. The state then introduced Fred Bailey, and the solicitor asked the witness to state whether, after the cutting, Collins Maddox went off and came back again, and the witness answered that he did go off and come back again. Objection was interposed and overruled to the question and answer. Further questions: "State what defendant had when he came back, if anything. A. He had a shotgun. Q. State what the defendant said when he came back, if anything. A. Get out of the way and let me shoot him. I'm going to finish him." The defendant then asked the witness the following question, to which objection was sustained: "Did not the defendant, at his home, just before you left, say that he was going after Mr. Joe Foster, and have him make Jesse Davis stop that fussing down there?" The defendant then introduced Maddox, and offered to ask him the same question as to what the defendant said about getting Mr. Foster to stop the fuss, to which objection was sustained, and this question, "State whether the defendant, at the time he went to the lot, stated for what purpose he was going, and whether he stated where he would go," to which objection was sustained, and this question, "State whether or not the defendant stated, at the time he started for the lot, where he was going," to which objection was sustained. On cross-examination the solicitor asked this witness the following question: "State what you were doing when Collins came back down there where the cutting occurred. A. That he was holding Jesse Davis up." Objection was interposed and overruled to both question and answer, as they were to the following question and answer to the same witness: "While you were holding Jesse Davis up, to keep his entrails out of the row, did not Collins Maddox tell you to get out of the way, that he was going to finish Jesse Davis?" and the answer, "Turn him loose, I am going to shoot him." While the defendant was on the stand, he testified that he had ordered Davis to go away from the house, and Davis replied, "Damn you, and your yard, too; I'm not going anywhere."

Daniel Collier, for appellant. Alexander M. Garber, Atty. Gen., for the State.

'MAYFIELD, J. It has been uniformly held in this state, in homicide cases, that the conduct, demeanor, and expressions of the accused, at or about the time of the homicide, are matters admissible in evidence against, but not for, him, unless part of the *res gestæ*. *McManus' Case*, 36 Ala. 292; *Blount's Case*, 49 Ala. 381; *Miller's Case*, 107 Ala. 40, 19 South. 37; *Johnson's Case*, 17 Ala. 623; *Henry's Case*, 79 Ala. 42; *Armor v. State*, 63 Ala. 173; *Levison v. State*, 54 Ala. 520; *Reeves v. State*, 96 Ala. 33, 11 South. 296; *Pate v. State*, 94 Ala. 14, 10 South. 665; *Campbell v. State*, 23 Ala. 44. This court has probably gone as far as any other in holding such evidence admissible against the accused and inadmissible for him. In the case of *Hainsworth v. State*, 136 Ala. 13, 34 South. 203, it was held that evidence as to the facial expression of the accused, how he looked or appeared, at a prayer meeting several hours before the homicide, which was committed at the house of the deceased, some distance from the place of the prayer meeting, was admissible against him. In *Campbell's Case*, 23 Ala. 79, it was held that the state could prove the appearance of the accused on the evening of the day of the homicide, and on the following day, but that the accused could not prove his appearance or expressions three days subsequent to the killing. The reason given in this case, and in other authorities, for the rule, is that evidence of the conduct, demeanor, acts, expressions, or appearance of the accused, shortly before, at the time of, or shortly after, the homicide, is admissible against him, because his conduct, appearance, and expressions, on these occasions, are presumed to correspond with the truth, but that they operate in the nature of admissions, and therefore they are often admissible as such, but that the defendant can no more make his conduct or appearance evidence for him, than he could his declarations of innocence, as this would permit him to manufacture his own evidence, which, of course, is not, and should not be, allowable.

The writer of this opinion thinks that this court and some trial courts have gone too far, in certain of the cases reported, in admitting such evidence against the accused; but the case at bar is not one of the class. The evidence admitted for the state over the objections of the defendant, and that excluded by the court, which was offered by the defendant for the purpose of showing his conduct prior to the time of and after the homicide, was in each instance properly admitted or excluded, except as hereafter appears.

It is insisted with some force by the learned counsel for the defendant that the evidence offered by the defendant as to these

questions was admissible, and improperly excluded, because the state had first given in evidence of these matters, and the defendant then had the right to lay before the jury all he said and did at the time and on the occasions referred to by the state's evidence, and on the theory that, where a part of a conversation or transaction is admitted at the offer of one party, the whole or other parts thereof are admissible, if offered by the other. The cases cited by counsel for defendant lay down the correct rule, which is: The accused cannot give in evidence his own declarations, unless they form a part of the *res gestæ*; but if the state gives in evidence his confessions, declarations, or admissions, then he may give in evidence all that he said in the particular confession, declaration, or admission, and the circumstances attending it, but he cannot make this the basis of showing what he said or did on other occasions. None of the evidence offered by the defendant and excluded by the court, except as hereafter referred to, was admissible under this rule. What was said by Justice Brickell, in the case of *Burns v. State*, 49 Ala. 374, which case is cited by counsel for appellant, is pertinent and applicable to show there was no error in excluding the evidence offered by the accused, which we quote: "The prisoner offered to prove exculpatory declarations made by him when he returned to the stillhouse after the shooting, which the court excluded. The bill of exceptions does not inform us whether these declarations formed a part of the conversation of which the state gave evidence, or whether they were made in another and subsequent conversation. Of course, we cannot say that the court erred in rejecting them."

However, the declarations of the accused, made at or about the time he left home, as to the object and purpose of his leaving, stand upon another footing. They are a part of the *res gestæ* of that matter, though not a part of the *res gestæ* of the killing. *Kilgore v. Stanley*, 90 Ala. 523, 8 South. 130; *Pitts v. Burroughs*, 6 Ala. 733; *Olds v. Powell*, 7 Ala. 652, 42 Am. Dec. 605; *Harris v. State*, 96 Ala. 24, 11 South. 255; *Burton v. State*, 115 Ala. 10, 22 South. 585; *Campbell v. State*, 133 Ala. 81, 31 South. 802, 91 Am. St. Rep. 17. The object and purpose of his leaving home at this time was properly made a subject of inquiry on the trial. His guilt or innocence, or, at least, the degree of the crime, might properly depend upon the question whether he pursued deceased for the purpose of killing him, or whether he left home, not for that purpose, but for the purpose (as he claimed) of going to Mr. Foster's to get the latter to come to his house to quell the disturbance.

It follows, therefore, that the trial court erred in refusing to allow proof of the dec-

larations of the accused, made at or about the time of his leaving home, to the effect that he was going over to get Mr. Foster to come there and stop the row or disturbance. For this error, the judgment of conviction must be reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and DENSON, JJ., concur.

GAMBILL v. COOPER.

(Supreme Court of Alabama. April 16, 1908.
Rehearing Denied Feb. 5, 1909.)

1. APPEAL AND ERROR (§ 1195*)—DECISION ON APPEAL—LAW OF THE CASE.

Where a cause is held on appeal to have been brought in the name of the proper plaintiff, such ruling will be decisive of the question on a subsequent trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661, 4663; Dec. Dig. § 1195.*]

2. LANDLORD AND TENANT (§ 291*)—RECOVERY OF DEMISED PREMISES—UNLAWFUL DETAINER—PLEADING.

A complaint in a suit against a tenant for unlawful detainer, in which each of the counts substantially complied with the form required in Code 1896, p. 948, form 27, is sufficient, though the terms of the lease contract between the parties were averred in each of the counts, for which no provision is made in the statutory form.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 291.*]

3. PLEADING (§ 111*)—PLEAS IN ABATEMENT—DISALLOWANCE—DISCRETION OF COURT.

Since a plea filed by defendant in a suit for unlawful detainer of demised premises, alleging that the person for whose use the suit had been brought had been adjudged a bankrupt after the commencement of the suit, did not go to the merits of the case, but only to the personal disability of the alleged bankrupt, being in the nature of a plea in abatement, the disallowance of it was within the discretion of the trial court, especially where a term of court had been allowed to elapse after the disability arose before the plea was offered.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 111.*]

4. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Error in the admission of incompetent evidence is harmless, where there is other undisputed competent evidence of the same fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161, 4163; Dec. Dig. § 1051.*]

5. LANDLORD AND TENANT (§ 291*)—RECOVERY OF DEMISED PREMISES—UNLAWFUL DETAINER—DAMAGES—RENTS PENDING APPEAL.

On appeal in forcible entry and detainer against a tenant, evidence as to the rental value of the demised premises pending the appeal was admissible, and plaintiff was entitled to recover the same, under the express provisions of Code 1896, § 2146.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 291.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

6. LANDLORD AND TENANT (§ 291*)—RECOVERY OF DEMISED PREMISES—NOTICE TO QUIT—SUFFICIENCY—"REASONABLE NOTICE."

Where a lessor made demand in writing of his tenant for possession of the premises demised before bringing suit for unlawful detainer, and more than 40 days before making such written demand gave the tenant notice that the premises had been sold and that he would require their possession, the notice given was a "reasonable notice," within a requirement of the lease that, in case the premises should be sold during the term of the lease, the lessee would give possession thereof after "reasonable notice" of the sale.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1220, 1222; Dec. Dig. § 291.*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 5974, 5975.]

7. APPEAL AND ERROR (§ 927*) — PRESUMPTIONS—EVIDENCE NOT SHOWN BY RECORD.

Where the bill of exceptions does not purport to set out all the evidence in the case, it will be presumed, in support of the court's action in giving a general charge, that the evidence was undisputed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3748, 4024; Dec. Dig. § 927.*]

Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge.

Unlawful detainer by H. D. Cooper, for the use of A. E. Leishman, against A. A. Gambill. From a judgment for plaintiff, defendant appeals. Affirmed.

The complaint was in the following language:

Count 1: "Plaintiff sues to recover possession of the following tract of land, to wit: [Here follows a description of the land]—of which he was in possession, and upon which, pending such possession, and before the commencement of this action, the defendant lawfully entered, on the demise of the plaintiff, for one year, namely, from the 1st day of October, 1899, to the 30th day of September, 1900. And the plaintiff avers that as a part of the consideration for said lease the defendant promised therein that, in case the said premises were sold during said term described above, he would give possession of said house and lot, after reasonable notice had been given of said sale and that possession of the said premises was wanted. And plaintiff further avers that he sold said premises during said term to A. E. Leishman, and that the said defendant was given such a notice more than 40 days before the bringing of this suit, and more than 40 days before written demand was made for the possession of the premises, which written demand the plaintiff hereby avers was made by the plaintiff in writing before the bringing of this suit and in accordance with the statute. The plaintiff further alleges that the defendant doth continue to unlawfully detain the said premises. The plaintiff further claims \$100 for the detention of said premises."

Count 2: Same as 1, down to and includ-

ing the words "of September, 1900," where they occur in said first count, with the following addition: "With the condition which was written in and made a part of the lease or contract of demise between the plaintiff and the defendant that the defendant, in the event the plaintiff sold the said premises, was to give possession of the same, if required to do so, within a reasonable time thereafter. And plaintiff avers that he did sell said premises during said term, on, to wit, April 20, 1900, to said A. E. Leishman, of which sale the defendant was duly notified and informed, and the defendant was duly notified and required to give possession of said premises in accordance with the terms of the said lease contract; but the defendant failed and refused to give possession of said premises within a reasonable length of time thereafter. And the plaintiff further avers that the defendant, after the termination as aforesaid of his possessory interest in and to the premises, and after the plaintiff's demand in writing therefor, which was duly made before the bringing of this suit, has unlawfully detained the said above-described premises at and before the time of the commencement of this suit, and did unlawfully detain the same for a long time thereafter. Plaintiff avers that he claims the sum of \$100 for the detention of said premises, and as a penalty for damage of holding over."

Demurrers were interposed as follows: To the complaint as a whole: "(1) That the aggregate amount claimed in the several counts thereof exceeds \$100, and therefore exceeds the jurisdiction of the justice of the peace, before whom the suit originated. (2) For that this suit is not properly brought in the name of a nominal plaintiff, and may not be brought in the name of one party for the use of another. (3) No sufficient cause therein is shown why a recovery should be had for the use of Leishman." To the first count of the complaint as follows: "(1) For that it does not sufficiently show the termination of defendant's possessory interest in the premises sued for before demand for the possession of same was made. (2) It does not sufficiently appear therefrom that plaintiff was entitled to the possession of said premises at the time the suit was instituted. (3) For that it does not sufficiently appear therefrom that the plaintiff demanded in writing the possession of the said premises by the defendant. (4) For that, after a sale of said premises, the demand for possession thereof should have been made by the purchaser." The same grounds were interposed to count 2.

The record shows that defendant tendered in court and asked permission and moved the court for leave to file the following plea: "The defendant, for plea to the complaint, says that on, to wit, the 18th day of October, 1900, said A. E. Leishman was duly adjudged a bankrupt by the District Court of the United States for the Southern Division of the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Northern District of Alabama, which had jurisdiction of the subject-matter and the parties to said proceedings. Wherefore the defendant says that this plea ought to abate." This plea was sworn to.

The substance of the lease is as set out in the complaint, and its execution was proven.

Motion was made to suppress the deposition of Leishman on the following grounds: "(1) The residence of the said witness is not given with the particularity required by law. (2) The residence of said commissioner is not given with the particularity required by law. (3) The defendant has not been notified of the residence of said witness, nor of the residence of said commissioner, with the particularity required by law, and has not been notified at what point in Jefferson county said witness resides, nor at what point in the city of Charlotte said commissioner resides."

The record shows that the notice served on the defendant for the taking of said deposition, and the affidavit on which same was taken, showed nothing as to the residence of the commissioner and the witness, other than that the witness resided in Jefferson county, Ala., and was temporarily in North Carolina, and would not return to Alabama before the trial, and that the commissioner, Yeager, resided in Charlotte, N. C., and that within the time allowed for filing cross-interrogatories the defendant had filed written objections to the taking of the deposition and the appointment of said Yeager as commissioner, and notice that he would move to suppress the same at the trial on the grounds set out above.

George Huddleston and John W. Altman, for appellant. Brown & Murphree and James A. Mitchell, for appellee.

DOWDELL, J. This is an action of unlawful detainer, commenced in the justice court and carried by appeal from that court into the circuit court. In the circuit court the plaintiff obtained a judgment, from which the defendant appeals to this court.

This is the second appeal in this case to this court. *Cooper v. Gambill*, 146 Ala. 184, 40 South. 827. On the present appeal there are 18 assignments of error on the record. Of these the fifth, seventh, eleventh, and twelfth assignments are expressly abandoned by the appellant.

The first, second, and third assignments of error go to the trial court's ruling on the demurrers to the complaint. When the case was here on former appeal, it was then decided by this court, that the suit was properly instituted in the name of Cooper. And we may here say that the words "for the use," etc., may be regarded as surplusage, and there is therefore no merit in the ground of demurrer again raising this question. *Reese v. Reeves*, 131 Ala. 195, 31 South. 447, and cases there cited.

We were at first of the opinion that the

complaint was subject to the demurrer interposed by the defendant, but upon more mature consideration we have reached a different conclusion. While the terms of the lease contract are averred in each of the counts of the complaint, yet each of said counts in its averments is in substantial compliance with the form given in the Code for unlawful detainer suit. Code 1896, p. 948, form 27. The demurrers to the complaint were, therefore, properly overruled.

The plea offered to be filed by the defendant at the time of the trial, and which was disallowed by the court, we think, under the circumstances, was a matter addressed to the discretion of the court. If the plea be considered as sufficient in its averments to constitute a good plea, it only went to the personal disability of Leishman, for whose use the suit was brought, arising after suit commenced, and in the nature of a plea in abatement. It did not go to the merits of the suit, and, if allowed, the suit could have continued for the use and benefit of the trustee in bankruptcy. Moreover, a term of the court had been allowed to pass after the disability arose before the plea was offered, and then not until after the trial was reached, late in another term of the court. As stated above, we think, under the facts, it was a matter addressed to the discretion of the court.

If there was error in admitting in evidence the deed from A. Cooper and Clara W. Cooper to Leishman, it was harmless, as there was other evidence, which was undisputed, of a sale by the plaintiff.

The motion to suppress the deposition of Leishman on the ground stated was without merit, and was properly overruled.

It was permissible to show the rental value of the leased property pending the appeal, and to have recovery of the same on plaintiff's motion. Code 1896, § 2146; *Giddens v. Bolling*, 92 Ala. 586, 9 South. 274.

The evidence showed that notice of the sale and a requirement of the possession of the property under the terms of the lease contract was given the defendant for at least 40 days before the demand in writing for possession was made. Forty days was, in law, a reasonable time given the defendant to quit, and was sufficient to terminate his possessory interest under the lease. The evidence also showed a demand in writing for possession before suit. The court was justified, under the evidence, in giving the general charge requested by the plaintiff; and, since the bill of exceptions does not purport to set out all of the evidence in the case, it will be presumed, in support of the court's action that the evidence was undisputed.

We find no reversible error in the record, and the judgment will be affirmed.

Affirmed.

TYSON, C. J., and SIMPSON, McCLELLAN, and MAYFIELD, JJ., concur.

DAVIS v. STATE.

(Supreme Court of Alabama. Feb. 4, 1909.)

1. CRIMINAL LAW (§ 1169*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The error, if any, in admitting in evidence, without proper identification, pieces of slag found at the place of the robbery as the instruments used by defendant, is harmless, where subsequent evidence fully identified them.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3140; Dec. Dig. § 1169.*]

2. ROBBERY (§ 23*)—EVIDENCE—MATERIALITY—INTENTION.

In a prosecution for robbery, the prosecutor may testify that he did not "consent" to defendant's taking his money.

[Ed. Note.—For other cases, see Robbery, Dec. Dig. § 23.*]

3. CRIMINAL LAW (§ 695*)—TRIAL—EVIDENCE—PROPER IN PART—OBJECTION.

In a prosecution for robbery, it was proper to overrule the objections to the question, put to the prosecutor, whether he "was willing or consented" to defendant taking his money, as a part of the question was proper; the prosecutor being entitled to testify that he did not "consent."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1633-1638; Dec. Dig. § 695.*]

Appeal from City Court of Talladega; G. K. Miller, Judge.

Henry Davis was convicted of robbery, and appeals. Affirmed.

The two counts in the indictment charge the taking of a suit case, two shirts, one pair of pants, one pair of overalls, a Bible, and a hair brush, stating the value of each item, the property of Clarence Dombly, from his person, against his will, by violence, etc. Count 3 charges the taking of a silver dollar, of the currency of the United States, etc. The evidence tended to show that Clarence Dombly got off the train at Childersburg and started up the railroad, looking for the home of a Mr. Crowe, and that he had a suit case, with the articles mentioned in the first two counts of the indictment in it. As he went up the road, he saw the defendant, and asked him if he knew where Mr. Crowe lived, and was told that he did not. Dombly then asked defendant if he would take his valise up the road to Mr. Crowe's house for 25 cents, and the defendant replied that he would, and he took the valise, and Dombly and the defendant proceeded on up the railroad, passed the brickyard of Mr. Clardy, and as they got near some woods the defendant set down the grip, called the attention of Dombly to a piece of iron melting or slag, and asked him if he could throw pretty well, and told Dombly that he saw a rabbit in the bushes, and that witness went round the bushes to see if he could see the rabbit, when defendant struck him on the head, and he became unconscious. There was other evidence tending to corroborate the statement, and also to show how the witness got to Mr. Crowe's, and as to

the nature and serious character of the wound, etc. It was further shown that the suit case or grip which he was carrying was afterwards taken from the defendant, and the articles contained therein were identified. The witness Newsome testified that the place where the assault happened was in Talladega county, and that he went to the place and found blood scattered about on the ground, a pair of glasses, which Dombly identified as his, and two pieces of iron melting or slag, and that the slag had hairs on it when he found it, and that there was blood right at it. The iron or slag was admitted in evidence over the objection of defendant. Subsequently the witness Dombly was shown the slag, and asked if he had ever seen it before, and he identified it as the piece of iron or slag he saw in the hands of defendant on the day and at the time he was assaulted; but at that time it was in one piece, and in the hands of defendant, who remarked that it would make a good chop ax.

Frank L. Vance, for appellant. Alexander M. Garber, Atty. Gen., and Marlon H. Sims, Sol., for the State.

DENSON, J. The defendant, convicted and sentenced to be hanged for the crime of robbery, has appealed from the judgment of conviction.

The indictment contains three counts, all of which charge the crime of robbery in Code form. The first and second counts were eliminated by charges given at the defendant's request. Defendant offered no evidence, while that of the state makes a clear and aggravated case of robbery, as charged in the third count of the indictment.

If the court erred in its first ruling, admitting in evidence the two pieces of "iron or slag" found and picked up by witness Newsome at the place where the robbery was committed, the error was cured by subsequent evidence of identification, which was sufficient to authorize their admission in evidence, and upon which it was the province of the jury to determine whether they had formed the identical piece of "iron or slag" which Dombly testified defendant picked up on the railroad, and also to determine whether it was the implement used by defendant in striking Dombly. *Mitchell's Case*, 94 Ala. 68, 10 South. 518; *Ezell's Case*, 103 Ala. 8, 15 South. 818; *Thornton's Case*, 113 Ala. 43, 21 South. 356, 59 Am. St. Rep. 97.

Whether or not it was competent for Dombly to testify that he was not willing for the defendant to take his money we need not decide, as it was competent for him to testify that he did not consent for him to do so. *Jones v. State*, 104 Ala. 30, 16 South. 135. The question objected to called upon the witness to testify whether he was willing or consented for the defendant to take his

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

stances of the parties, such ambiguities may be disclosed as to cause the contract to be withdrawn from the jury; but as the contract now appears to us it sufficiently satisfies the statute of frauds.

The judgment is reversed.

SHACKLEFORD, C. J., and WHITFIELD, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

(53 Fla. 609)

KNIGHT et al. v. MATSON et al.
(Supreme Court of Florida, Division B. March 28, 1907.)

TAXATION—ILLEGAL ASSESSMENT—REMEDY BY PETITION.

Section 1542, Rev. St. 1892 (section 2006, Gen. St. 1906), providing a summary remedy by petition to declare the assessment on real estate not lawfully made, embraces those assessments only in which there is error on the face of the assessment roll. This remedy by petition is not coextensive with that afforded by a court of equity, and is not available after the assessed property has been sold for taxes, and a certificate of sale thereof has been issued, or a tax deed executed, and the rights of third persons have become involved.

(Syllabus by the Court.)

Error to Circuit Court, Citrus County; William S. Bullock, Judge.

Action by Robert J. Knight and William C. Knight against R. H. Matson and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

T. P. Lloyd, for plaintiffs in error.

PARKHILL, J. On the 11th day of July, 1906, the plaintiffs in error filed a petition in the circuit court for Citrus county. The petition, omitting formal parts, is as follows:

"Your petitioners, Robert J. Knight and William C. Knight, as copartners, doing business under the name and style of Knight Bros., who reside in Citrus county, Florida, represent unto your honor and allege the following state of facts to be true: That your petitioners are, and have been since the 6th day of July, 1905, the owners of the legal title to the following described lands, in Citrus county, Florida, to wit: An undivided three-fourths interest in all of section 2, section 5, all of section 8, all of section 11, all of section 17, N. $\frac{1}{2}$ and S. E. $\frac{1}{4}$, N. $\frac{1}{2}$ of S. W. $\frac{1}{4}$, S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of section 20, N. E. $\frac{1}{4}$, N. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of section 21, S. $\frac{1}{2}$ of section 22, all section 23, all section 26, all of section 27, all in township 19 south, of range 18 east. Also the S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of section 7, N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ section 13, all. Also the S. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ and N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of section 2, township 19 south, range 20 east. That your petitioners purchased said lands for a valuable consideration from Herbert L. Anderson, as trustee, and that your petitioners received and now hold

a deed of conveyance of the said lands, executed and delivered to them by the said Herbert L. Anderson, as trustee. And your petitioners further show that before and on the 25th day of April, 1899, one W. J. Hillman was the owner of the legal title to the above-described lands, and was in possession of the same, and that on the day of 25th of April, 1899, the said Hillman executed and delivered to Robert J. Knight, one of your petitioners, an indenture of lease by the terms of which the said Robert J. Knight, for a valuable consideration then and there paid by him, the said Knight, to the said Hillman, acquired the privilege and right to enter upon the said lands, hold possession of the same, and use the pine timber growing on the same for turpentine purposes, and that the said Robert J. Knight then and there entered into actual possession of the said lands held under and by virtue of the said lease aforesaid. And your petitioners show that subsequently the said Knight assigned and conveyed to his copartner, William C. Knight, an interest in the said turpentine lease, and that at the time of the filing of this petition your petitioners are in the actual possession of the said lands, working the same for turpentine purposes, and that, beginning with the 25th day of April, 1899, your petitioner Robert J. Knight, and your petitioners herein, have been in the continuous possession of the said lands using the same for turpentine purposes, occupying the same for the above-named purposes with their laborers, and subjecting the same to the character of possession of which the same are capable. And particularly petitioners charge that, from and after the 31st day of December, 1901, up to and including the 1st day of April, 1902, Robert J. Knight, one of your petitioners, was in the actual, open, notorious possession of the said lands, using the same for turpentine purposes, and that the said Robert J. Knight had before that time boxed the pine trees growing upon the said lands for turpentine purposes, and was during said last-mentioned dates in the actual possession of the same, and that his use and occupation of the said premises was under and by virtue of the lease from the said Hillman, and was evidenced by the boxing, chipping, scraping, and working of the pine trees growing on the said lands, and that his possession was open and notorious.

"Petitioners further show that between the year 1899 and the 31st day of December, 1901, W. J. Hillman was the owner of the legal title to the said lands, and that the said Robert J. Knight was in the possession of the same, as above set out; that on the 31st day of December, 1901, the said Hillman made and delivered a warranty deed of conveyance of the above-described lands to H. L. Anderson, as trustee, and that the said Anderson, as trustee, purchased the said lands for a valuable consideration, subject to the lease and occupation of the said lands by the said Knight, as aforesaid; and that the said An-

Court of that state is to the same effect; the court holding that the language of the statute showed that it was intended to protect the insurance association from legal process. *Martin v. Martin*, 187 Ill. 200, 58 N. E. 230. Under the same statute it was held that it was the duty of the corporation, when garnished, to interpose the defense of the statute, and, failing so to do, it was liable for the entire amount of the policy; the court saying, as to the contention of the defendant that said act was only for the benefit of the company: "This view of the statute is entirely too narrow." *Rumbold v. Supreme Council, Royal League*, 206 Ill. 513, 69 N. E. 590, 593.

The statute of Michigan is in the same language, and the Supreme Court of that state held that, after the beneficiary had collected the money and deposited it in bank, it was subject to garnishment for his debts; the court placing stress on the expression "to be paid," and holding that the wording of the statute indicated that the fund was to be exempt from legal process until it was paid and became "the sole property of the beneficiary, to be owned and held as any other property." *Recor v. Commercial & Savings Bank*, 142 Mich. 479, 484, 106 N. W. 82, 84, 5 L. R. A. (N. S.) 472.

The statute in California provides that "all moneys, benefits, privileges or immunities accruing, or in any manner growing out of any life insurance, if the annual premiums paid do not exceed \$500.00," are exempt from execution; and the Supreme Court of that state held that the exemption "extends, not only against the debts of the person whose life was insured and who paid the premiums, but also to the debts of the beneficiary to whom it is payable after the death of the insured." *Holmes v. Marshall*, 145 Cal. 777, 79 Pac. 534, 69 L. R. A. 67, 104 Am. St. Rep. 86.

Our statute provides that "the sum or amount of insurance becoming due and payable by the terms of the application and policy, shall be exempt from all creditors of the assured or beneficiary, and must be paid to the beneficiary so named in the policy, or his or her assigns." Acts 1896-97, p. 1393. It will be observed that it does not speak of garnishment or other process, nor does it contain any terms indicating that it was for the protection of the company alone. On the contrary, the privilege is conferred upon "any person" who may "insure his own, or her own, life," etc., indicating that the Legislature had in mind the protection of the estate of the insured, as well as his wife and children.

Without deciding that the cases above cited may not be good law, in so far as the debts of a named beneficiary are concerned, after the fund has come into his hands, or whether the Supreme Court of California

is right on that subject, we hold that the fund is not liable for the debts of the estate of the insured. As to whether it was a wise policy for the Legislature to adopt, we are not permitted to consider. The codifiers seem to have thought not, and this section is omitted from the Code of 1907.

The decree of the court is affirmed.

DOWDELL, ANDERSON, and McCLELLAN, JJ., concur.

(119 Ala. 361)

SHEPPARD v. AUSTIN.

(Supreme Court of Alabama. Feb. 5, 1909.)

1. EVIDENCE (§ 314*)—HEARSAY—REASON FOR EXCLUSION.

The reason for excluding hearsay evidence is based upon the fact that the probabilities of falsehood and misrepresentation, either willful or unintentional, being introduced into a statement, are greatly multiplied every time it is repeated, and that the original statement, even if correctly reported, is not under the safeguards of the personal responsibility of the author as to its truth or the test of cross-examination.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1168; Dec. Dig. § 314.*]

2. EVIDENCE (§ 205*)—HEARSAY.

In a slander action, an answer to a question, asked plaintiff as a witness, whether it had been reported to him that defendant had been denouncing plaintiff as a liar, being *prima facie* hearsay, was not rendered admissible as an admission of defendant where plaintiff, to show that he had stated to defendant what he had heard defendant had said about him, and that defendant had repeated it to him, thus making it an admission, did not testify that he had told defendant even substantially what he testified had been reported to him.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 205.*]

Denson, J., dissenting.

Appeal from City Court of Birmingham; C. C. Nesmith, Judge.

Action by C. W. Austin against F. G. Sheppard. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The libelous matter alleged in the complaint is that the defendant said of the plaintiff, falsely and maliciously, that on a certain day he swore a lie, that he swore falsely, etc.

Cabaniss & Bowie, for appellant. Bowman, Harsh & Beddow, for appellee.

DENSON, J. This is an action for slander. There was testimony tending to show utterance by defendant of the slanderous words attributed to him in the complaint. The plaintiff, while testifying as a witness in his own behalf, was asked by his attorney this question: "I will ask you to tell the jury whether or not it had been reported to you, after that trial in the police court of Mr. Sheppard on account of a violation of the city ordinance, that he had been going about

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the city of Birmingham and to various and sundry people denouncing you as a liar." The court overruled the objection of the defendant that the question called for hearsay evidence, but limited the affirmative answer "to the purpose of showing humiliation, and not to proof of offense at all." This ruling of the court is assigned for error, and is the only assignment discussed in brief of counsel for appellant.

The reasons for the rule excluding hearsay or derivative evidence are not difficult to discover, "for, apart from the circumstances that the probabilities of falsehood and misrepresentation, either willful or unintentional, being introduced into a statement, are greatly multiplied every time it is repeated, there remains the further fact that the original statement, even if correctly reported, has scarcely ever been made under the safeguards of the personal responsibility of the author as to its truth, or the tests of a cross-examination as to its accuracy." Rice on Ev. (Civ.) vol. 1, p. 367, § 212; Reynolds, Theory of Ev. §§ 16, 17; 1 Greenl. (15th Ed.) § 99; 11 Am. & Eng. Ency. Law, 521; 16 Cyc. 1196; Glover v. Millings, 2 Stew. & P. (Ala.) 28, 43; Brooklyn, etc., Co. v. Bledsoe, 52 Ala. 538, 549; Mima Queen v. Hepburn, 11 U. S. 201, 3 L. Ed. 348; Hereford v. Combs, 126 Ala. 369, 380, 28 South. 582.

The question propounded and objected to supposes or implies that the statements or reports made to the plaintiff were made by a person not called as a witness, and that they are prima facie and really hearsay or derivative evidence, and therefore subject to that exclusionary rule of evidence, unless they fall within some recognized exception to the rule or are saved from exclusion upon another principle. Hereford v. Combs, supra. The plaintiff, in connection with his offer to make the proof, stated to the court that he proposed to show that he went to the defendant to find out whether the report was true or not, "and it was repeated to him." If the plaintiff had stated to the defendant what he had heard, or what had been reported to him, and defendant had admitted it, the testimony admitted would have been relieved from the hearsay rule.

While the plaintiff testified he did have an interview with the defendant, the majority of the court are of the opinion that his testimony as to what he "told" defendant in that interview is not even substantially what he testified had been reported to him, and, therefore, that defendant's response cannot be taken as an admission, nor operate to bring the evidence admitted, within any exception to the rule that hearsay evidence is inadmissible. Consequently they hold that the trial court committed reversible error in admitting the testimony. The writer entertains the opinion that, in the interview be-

tween plaintiff and defendant, plaintiff's statement to defendant conformed substantially to his (plaintiff's) testimony, and that the jury might infer from the defendant's reply an admission that he had uttered the statements which plaintiff testified had been reported to him. Upon first impression we were of the opinion that the testimony objected to was admissible on the ground held good by the trial court; but after more mature reflection we have reached the conclusion that that theory is unsound, and that the case cited by appellee's counsel in support of it (Patterson v. Frazer [Tex. Civ. App.] 93 S. W. 146) is not in point, when the facts of that case are closely scrutinized.

It results, from the holding of the majority, that reversible error was committed by the court in admitting the testimony. The judgment must be reversed, and the cause remanded.

Reversed and remanded.

TYSON, C. J., and DOWDELL, SIMPSON, ANDERSON, and MAYFIELD, JJ., concur. DENSON, J., dissents.

BUFFORD v. LITTLE.

(Supreme Court of Alabama. Jan. 18, 1909.
Rehearing Denied Feb. 16, 1909.)

1. TRIAL (§ 84*)—RECEPTION OF EVIDENCE—OBJECTIONS—GENERAL OBJECTIONS.

A general objection to evidence, because "illegal, irrelevant, and incompetent," cannot be sustained, unless the evidence is manifestly illegal and irrelevant, and apparently incapable of being rendered admissible in connection with other evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 211-213; Dec. Dig. § 84.*]

2. APPEAL AND ERROR (§ 232*)—OBJECTIONS IN LOWER COURT—SPECIFIC DEFECTS.

The trial court will not be put in error for overruling a specific objection to evidence which does not cover the existing defect.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1351, 1368, 1430, 1431; Dec. Dig. § 232; * Trial, Cent. Dig. §§ 211-222, 691-693.]

3. TRIAL (§ 84*)—RECEPTION OF EVIDENCE—BEST AND SECONDARY EVIDENCE—OBJECTIONS.

An objection to a question calling for secondary evidence, which was admissible except for the fact that the primary evidence was accessible, that the question was incompetent, illegal, irrelevant, and immaterial, was properly overruled.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 211-213; Dec. Dig. § 84.*]

4. EVIDENCE (§ 474*)—OPINION EVIDENCE—KNOWLEDGE—ESTIMATES.

Where, in an action for timber trespass, witnesses had "looked over the ground where the timber had been sawed," they were properly permitted to give their best judgment as to the number of trees cut, though they did not count the stumps.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2199; Dec. Dig. § 474.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

5. EVIDENCE (§ 483*)—NONEXPERTS—SUBJECT OF TESTIMONY.

A nonexpert could testify whether stumps on land were old or showed that the trees had been recently cut.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2257; Dec. Dig. § 483.*]

6. WITNESSES (§ 37*)—COMPETENCY—KNOWLEDGE.

In an action for timber trespass, witness, having testified that he was working for defendant and hauling logs under his direction, was properly permitted to state that he hauled logs from the land in question in the direction of defendant's mill.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 80; Dec. Dig. § 37.*]

7. TRESPASS (§ 68*)—CUTTING TIMBER—INSTRUCTIONS.

Where, in an action for timber trespass, there was evidence that defendant had some of the logs, for which plaintiff claimed, sawed and hauled away, instructions that there was no evidence that defendant took from plaintiff's land 300 pine trees already cut down, as averred, or that defendant cut or sawed 300 pine trees, were properly refused, as misleading the jury to believe that plaintiff could not recover unless he proved the cutting or hauling of 300 pine trees; plaintiff being entitled as a matter of law to recover for any less number proven.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. §§ 151, 152; Dec. Dig. § 68.*]

8. TRESPASS (§ 44*)—CUTTING TIMBER—WANT OF CONSENT.

In an action for timber trespass, plaintiff was not barred from recovering because of the absence of evidence that he did not consent to the cutting of the timber, where the jury was authorized to draw such inference from plaintiff's acts and other evidence.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 114; Dec. Dig. § 44.*]

Appeal from Circuit Court, Macon County; S. L. Brewer, Judge.

Action by C. E. Little against M. H. Buford for damages for cutting trees from land. From a judgment for plaintiff, defendant appeals. Affirmed.

The first count is for cutting or sawing 300 pine trees growing upon the land of plaintiff, which is described as the E. ½ of N. W. ¼ of section 21. The second count is for carrying away 300 pine trees, which had been cut down and were on the said land. The defense was the general issue. The witness testified that he did not count the trees, and that he did not know how many had been sawed, but that he had looked over the ground where the timber had been sawed on the land in suit, and in his best judgment there were 300 trees sawed. He was then asked by counsel if in his best judgment there could have been less than 250 trees cut or sawed. Objection was interposed and overruled to this question. The plaintiff testified that he wrote the defendant a letter, addressed it to him, put a two-cent stamp on it, and put it in the post office. Plaintiff's counsel then, after asking the defendant and his counsel to produce the letter and the letter being produced, asked the witness if he knew the substantial contents of the letter

and what they were. Objection was interposed and overruled to this question, and witness answered that he knew the substantial contents of the letter, and that he wrote the defendant that he had depredated on his land and had cut his timber, and that he should have known better, and that he would expect him to pay for it, or he would prosecute him to the full extent of the law. Motion was made to exclude the answer, which was overruled. The objection to the question calling for the contents of the letter was that it was incompetent, illegal, irrelevant, and immaterial, and the motion to exclude the answer as to the contents of the letter was based upon the same grounds.

The following charges were refused to the defendant: "(1) Plaintiff must prove with certainty the averments of the complaint. There is no evidence before you that the defendant took away from the land of the plaintiff 300 pine trees already cut down, as averred in the complaint." (2) Same as 1, except that there is no evidence that defendant cut or sawed 300 pine trees. (3) General affirmative charge to find for the defendant. (4) General affirmative charge to find for the defendant on the second count of the complaint. "(5) The plaintiff has averred that the defendant willfully and knowingly cut or sawed down 300 trees. The evidence before you does not show that this averment is true." "(7) I charge you that, if you believe the evidence in this case, the plaintiff has not the legal title to the land on which the timber is alleged to have been cut. (8) I charge you that you must believe from the evidence that the defendant knowingly and willfully, and without the consent of the owner, cut or sawed 300 pine trees on the lands described in the complaint before you can find a verdict for the plaintiff."

H. P. Merritt, for appellant. O. S. Lewis, for appellee.

ANDERSON, J. The letter, written by the plaintiff to the defendant, had been produced and was the best evidence; but the point was not taken by an objection to the proof of its contents. The objection was general, or, if specific, did not specify the ground covering the objectionable feature of the evidence introduced. A general objection, "because the same was illegal, irrelevant, and incompetent," cannot be sustained, unless the evidence is manifestly illegal and irrelevant, and apparently incapable of being rendered admissible in connection with other evidence. *Sanders v. Knox*, 57 Ala. 83. Nor will the trial court be put in error for overruling a specific objection which does not cover the defect in the evidence offered. 1 *Wigmore on Evidence*, § 18. The contents of the letter from plaintiff to defendant, and his reply thereto, which was introduced in evidence, was legal, relevant,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and competent, and was inadmissible for the sole reason that parol proof of its contents was secondary and the best evidence was accessible to the plaintiff.

There was no error in permitting the witnesses to give their best judgment as to the number of trees sawed down. It is true they did not count the stumps, but "looked over the ground where the timber had been sawed on the land." *Bass Furnace Co. v. Glasscock*, 82 Ala. 452, 2 South. 315, 60 Am. Rep. 748; *Railroad v. Riley*, 119 Ala. 260, 24 South. 858; *Railroad v. Hill*, 93 Ala. 514, 9 South. 722, 30 Am. St. Rep. 65; *Linnehan v. State*, 116 Ala. 479, 22 South. 662. Nor do we think it required an expert to tell whether or not the stumps were old or showed that the trees had been recently cut or sawed.

The evidence that Shirley Law hauled logs from the land in the direction of defendant's mill was made relevant by the subsequent evidence of Law, who testified that he was working for the defendant and hauling logs under his direction.

The trial court did not err in refusing charges 1 and 2 requested by the defendant. If not otherwise bad, they were misleading, as the jury might conclude therefrom that plaintiff could not recover unless he proved the cutting or hauling of 300 pine trees, when as matter of law he would be entitled to recover for any less number proven, and there was evidence from which the jury could infer that defendant had some of the logs sawed and hauled away.

The trial court did not err in refusing the other charges requested by the defendant. There was evidence from which the jury might infer that the plaintiff was the owner of the trees, especially as against a mere trespasser, and that the trees were sawed down and hauled away by the defendant's agents or servants, with his knowledge, and within a year prior to the commencement of the suit. It is true there was no direct proof that the plaintiff did not consent; but the acts of the plaintiff and other evidence before the jury could create an inference that the plaintiff did not consent.

The trial court did not err in refusing the motion for a new trial; and, as no reversible error was committed, the judgment of the circuit court is accordingly affirmed.

Affirmed.

HARALSON, SIMPSON, and DENSON, JJ., concur.

(159 Ala. 306)

BUCK v. LOUISVILLE & N. R. CO.

(Supreme Court of Alabama. Feb. 11, 1909.)

1. TRESPASS (§ 20*)—POSSESSION TO MAINTAIN ACTION.

Plaintiff, in order to recover, must have been in possession, actual or constructive, when the trespass was committed, and it is not essen-

tial for him to have been in possession at the commencement of suit.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. §§ 32-38; Dec. Dig. § 20.*]

2. TRESPASS (§ 50*)—DAMAGES.

In trespass on real property, the measure of damages is the difference in the value of the land before and after the trespass.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. § 134; Dec. Dig. § 50.*]

3. RAILROADS (§ 129*)—SALES—LIABILITY OF PURCHASER.

In trespass against a railroad company for locating a track, etc., on plaintiff's land, defendant was not liable for excavating and other acts done by its grantor.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 129.*]

4. ADVERSE POSSESSION (§ 100*)—COLOR OF TITLE—CONSTRUCTIVE POSSESSION.

Where one is in actual possession of a part of a tract of land embraced in his deed, his constructive possession does not extend to a portion of the tract in the actual possession of another.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 547-574; Dec. Dig. § 100.*]

5. EVIDENCE (§ 67*)—PRESUMPTIONS.

Actual possession under color of title, once shown, is presumed to continue, in the absence of proof of an abandonment.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 87, 88, 103; Dec. Dig. § 67.*]

6. ADVERSE POSSESSION (§ 115*)—EVIDENCE.

On an issue as to adverse possession, the evidence of abandonment of possession held one for the jury.

[Ed. Note.—For other cases, see *Adverse Possession*, Dec. Dig. § 115.*]

Appeal from Circuit Court, Jefferson County; A. A. Coleman, Judge.

Action by F. B. Buck against the Louisville & Nashville Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

The facts are sufficiently stated in the opinion. The following charge, given at the request of the defendant, is the one referred to in the opinion: "(A) I charge you that, if you believe from the evidence that at the time of the filing of this suit the defendant was in adverse possession of the land on which were its tracks and roadbeds, the jury must find for the defendant."

Trotter & Odell, for appellant. Tillman, Grubb, Bradley & Morrow, for appellee.

ANDERSON, J. In order to recover in trespass, the plaintiff must show possession of the land, actual or constructive, when the alleged trespass was committed. The plaintiff never showed any actual possession—*possessio pedis*—to the strip upon which defendant's track was located, and therefore had to rely upon constructive possession given by his color of title, in connection with his actual possession of a part of the land embraced in his deeds. There is no field of operation, however, for constructive possession of one when the land is in the actual

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

possession of another. The plaintiff never went into the actual possession of the strip in controversy, but constructed his fence so as to leave it out of his boundary, and the roadbed had been graded and erected and was open to observation. The defendant's grantor, the Mineral Railroad, went into possession of this strip under color of title to the easement only, before the plaintiff acquired the 20 acres of which the strip is a part, and when actual possession is shown, under color of title, the said possession is presumed to continue, in the absence of any proof of an abandonment. There was proof from which the jury could infer an abandonment of the roadbed before the defendant entered and laid its track, and, if they believed it had been abandoned by the Mineral road before the entry of the defendant, then the plaintiff was in the constructive possession at the time of the said entry by the defendant, and could maintain this action. It is true Wiloughby testified to going over the roadbed several times between 1887 and 1904; but this fact was not, of itself, sufficient to negative an abandonment, when taken in connection with the evidence that the company had chosen and used another connecting route, and the question of abandonment was clearly one for the jury.

There was no error in refusing to exclude the conveyance offered from the Village Creek Company to the Birmingham Mineral Railroad. It conveyed the right of way to 25 feet on each side from the center of the railroad as then located, and the proof shows that the road was at the time located and staked. *Coyne v. Warrior Southern R. R.*, 137 Ala. 554, 34 South. 1004. The plaintiff, in order to recover, must be in the possession, actual or constructive, when the act or trespass complained of was committed, and it is not essential to his right to recover for him to be in possession at the commencement of the suit. 28 Am. & Eng. Ency. Law, 576; *Garrett v. Sewell*, 108 Ala. 521, 18 South. 737; *L. & N. R. R. v. Hill*, 115 Ala. 334, 22 South. 163. The trial court, therefore, erred in giving charge "A" requested by the defendant. It is true there is an expression used in the case of *Rogers v. Brooks*, 99 Ala. 34, 11 South. 753, to the effect that the plaintiff should have the possession of the land both at the time of the trespass and of the institution of the action; but the court was dealing with a penal action for cutting trees. Moreover, this expression is in conflict with the rule as correctly stated in the former part of the opinion in said case.

Since this case must be reversed, as we view the evidence, there are but two questions to be considered upon the next trial, there being no material change in the evidence. First, the plaintiff's right to recover, which is, as we have indicated, a question for the jury; second, the measure of dam-

ages in case of a recovery. The rule is the difference in the value of the tract of land before and after the acts constituting the trespass. The complaint claims for "excavating, filling," etc.; but the proof shows that the roadbed was graded and completed long before the defendant entered, and by the Birmingham Mineral Railroad. The defendant would not be liable for the acts of its grantor, but only for its own acts. The damage to the land should, therefore, be confined to the difference in the market value of the land immediately before and after the acts of the defendant, and not some third person. In other words, what damage did the defendant do the land, and not what damage was done by the Birmingham Mineral Railroad.

The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

(159 Ala. 90)

GLASSCOCK v. STATE.

(Supreme Court of Alabama. Feb. 4, 1909.)

1. STATUTES (§ 109*)—SUBJECTS AND TITLES—CONSTITUTIONAL REQUIREMENTS.

Const. 1901, § 45, providing that each law shall contain but one subject, which shall be clearly expressed in the title, contemplates but one title to a law; and the provision is satisfied if the law has but one general subject, fairly indicated in the title, which will support all matters reasonably connected with it, and all proper agencies which may facilitate its accomplishment are germane to the title, the form of which must be left to the Legislature, and not to the courts.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 136; Dec. Dig. § 109.*]

2. STATUTES (§ 118*)—SUBJECTS AND TITLES.

Loc. Acts 1900-01, p. 688, entitled "An act in relation to trials of misdemeanors in Fayette county, Alabama," which bestows on the county court of the county concurrent jurisdiction with the circuit court in the trial of misdemeanors, provides for transfers of indictments in misdemeanor cases from the circuit to the county court, for a trial by jury, trials without indictment, appeals, and bestows certain duties on the deputy solicitor of the county as to prosecuting the cases in the county court, is not violative of Const. 1901, § 45, declaring that each law shall contain but one subject, which shall be clearly expressed in the title.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 118.*]

3. INDICTMENT AND INFORMATION (§ 3*)—MISDEMEANOR CASES—NECESSITY FOR INDICTMENT.

The Legislature has authority to dispense with indictments in misdemeanor cases, and to authorize prosecutions and trials thereof upon affidavit or complaint.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 22; Dec. Dig. § 3.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. INTOXICATING LIQUORS (§ 236*)—ILLEGAL SALE—PROSECUTION—EVIDENCE.

Evidence held sufficient to sustain a conviction of illegal dealing in intoxicating liquors, in violation of Loc. Acts 1907, p. 249, making it unlawful to sell, give away, deliver, or otherwise dispose of spirituous, vinous, or malt liquors.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 236.*]

5. CRIMINAL LAW (§ 1173*)—APPEAL—REVIEW—HARMLESS ERROR—REFUSAL OF REQUESTS.

In a prosecution for illegal dealing in intoxicating liquors, where all the evidence, including that of accused himself, clearly showed his guilt, so that a general affirmative charge could have been given against him, if such a charge could ever be given in a criminal case, the refusal of all accused's requested charges would not be prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1173.*]

6. CRIMINAL LAW (§ 1169*)—APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE.

In a prosecution under a local prohibition law for illegal dealing in intoxicating liquors, the admission of testimony of the county sheriff that an election had been held in the county under the law, if prejudicial, was cured by the introduction of the record evidence of the election and the result thereof, as provided by the act.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3138; Dec. Dig. § 1169.*]

7. FINES (§ 15*)—COUNTY CONVICTS—WORKING OUT COSTS OF CONVICTION—RATE.

Under the express provisions of Gen. Acts Ex. Sess. 1907, p. 183, § 13, a county convict, sentenced to hard labor for the county for payment of the costs of his conviction, must work out the costs at the rate of 40 cents per day.

[Ed. Note.—For other cases, see Fines, Cent. Dig. § 17; Dec. Dig. § 15.*]

Appeal from Circuit Court, Fayette County; S. H. Sprott, Judge.

John Glasscock was convicted of violating a local prohibition law, and appeals. Corrected and affirmed.

The complaint filed by the solicitor in the circuit court is as follows: "The state of Alabama, by its solicitor, W. B. Oliver, complains of John Glasscock that within twelve months before the commencement of this execution he did sell spirituous, vinous, or malt liquors without a license and contrary to law. The state of Alabama, by its solicitor, W. B. Oliver, further complains of John Glasscock that within twelve months before the commencement of this execution, he did sell, give away, deliver, or otherwise dispose of spirituous, vinous, or malt liquors contrary to law." Objection was made to this complaint, because it was a departure from the original affidavit, and because this was an appeal from the county court of Fayette county, in which a trial by jury was demanded, and that before the case could properly be in the circuit court an indictment by grand jury must have been preferred. The witness for the state testified that on the first Sunday in February, 1908, he purchased a quart bottle of liquor from the defendant, paid him \$1 for it, and that the defendant and his son delivered the

same at the house of the witness. The defendant's evidence was that he had some phosphate gin at his house and that he told the state's witness where it was, after the state's witness had asked him several times for whisky, and that he knew the boys who were with the witness, so told them where the whisky was in his house, and to go and steal it, or get it some way, and drink it up, but that he received no money for it. It was admitted that the alleged gift or sale was within the corporate limits of the town of Fayette, that the house of defendant was within said incorporation, and that the town was incorporated and had police jurisdiction both day and night. The defendant requested the affirmative charge, and another charge, as follows: "If the jury believe from all the evidence in this case that it was only the gift of the alleged whisky, and that defendant did not receive anything for the same, then you must find the defendant not guilty."

Robert F. Peters, for appellant. Alexander M. Garber, Atty. Gen., for the State.

MAYFIELD, J. The appellant appeals from a conviction for violating the local prohibition laws of Fayette county. The prosecution was based upon an affidavit and warrant made returnable to the county court of Fayette county. The defendant demanded a jury trial in the county court, and by local statute the cause was transferred to the circuit court of such county, where a jury trial was had. The trial resulted in a conviction, and from the judgment thereupon the defendant appeals.

The defendant assails the constitutionality of two local statutes of Fayette county; the first being entitled "In relation to trials of misdemeanors in Fayette county, Alabama" (Loc. Acts 1900-01, pp. 689, 690), and the second being a local prohibition act for that county, approved February 26, 1907 (Loc. Acts 1907, p. 249). It is insisted by counsel for appellant that the first act is void because the title thereof does not conform to the requirements of section 2, art. 4, of the Constitution of 1875, now section 45 of the Constitution of 1901, which provides, among other things, that "each law shall contain but one subject, which shall be clearly expressed in the title," etc. We fail to see anything in the title of this act which could possibly render the whole enactment void. Certainly there is but one subject, and it is clearly expressed in the title of the law, to wit, "In relation to trials of misdemeanors in Fayette county, Alabama."

This provision of the Constitution is satisfied if the act has but one general subject, fairly indicated in the title, and such title will support all matters reasonably connected with it, and all proper agencies, instrumentalities, or measures which may facilitate its accomplishment are proper and germane or

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

cognate to the title. Much must be left to the legislative discretion, with which there cannot be judicial interference. The constitutional provision contemplates but one title to a law or act, not a multiplicity thereof. The title may be expressed in very general terms, or it may summarize or embrace a table of its contents, or be in the form of an index or abstract of the contents. The Constitution is complied with, in this respect, if the law or act has but one subject, and that subject is fairly indicated in the title. The form of this title must be left to the Legislature, and not to the courts. The object and purpose of this provision have probably been most clearly expressed by Judge Cooley, as follows: "First, to prevent 'hodgepodges' or 'logrolling' legislation; second, to prevent surprise or fraud upon the Legislature by means of provisions in the bills of which the title gives no information, and which might, therefore, be overlooked, and carelessly and unintentionally adopted; and, third, to fairly apprise the people, through such publication of legislative proceedings as is usually made, of the subjects of legislation that are being considered, in order that they may have the opportunity of being heard thereon, by petition or otherwise, if they so desire." Cooley, Const. Lim. 172, quoted by Chief Justice Brickell in *Lindsay v. U. S. Savings & Loan Ass'n*, 120 Ala. 172, 24 South. 171, 42 L. R. A. 783. The following cases fully support the validity of this act, so far as this appeal is concerned, with reference to its title: *Ex parte Pollard*, 40 Ala. 90; *Ballentine's Case*, 75 Ala. 533; *State v. Rogers*, 107 Ala. 444, 19 South. 909, 32 L. R. A. 520; *State v. McCary*, 128 Ala. 139, 30 South. 641; *Key v. Jones*, 52 Ala. 238; *Boyd v. State*, 53 Ala. 606; *Adler v. State*, 55 Ala. 21.

Counsel for appellant complains of several provisions of the act, as to which this defendant has no concern, and which do not go to the whole act, nor to any part of which he can complain, as to which subjects or functions it is not necessary to decide, and we do not so decide; but, from a mere reading of the act and its title, we see no objection as to any of these subjects or questions. It is perfectly competent for the Legislature to dispense with indictments in misdemeanor cases, and to authorize prosecutions and trials therefor upon affidavit or complaint; and it has clearly and legally so done in this case. The act in question expressly authorizes it, and provides that the process be made returnable to the county court, and that a trial be there had by the county court judge without a jury, and that the defendant can appeal to the circuit court and there have a jury trial *de novo*, or that he can have a jury trial originally in the circuit court, by demanding it within proper time. The statute does not make the giving of the bond a condition precedent to a jury trial in the circuit court, but only requires that the

defendant give bond or remain in the custody of the sheriff, or of the law, so as to appear at the circuit court for trial. This much he would have to do in any event, whether he had a jury trial or not. We fail to see anything in the act which deprives the defendant of any inalienable constitutional right.

Counsel for the appellant and the Attorney General, in their briefs, seem to wholly misconceive the statute under which this prosecution was had. It was not under either of the two general prohibition statutes—local option or general statutory—but was under a local statute passed specially for that county. Loc. Acts 1907, p. 249. We have examined this act, and find nothing therein that renders it void so far as any question is raised on this appeal. The election held under it seems to have been in accord with the provisions of the act, and prohibition was, therefore, in effect under that act when the alleged offense is shown to have been committed. Under this act it is made an offense "to sell or to give away, deliver or otherwise dispose of spirituous, vinous or malt liquors," etc.

Under all the evidence in the case, including that of the defendant himself, he was clearly guilty of violating this statute, and the general affirmative charge could have been given against him, if such charge can ever be given in a criminal case. Consequently there could be no injury in refusing every one of defendant's requested charges.

The original warrant and complaint filed by the solicitor were all-sufficient under either the general or the special law.

There was likewise no error in allowing the sheriff of the county to testify as to the fact that an election was held in Fayette county under the local act in question. If there could be error therein, it was cured by the introduction of the record evidence of the election and the result thereof as provided by the act.

We find no error save in the sentence of the court, by the terms of which it was adjudged that the defendant pay the costs at the rate of 30 cents per day, whereas the rate should have been 40 cents per day, in accordance with the act, passed at the extraordinary session of the Legislature. Gen. Acts Ex. Sess. 1907, p. 183, § 13. The amount of costs is shown to be \$47.90, and defendant was sentenced to hard labor for 143 days, at 30 cents per day, to pay same, whereas he should have been sentenced for only 119 days, at the rate of 40 cents per day.

The judgment of sentence as to costs will be here amended in this respect, and, as amended, is affirmed.

Corrected and affirmed.

TYSON, C. J., and SIMPSON and DENSON, JJ., concur.

(159 Ala. 171)

CHAMBERLAIN v. SOUTHERN RY. CO.
(Supreme Court of Alabama. Jan. 18, 1909.
On Rehearing, Feb. 16, 1909.)

1. MASTER AND SERVANT (§ 85*)—INJURIES TO SERVANT—MASTER'S DUTY.

A master is bound at common law to furnish proper machinery and materials for the work, to employ only competent servants, and to make proper rules and establish proper methods of work, which duties are nondelegable.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 85.*]

2. MASTER AND SERVANT (§ 111*)—INJURY TO SERVANT—RAILROADS—LOADING CARS.

A railroad company is bound to use reasonable care to see that its cars are properly loaded, so as not to cause injury to its servants.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 217; Dec. Dig. § 111.*]

3. MASTER AND SERVANT (§ 265*)—INJURIES TO SERVANT — NEGLIGENCE — BURDEN OF PROOF.

In an action against a master for injuries to his servant, the burden is on plaintiff to establish defendant's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908; Dec. Dig. § 265.*]

4. MASTER AND SERVANT (§ 265*)—NEGLIGENCE—RES IPSA LOQUITUR.

Plaintiff's intestate, a laborer in the service of defendant railroad company, was directed by his superior to assist in unloading a box car loaded with cotton bales. While opening the sliding door of the car as instructed, and before he could get away, a large cotton bale fell out of the car and crushed him, so that he died. The car was loaded two bales deep, one bale on the end of the other, and the bales opposite the doors were not pinned or tied together, or boarded in. *Held*, that the circumstances surrounding the accident were sufficient to establish a prima facie case of defendant's negligence under the doctrine of "res ipsa loquitur."

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-893; Dec. Dig. § 265.*]

5. MASTER AND SERVANT (§ 264*)—DEATH OF SERVANT — RAILROADS — NEGLIGENCE OF PRESIDENT OR DIRECTORS.

If an action against a railroad company is in case, and not in trespass, for the death of a servant by the alleged negligent loading of a car of cotton, plaintiff was not bound to show that defendant's president or board of directors actually participated in the damning act.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 264.*]

Dowdell, C. J., and Simpson and Sayre, JJ., dissenting.

Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge.

Action by Bart B. Chamberlain, administrator, against the Southern Railway Company, for the death of his intestate. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

The complaint contains several counts, all of which were eliminated by demurrer, except the second count, which, as last amended, is as follows: "Plaintiff claims of defendant \$5,000 damages, for that on the 13th day of October, 1906, the defendant was then and there a public common carrier, and

operating a railroad in the city of Mobile, which ran to other points without the city of Mobile, and plaintiff's intestate, Major Brown, was then and there a laborer in the service of defendant's company; that while said Major Brown was in the employment of defendant, and as a part of the duties thereof, he was put to work to unloading a certain box car for the defendant in the city of Mobile, loaded with bales of cotton, and pursuant to said work he was instructed to open a sliding side door of said box car, and while in the act of so opening the same, and before he could get away from the place where the said act of opening occurred, a bale of cotton of large weight, to wit, approximately 500 pounds, fell out of said car upon him, and mashed and crushed him so that his death was caused thereby; that it was the duty of the defendant company to exercise reasonable care to so load or cause to be loaded the bales of cotton in said box car that, when the door was open, said cotton would not fall out of said car and injure any employé opening said door, but defendant negligently violated said duty, and as a proximate result thereof the said Major Brown was crushed by said falling cotton bale and killed."

It was admitted that plaintiff's decedent was killed by a falling cotton bale while engaged in the services of defendant. The evidence for the plaintiff further tended to show the nature of the injuries received from which the death resulted. The evidence further tended to show that, when Brown was killed, he and John Friend were opening a car; that the instruction for opening the car came from Mr. Thomas, who was in the employment of the defendant company, and was boss over the men, and that the order from him was to open the car—to shove open the door; that when the door was shoved open Friend stepped back a little, but that Brown was right in front of the door, and as he stepped on the platform the bale came right over and caught him, crushing him. Brown had just started to work for the defendant that morning, while Friend had been working for about a year. The car was loaded with cotton, two bales deep, one bale setting on the end on top of another. The bale did not fall as soon as the door was held open, but fell as Brown turned around to step on the platform. This all happened in the city of Mobile on the premises of the defendant. It was further shown that there was a spring in the middle of the doors which released the doors of the car, and as the door passed open the bale tilted and fell out. It was further shown that nobody pulled the bale of cotton to give it a start; that the bales of cotton were not pinned or tied together, or fixed in any way; and that there were no boards nailed

across the door to prevent them from falling out, nor was there any other precaution taken to prevent the same. On motion of the defendant the court excluded all the evidence offered by the plaintiff on the ground that it failed to make out a case under the second count.

R. W. Stoutz and Roach & Chamberlain, for appellant. Bester, Bestor & Young, for appellee.

ANDERSON, J. Under the common law the master is responsible for his own negligence and want of care, and this may appear from his failure to furnish proper machinery and materials for the work, or from the employment of incompetent servants, or from a failure to make proper rules or establish a proper method for the conduct of his business. As to such acts the agent occupies the master's place, and the latter is deemed present and liable for the manner in which they are performed. *Ford v. Lake Shore R. R.*, 124 N. Y. 493, 26 N. E. 1101, 12 L. R. A. 454. "It is the duty of a railroad company to use reasonable care to see that its cars are properly loaded, so as not to cause injury to its servants." 26 Cyc. 1124; *Austin v. Fitchburg R. R.*, 172 Mass. 484, 52 N. E. 527; *George v. Clark*, 85 Fed. 608, 29 C. C. A. 374; *McCray v. G., H. & L. R. R.*, 89 Tex. 168, 34 S. W. 95.

The gravamen of the second count of the complaint is the negligent failure of the defendant to load or cause to be loaded the car in question. There was no direct proof that the defendant caused the car to be loaded, but the evidence afforded an inference from which the jury could find a responsibility for the loading. Nor was there any proof of negligence, apart from what might be reasonably presumed by the jury from the circumstances connected with and surrounding the injury; and this case, therefore, presents for consideration the maxim: "*Res ipsa loquitur*." The affair speaks for itself. The burden of proof rests on the plaintiff upon the issue of negligence; and it is a general rule that, when a servant sues his master or employer for damages arising from injuries caused by the negligence of the latter, the plaintiff must prove the negligence of the defendant, and the proof of the accident and injury alone will not be sufficient to establish negligence. However, it is well settled that the circumstances attending the injury may be sufficient to establish negligence, without any direct proof thereof. *Western Steel Co. v. Cunningham*, 48 South. 109;

Tenn. Co. v. Hayes, 97 Ala. 201, 12 South. 98; *McCray's Case*, supra. We think the circumstances shown, in connection with the injury and accident, in the case at bar, were such as to authorize the jury to draw an inference of negligence on the part of the defendant in and about loading the car. The car was in the possession of the defendant, and was being unloaded on its track by the direction of its agent. If it had nothing to do with the loading, or was not otherwise responsible for same, or the injury was proximately caused by the negligence of the plaintiff's fellow servant, rather than from an imperfect system or custom of the defendant as to loading cars, then these facts were peculiarly within the defendant's power of production. *Austin v. Fitchburg*, supra.

The trial court erred in excluding the plaintiff's evidence, upon the assumption that he did not make out a case for the jury. It is intimated in brief of counsel that the trial court proceeded upon the theory that the president or board of directors were not shown to have actually participated in the damaging act, as required in the case of *City Delivery Co. v. Henry*, 139 Ala. 161, 34 South. 389. The second count, in the case at bar, is unlike the ones to which the rule was applied in the foregoing case. The counts in said case charged a direct corporate trespass, while the count here is in case.

The judgment of nonsuit is set aside, and the judgment rendered against the plaintiff for cost is reversed, and the cause is remanded.

Reversed and remanded.

DENSON, McCLELLAN, and MAYFIELD, JJ., concur.

On Rehearing.

ANDERSON, J. This application was considered after Justice HARALSON, one of the concurring justices, had vacated the bench. The writer, with Justices DENSON, McCLELLAN, and MAYFIELD, are of the opinion that the opinion is correct, and that the application should be overruled, which is accordingly done.

DOWDELL, C. J., and SIMPSON and SAYRE, JJ., are of the opinion that the proof did not make out a prima facie case, and that the action of the trial court in excluding same should not be reversed, and think that the application for rehearing should be granted, and the case affirmed.

CHARLIE'S TRANSFER CO. v. MALONE.

(Supreme Court of Alabama. Feb. 3, 1909.)

1. LANDLORD AND TENANT (§ 166*)—PREMISES AND ENJOYMENT THEREOF—INJURIES FROM DEFECT.

A tenant takes a lease of the premises in the condition in which they are when leased, and the landlord is not liable to the tenant for injury to the tenant's property resulting from the unsafe condition of the premises, unless he has agreed to repair or has misrepresented the premises; and this, whether the tenant rents all or only a part of the premises.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 647-660; Dec. Dig. § 166.*]

2. LANDLORD AND TENANT (§ 169*)—INJURIES FROM DEFECTIVE CONDITION OF PREMISES—ACTION—PLEADINGS.

A complaint by a tenant against a landlord averred that plaintiff leased the lower story of defendant's building, and that there were pipes running through a portion of the building to convey water to the second floor, and that one of them burst and water leaked through the second story on the plaintiff's goods; that defendant was negligent, in that the pipes were defective and unsound, and that it was the duty of defendant to keep the pipes in a sound condition; that by reason thereof said pipes burst. *Held*, that the counts were demurrable, as failing to show a covenant to repair, an agreement in respect to the condition of the building, or a misfeasance on the part of the landlord; the gravamen of the counts being negligence in that the pipes were defective.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 664; Dec. Dig. § 169.*]

3. PLEADING (§ 8*)—AVERMENT OF CONCLUSION.

In an action by a tenant against a landlord for damages from the bursting of a water pipe, an averment that it was the duty of defendant to keep the pipes in a sufficiently safe condition, so as to safely convey water, showed no duty of the landlord, except by the conclusion of the pleader.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 19-28; Dec. Dig. § 8.*]

4. LANDLORD AND TENANT (§ 169*)—INJURY FROM DEFECTIVE CONDITION OF PREMISES—PLEADING.

In an action by tenant against a landlord for injury to goods from the bursting of a water pipe, an averment that the defendant was the owner of said premises, and had charge and control of said pipes through her agents, and knew that said pipes were defective and unsound, and negligently failed to repair the same, did not show but that the pipes were defective at the time the lease was made, and that the tenant knew it, or made no effort to ascertain the condition of the premises.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 169.*]

5. PLEADING (§ 34*)—CONSTRUCTION AGAINST PLEADER.

The words "charge and control," as so used, being susceptible of the construction that they referred to the time the lease was made, such construction must be adopted as against the pleader.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 66; Dec. Dig. § 34.*]

6. LANDLORD AND TENANT (§ 169*)—INJURY FROM DEFECTIVE CONDITION OF PREMISES—PLEADING.

In an action by a tenant of the first floor of a building against the landlord for injuries

from the bursting of a water pipe on the second floor, a count averred that defendant had at the said time the care and charge of keeping said pipes, which conveyed water to the second floor, in repair and good order; that it was her duty to do so, and in the exercise of such care and charge defendant failed to keep the pipes in good order, and was negligent, in that she used weak and defective pipe, and that by reason of said negligence the pipe burst, or leaked; and that the negligence was the proximate cause of damage. *Held*, that the count, being on the theory of the failure to keep in repair a portion of the building not rented to defendant, was demurrable for failure to aver knowledge or notice on defendant's part of the defect.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 169.*]

7. PLEADING (§ 54*)—COMPLAINT—REFERENCE TO OTHER COUNTS.

Though count 7 of a complaint was rendered unintelligible by a reference therein to count 1, perhaps inadvertently inserted instead of count 5, the court cannot change the writing, but must treat it as found.

[Ed. Note.—For other cases, see *Pleading*, Dec. Dig. § 54.*]

8. NEGLIGENCE (§ 44*)—CONDITION AND USE OF BUILDINGS—CARE REQUIRED IN GENERAL.

A complaint by the occupant of the lower floor of a building against the occupant or person in control of the second story of the building for damages to plaintiff's goods by the bursting of a water pipe on the second story, being based on the principle of defendant's duty to so use his property as not to injure another, it was not necessary that it aver the relationship between the parties, whether that of tenant and landlord, or that of distinct ownership.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 59; Dec. Dig. § 44.*]

9. NEGLIGENCE (§ 108*)—CONDITION OF BUILDINGS—CARE REQUIRED—PLEADING.

A complaint alleged that at a certain time plaintiff was lawfully in possession of stores on the grade floor of a certain building, and had stored therein a large quantity of goods; that defendant was the owner and had charge of certain lavatories and the pipes used to convey water to the same; that said pipes were defective, unfit to convey water with safety, and that they burst, and water flowed through the second floor and on plaintiff's goods; that defendant had notice of the defective condition of said pipes several days prior to the bursting, and that their bursting would be liable to injure plaintiff's goods; and that defendant was the owner, had the care and control of said hallway along which the pipes ran, lavatory, and pipes, but negligently failed to keep said pipes in repair, and that as a proximate result of said negligence plaintiff was damaged. *Held* not demurrable, but to state a cause of action on the principle that it was defendant's duty to so use his property as not to injure others.

[Ed. Note.—For other cases, see *Negligence*, Dec. Dig. § 108.*]

Tyson, C. J., and Denson and Anderson, JJ., dissenting.

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

Action by Charlie's Transfer Company against Mrs. S. C. Malone for damages to goods on account of defective water pipes. Judgment sustaining demurrers to the complaint, and plaintiff appeals. Reversed and remanded.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The complaint was as follows:

"(1) Plaintiff claims of defendant the sum of \$600 as damages, for that heretofore, to wit, plaintiff rented and leased out to defendant from October 1, 1904, to September 30, 1905, two storehouses on the grade floor of a building, said building being located in the city of Birmingham, state of Alabama, and known as No. 1908 and No. 1910 Avenue D, Southside; the aforesaid storehouses to be used by plaintiff as a warehouse. The plaintiff occupied said aforesaid storehouse according to the terms of said lease on, to wit, October 1, 1904, and stored in said storehouse No. 1908 a large quantity of household goods, furniture, and things of value of various kinds; said property being rightfully and lawfully in possession of the plaintiff. That the defendant was the owner of said storehouse No. 1908, and of the aforesaid building, and that there were pipes running through a portion of said building for the purpose of conveying water to or from the closet or lavatory on the second floor in the aforesaid building. That on, to wit, the 22d day of November, 1904, one or more of the aforesaid pipes which conveyed water to or from the lavatory or closet in the rear end of the hallway on the second floor of the aforesaid building burst, and a large quantity of water escaped therefrom, and leaked through the second story of the aforesaid building, and upon the aforesaid household goods, furniture, and things of value, which were stored in the aforesaid storehouse No. 1908 by the plaintiff, said household goods and furniture, being then and there rightfully and lawfully in possession of the plaintiff, and by reason whereof a large portion of aforesaid household goods, furniture, and things of value were destroyed, and a large portion of them injured. The plaintiff avers that defendant was negligent, in that the pipe or pipes used to convey water to or from the lavatory or closet in the rear end of the hallway on the second floor of the aforesaid building were defective and unsound. [Here is inserted by way of amendment the following: "That it was the duty of said defendant to keep said pipes in a sufficiently safe and sound condition so as to safely convey water to and from its lavatory and closets. That the defendant negligently failed to do so."] And by reason whereof aforesaid pipe or pipes burst, and water escaped from or leaked through the second story of said building, and upon the aforesaid property which was stored in said storehouse No. 1908 by the plaintiff, to its damage as aforesaid."

(2) Same as 1, down to and including the words, "and another large portion of them were injured," where they occur together in said count, and adding the following: "And plaintiff avers [amendment as follows: "That the defendant was the owner of said premises, and had charge and control of said pipes

through her agents, and knew that said pipes were defective and unsound, and negligently failed to repair same." That the defendant was negligent in using or allowing to be used a defective or unsound pipe or pipes in aforesaid building, for the purpose of conveying water to or from the lavatory in the rear end of the hallway in the second story of aforesaid building, and by reason whereof said pipe or pipes burst, and water escaped therefrom, and flowed through the second story of aforesaid building, and upon aforesaid property stored in storehouse No. 1908 by the plaintiff, to its damage as aforesaid."

(3) Same as 1, down to and including the words, "and injured another large portion of them," where they occur together in said count, and adds: "The plaintiff avers that it has been damaged by reason of the negligence, in that the defendant used a defective or unsound pipe or pipes for the purpose of conveying water to or from the lavatory or closet in the rear end of the hallway on the second floor of the aforesaid building. That the said pipe or pipes were unable to hold or control said water, and by reason whereof said pipe or pipes burst, and water escaped or leaked through the second story of aforesaid building, and upon the aforementioned property which was stored in storehouse No. 1908 by the plaintiff."

The fourth and amended count is as follows: "The plaintiff adopts all of the first count down to and including the words, 'and another large portion of them were injured,' and adds the following: 'The plaintiff avers that the defendant had at the said time the care and charge of keeping said pipes which conveyed water to and from the lavatory and closet on said second floor of said building in repair and good order, and that it was her duty to do so. The plaintiff avers that the defendant, in the exercise of such care and charge over said water pipes, failed to keep said pipe in good order, and was negligent, in this: That she used weak and defective pipe on said floor to convey water to and from said lavatory or closet. That by reason of said negligence in so using said defective pipes they burst or leaked, and large quantities of water flowed therefrom and leaked through the second floor of said building into the plaintiff's store and upon his goods and things of value stored therein, to his damage as aforesaid. The plaintiff further avers that the negligence of the defendant in the control and management of her said water pipes and lavatory on the second floor was the proximate cause of the damage caused the plaintiff.'

"(5) Plaintiff claims of the defendant the sum of \$600 as damages aforesaid, for that heretofore, to wit, on the 22d day of November, 1904, and for several weeks prior thereto, plaintiff was lawfully and peaceably in possession of two stores on the grade floor of a building known as No. 1908 and No. 1910,

Avenue D, Southside, in the city of Birmingham, and on said date had stored therein in storehouse No. 1908 a large quantity of household goods, furniture, and things of value of various kinds, which said property was then and there rightfully and lawfully in the possession of the plaintiff. That the defendant, on, to wit, said date, was the owner and had charge, care, and control of certain closets and lavatories and the pipe used to convey water to and from the same, which she operated at the rear end of a hallway which ran through the center of the second floor in said building. That the said hallway, closets, and lavatories were operated by the defendant for the use of all her tenants in common who occupied said second floor. That there were water pipes running along said hallway, which conveyed water to and from said lavatory, and that the said pipes were defective, unsound, and unfit to convey water with safety to and from said lavatory, and that by reason of said defective condition of said pipes they burst on, to wit, the 22d day of November, 1904, and large quantities of water escaped and flowed therefrom upon said hallway, and through the second floor, and upon the said household goods, furniture, and things of value of the plaintiff, thereby destroying a large portion of them and materially injuring another large portion of them. The plaintiff avers that the defendant was negligent in using and caring for said defective pipes as aforesaid, and further avers that the said negligent use and care of said pipes as aforesaid by defendant was the proximate cause of its damage as aforesaid."

(6) Same as fifth, down to and including the words, "and materially injuring another large portion of them," and adds: "The plaintiff avers that defendant had notice of the defective condition of said pipe several days prior to the bursting of same, and that the bursting of same would be liable to result in injury to plaintiff's goods. That she was the owner and had the care and control of said hallway, lavatory, and pipes, but nevertheless negligently failed to keep said pipes in repair; and plaintiff avers that as a proximate result of said negligence plaintiff was damaged as aforesaid."

"(7) The plaintiff adopts all of the first count thereof, down to and including the words, 'and materially injured a large portion of them,' and adds: 'The plaintiff avers that the defendant was in possession, and the owner and had the care and control of said hallway, pipes, and lavatory, and that it was her duty to keep same in a reasonably safe condition (in such a condition as not to injure the property of the plaintiff by their use), and that she negligently failed to so keep things. The plaintiff avers that said negligence is a proximate cause of plaintiff's damages as aforesaid.'"

The grounds of demurrer take the points decided in the opinion.

Charles A. Dougherty, for appellant. Tillman, Grubb, Bradley & Morrow, for appellee.

DENSON, J. The plaintiff rented or leased from the defendant the ground-floor rooms of a two-story building. Water pipes ran through the building for the purpose of conveying water to and from a closet or lavatory located in the rear end of the building on the second floor. One or more of the pipes burst, and as a consequence plaintiff's goods, located in the rented rooms below, were flooded and damaged; hence this suit against the landlord. The doctrine seems to be well established, upon reason and authority, that a tenant takes leased premises in the condition in which they happen to be when leased, and that the landlord is not liable to the tenant for injuries resulting from the unsafe condition of the premises, unless he has contracted to repair or has misrepresented the premises; and this is true, whether the tenant rent the whole, or only a part, of the premises.

In *Cowen v. Sunderland*, 145 Mass. 363, 14 N. E. 117, 1 Am. St. Rep. 469, the Supreme Court of Massachusetts, after stating the rule substantially as we have stated it above, adds: "There is an exception to this general rule, arising from the duty which the lessor owes the lessee. This duty does not spring directly from the contract, but from the relation of the parties, and it is imposed by law. When there are concealed defects, attended with damage to an occupant, and which a careful examination would not discover, known to the lessor, the latter is bound to reveal them, in order that the lessee may guard against them. While the failure to reveal such facts may not be actual fraud or misrepresentation, it is such negligence as may lay the foundation of an action against the lessor, if injury occurs." The Supreme Court of Missouri, in *Ward v. Fagin*, 101 Mo. 669, 14 S. W. 738, 10 L. R. A. 147, 20 Am. St. Rep. 650, makes this succinct statement of the rule of liability of the landlord or lessor: "Aside from an express covenant to that effect, the landlord is not bound to keep the leased premises in repair, nor is he responsible in damages to his tenant for injuries resulting to the latter from the nonrepair of the leased premises. In the absence of contractual obligation, the landlord, as regards his tenant, is only liable for acts of misfeasance, but not of nonfeasance." *Hamilton v. Feary*, 8 Ind. App. 615, 35 N. E. 48, 52 Am. St. Rep. 485, 492. The decisions of the New York courts are to the same effect. Thus in *Franklin v. Brown*, 118 N. Y. 110, 23 N. E. 126, 6 L. R. A. 770, 16 Am. St. Rep. 744, 746, it is said: "It is uniformly held in this state that the lessee of real property must run the risk of its con-

dition, unless he has an express agreement with the lessor covering that subject. The tenant hires at his peril, and a rule similar to that of 'caveat emptor' applies, and throws on the lessee the responsibility of examining as to the existence of defects in the premises, and of avoiding against their ill effects." Again in *O'Brien v. Capwell*, 59 Barb. (N. Y.) 504, it was said: "As between landlord and tenant, where there is no fraud, false representations, or deceit, and in the absence of an express warranty or covenant to repair, there is no implied covenant that the demised premises are suitable or fit for occupation, or for the particular use which the tenant intends to make of them, or that they are in a safe condition for use." *Murray v. Albertson*, 50 N. J. Law, 167, 13 Atl. 394, 7 Am. St. Rep. 787; *Jones v. Millsaps*, 71 Miss. 10, 14 South. 440, 23 L. R. A. 155. Authorities to the same effect, from other jurisdictions, could be cited ad infinitum.

But we come to the decisions of our own court. *Burks v. Bragg*, 89 Ala. 204, 7 South. 150, was an action against a tenant for rent due. The defendant pleaded set-off and recoupment, claiming damages on account of injury to his goods, during the lease term, caused by defects in the roof and gutters of the rented house, and plaintiff's failure to make repairs. Speaking to the substantive law of the case, this court said: "No duty devolved upon the landlord to make any repairs on the premises, unless there was an agreement to make them. The tenant would take the storehouse at his own risk, as to fitness for habitation or use, whatever its condition may have been at the time." The same principle is enunciated in *Bullock*, etc., *Co. v. Coleman*, 136 Ala. 610, 613, 33 South. 884. The case of *Buckley v. Cunningham*, 103 Ala. 449, 15 South. 826, 49 Am. St. Rep. 42, was an action by a tenant against his landlord to recover damages resulting from the bursting of a water pipe. The upper story of the building was unoccupied, and was under the exclusive control of the landlord. The negligence averred was "that the defendant negligently failed to provide a shut-off for said water pipe, so that the water in said pipe could be shut off." The defenses were not guilty, and contributory negligence. After deciding that there was no evidence to show that defendant's fault, if such it was, proximately contributed to plaintiff's injury, the court, speaking through *Coleman, J.*, said: "Moreover, we are of opinion that every man has a perfect right, in the matter of water pipes or other conveniences, to construct his own buildings according to his own preference, either with or without them. There being no latent defects, or fraud or concealment, a tenant takes a building as it is, regulating the price according to the value, increased or diminished by its condition and conveniences. If the building or room has a water pipe

through it, and there is no step or waste cock, the tenant knows it when he rents the building, fixes its rental value accordingly, and, unless it is provided otherwise by contract, he assumes the risk incident to its condition." Several authorities are cited to support the proposition, amongst them being the case of *Cowen v. Sunderland*, from which we have quoted above.

In the light of the principles above adverted to, we experience no difficulty in reaching the conclusion that the demurrer to original counts 1, 2, and 3, was properly sustained. Each of the counts fails to show any covenant to make repairs, or agreement in respect to the condition of the building. Nor is misfeasance on the part of the landlord alleged; the gravamen of the counts being negligence of the landlord, in that the water pipes were defective and unsound. Neither of them shows a breach of any duty owing by the defendant to the plaintiff.

The record contains three separate amendments to the complaint, filed on January 3, 1906. The first of the amendments appears on page 4 of the record, and is an amendment only to count 1. If the amendment makes any material change in count 1, it does not appear from the count as amended, except by the conclusion of the pleader, that defendant owed plaintiff any duty.

The amendment which appears on page 5 of the record purports to amend count 2. If this amendment makes any material change in the count, still the averments which have been heretofore condemned as insufficient are left in the count. Furthermore, the averments are scarcely sufficient to show duty on the part of the defendant to repair. For aught that appears on the face of the count after the amendment, the pipes were defective at the time the contract of rental was made, and the plaintiff knew it, or made no effort to ascertain the condition of the premises. *Anderson v. Oppenheimer*, L. R. 5 Q. B. Div. 602, 49 L. J. Q. B. 708. Moreover, "charge and control," as these words are used in the count, may refer only to the time the plaintiff rented from the defendant. The count is susceptible of this construction, and it must be adopted as against the pleader. In this view it fails to show any duty.

The third amendment is on page 6 of the record, and purports to be an additional count, designated count 4. Granting that this count is good in all other respects, it proceeds upon the theory of failure to keep in repair a portion of the building not rented to the defendant. In other words, negligence is the gravamen of the count, and the negligence averred is in the use of weak and defective pipes. To put the lessor in default in this respect, pretermittting all other considerations, it is necessary to aver knowledge or notice on her part of such defect. This the count fails to do, and it was there-

fore open to the sixth ground of the demurrer.

The fifth count of the complaint is subject to the same criticism. *Angevine v. Knox-Goodrich* (Cal.) 31 Pac. 529, 18 L. R. A. 264; *Thompson v. Clemens*, 96 Md. 196, 53 Atl. 919, 60 L. R. A. 580; *Bowe v. Hunking*, 135 Mass. 380, 46 Am. Rep. 471.

It is only necessary, in disposing of count 7, to say it is rendered unintelligible by its reference to count 1. It may be that count 1 was inadvertently inserted, instead of count 5; but we have no authority to change the plain writing and language of the record, and must treat it as we find it.

Count 6 is an attempt to fasten liability upon the defendant by the application to the owner, occupant, or person in control of the upper story of the building of the maxim, "*Sic utere tuo ut alienum non lædas*." While from the language of the count it may not be clear what the relationship existing between plaintiff and defendant was, whether that of tenant and landlord, or of distinct ownership, yet, in the application of the maxim, this is deemed immaterial. 2 *Walt's Actions & Def.* 745; *Krueger v. Ferrant*, 29 Minn. 385, 13 N. W. 158, 43 Am. Rep. 223, 225. "This maxim restrains a man from using his own to the prejudice of his neighbor, but is not usually applicable to a mere omission to act, but rather to some affirmative act or course of conduct which amounts to or results in an invasion of another's rights." *Krueger v. Ferrant*, supra, and cases there cited. It is clear that the count claims nothing, and makes no allegation, in respect to affirmative conduct on the part of the defendant. It simply avers notice of the defective condition of the pipes, and omission to repair same before they burst. It does not present a case of maintenance of a nuisance and consequent injuries to defendant's neighbor. So far as the averments go, the pipes, when placed in the building, were perfectly sound and reasonably suitable for the purposes to which they were put; and though they had become defective, and the defendant had had notice, still the count does not show notice of the defects in time to enable defendant, before the breakage occurred, to make the necessary repairs.

If the relation of the parties (in respect to the part of the premises occupied by the plaintiff) should be construed as being that of landlord and tenant, there is in the count no averment of any covenant or agreement on the part of the landlord to make repairs; and we have seen that there is no implied agreement to make repairs, nor that the premises are or will be suitable for the tenant's use or business. It is plaintiff's theory however, that where the landlord leases only a part of the premises, and retains the remainder under his control, he is liable to the tenant for damages which may flow

from failure to repair. This principle was recognized and enforced in the case of *Toole v. Beckett*, 67 Me. 544, 24 Am. Rep. 54. That decision has been adversely criticised by more than one court of final resort, and its fallacies have been pointed out. In *Jones v. Millsaps*, 71 Miss. 10, 14 South. 440, 23 L. R. A. 155, 158, the Supreme Court of Mississippi, criticising *Toole v. Beckett*, said: "The decision and its reasoning are not satisfactory, and the vice of the opinion is that it confounds the passivity of the landlord with affirmative action on his part amounting to negligence." Other decisions which were relied upon as supporting or following *Toole v. Beckett* were referred to by the court and it was pointed out that they distinguished themselves from that case, in that they presented cases of negligence in affirmative action on the part of the landlord. It was then said by the Mississippi court: "If the weight of authority is controlling, it will be ascertained, on examination, that the current is against liability of the landlord." Many cases are cited by the court. The Supreme Court of Minnesota, in the case of *Krueger v. Ferrant*, repudiated the theory of the plaintiff now under consideration, and declined to follow *Toole v. Beckett*, supra. 29 Minn. 385, 13 N. W. 158, 43 Am. Rep. 223. *Ward v. Fagin*, 101 Mo. 669, 14 S. W. 738, 10 L. R. A. 147, 20 Am. St. Rep. 650, 654.

It seems, upon reason and the weight of authority, that in the absence of a covenant to repair, or of fraud or deceit, the lessor can be made liable for damages on account of defects only in cases of misfeasance, or of active interference on his part, or where he maintains a nuisance on the premises, and that no liability attaches for mere non-interference, even though the landlord remain in the occupancy of a part of the premises. The demurrer to the sixth count was properly sustained. Authorities supra; *Buckley v. Cunningham*, 103 Ala. 449, 453, 15 South. 826, 49 Am. St. Rep. 42; *Doupe v. Genin*, 45 N. Y. 119, 6 Am. Rep. 47; *Ward v. Fagin*, 101 Mo. 669, 14 S. W. 738, 10 L. R. A. 147, 20 Am. St. Rep. 650, 653; 6 Am. Law Review, 614; *Purcell v. English*, 86 Ind. 34, 44 Am. Rep. 255.

Chief Justice TYSON and Justice ANDERSON concur in the opinion and conclusions, while Justices DOWDELL, SIMPSON, McCLELLAN, and MAYFIELD concur therein, save as to the sixth count of the complaint, entertaining the opinion that this count is not subject to the demurrer, and that the court committed reversible error in sustaining the demurrer thereto. Therefore, in accordance with the views of the majority, the judgment of the trial court, for the error committed in sustaining the demurrer to the sixth count, must be reversed, and the cause remanded.

Reversed and remanded.

T. J. SCOTT & SONS v. RAWLS & RAWLS.
(Supreme Court of Alabama. Feb. 4, 1909.)

1. PLEADING (§ 8*)—CONCLUSIONS—DENIAL OF INDEBTEDNESS.

A plea in an action on a note, which merely states as a conclusion of the pleader that defendant does not owe the demand sued on, without the statement of any facts, is demurrable, since it fails to inform plaintiff of what he is to meet.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 16; Dec. Dig. § 8.*]

2. BILLS AND NOTES (§ 476*)—DEFENSES—FAILURE OF CONSIDERATION.

In an action on a note, failure of consideration, to be available, must be specially pleaded.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 476.*]

3. BILLS AND NOTES (§ 484*)—DEFENSES—PAYMENT.

In an action on a note, payment, to be available, must be specially pleaded.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 484.*]

4. BILLS AND NOTES (§ 484*)—PLEA OF PAYMENT.

A plea, in an action on a note, which alleges that the note was a part of a sum agreed on by the parties and settled on as the amount due from defendant to plaintiff, that the amount was paid, and that the sum was paid in a manner set forth, though bad for failing to aver that the payment was made before the commencement of the suit, is good as against a demurrer alleging that the plea is double, that it does not show the fact from which the indebtedness arose, and does not show that the order on a third person, as set forth in the plea, was given in payment.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1335; Dec. Dig. § 484.*]

5. PLEADING (§ 34*)—CONSTRUCTION.

A pleading must be construed most strongly against the pleader.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 66; Dec. Dig. § 34.*]

6. ACCORD AND SATISFACTION (§ 8*)—VALIDITY.

A parol agreement on the part of a creditor to accept, followed by the payment by the debtor of a less sum than the real debt, concerning which there is no dispute, is nudum pactum.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. § 61; Dec. Dig. § 8.*]

7. ACCORD AND SATISFACTION (§ 25*)—PLEADING—ALLEGATIONS.

A plea in an action on a note, which alleges that the note was a part of an indebtedness due from defendant to plaintiff, but subsequent to the execution of the note the parties compromised, whereby it was agreed that plaintiff would accept a less sum in settlement of the amount due, that thereupon defendant paid to plaintiff such less sum, and that plaintiff executed a receipt acknowledging payment in full, etc., is demurrable for failing to allege a valid consideration for accepting the less sum in satisfaction of the amount claimed.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. § 154; Dec. Dig. § 25.*]

8. APPEAL AND ERROR (§ 1078*)—ASSIGNMENT OF ERROR—WAIVER.

An assignment of error, complaining of the ruling on a demurrer to a plea, not insisted on on appeal, will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4258; Dec. Dig. § 1078.*]

Appeal from Circuit Court, Coffee County; H. A. Pearce, Judge.

Action on a promissory note by T. J. Scott & Sons against Rawls & Rawls. From a judgment for plaintiffs, defendants appeal. Reversed and remanded.

The pleas to which demurrers were interposed and overruled by the court are as follows:

Plea 3: "Defendants, as a further defense, aver that said note sued on was a part of the total sum of \$2,250, agreed upon by plaintiffs and defendants, and settled upon as the amount to be due and paid to plaintiff by defendants, and that this amount was paid, and was a settlement in full of the said note, and all claims held against the defendants, including said note sued on; that the sum of \$2,250 was paid by one R. Tillis to plaintiffs upon the written order of defendants, and the said plaintiffs gave their receipt upon such payment to R. Tillis, for defendants, for the sum of \$2,250 in full settlement of said note, with all amounts due to them by defendants, and thereupon plaintiffs promised and agreed to surrender and send to defendants their said note." The following demurrers were interposed to plea 3: "(1) Said plea does not show in what way, nor allege the facts from which, said indebtedness arose, nor allege how the note sued upon was a part of said \$2,500, whereby it can be seen that the payment of the \$2,250 was a payment of said note. (2) Said plea is double, in that it alleges a settlement of said note by payments, and also alleges a payment by a written order by defendant upon R. Tillis. (3) Said plea does not show that the order upon R. Tillis for the said \$2,500 was given for the payment of the note sued on. (4) For aught that appears in said plea, the receipt given to R. Tillis by the plaintiffs was without consideration."

Plea 1a: "That they do not, and did not at the commencement of the suit, owe the demand sued on, or any portion thereof." The demurrers interposed to this plea were as follows: "(1) The same alleges a mere legal conclusion. (2) The same does not allege any act shown that they do not owe the note sued upon."

Plea 3a: "That the note sued on is based upon the following consideration: Plaintiffs, T. J. Scott & Sons, had performed certain work for defendants, and agreed to do certain other work for defendants in connection with certain lands situated in Choctaw county, Ala., for which defendants agreed to pay plaintiffs the sum of \$2,250. Subsequent to said agreement, on, to wit, the 19th day of February, 1901, defendants executed to plaintiffs the note sued on for that portion of said \$2,250 upon the request of plaintiffs, and their representation to defendants that they needed some money and wanted defendants' note

for \$500 to enable them to procure some money; that subsequent to the execution of said note, on, to wit, the 20th day of February, 1901, defendants and plaintiffs entered into an agreement of compromise and settlement with plaintiffs, whereby and wherein it was agreed that plaintiffs would accept in full and complete settlement and satisfaction of the total amount of \$2,250 as aforesaid, which included the said notes so given, the sum of \$1,750; and that thereupon defendants paid to plaintiffs the said sum of \$1,750, and plaintiffs thereupon executed and delivered to defendants their receipt in writing, which receipt was and is in the following words and figures, to wit: 'Montgomery, Ala., Feb. 20, 1901. Received from R. Tillis, for Rawls & Rawls, \$2,250 in full for commissions as per agreement in Roseberry-Spencer sale of Choctaw county lands. T. J. Scott & Sons.' And defendants aver that it was the agreement of the parties, and said receipt was given and intended as full satisfaction of the said sum of \$2,250, including said note, wherefore and whereby, they say, said note was paid in full." The demurrers interposed to this plea are as follows: "(1) Said plea does not allege any fact showing a valid consideration for accepting a less sum than \$2,250, or for releasing defendants from the payment of said note. (2) The facts alleged in said plea do not show a payment in law of the note sued upon. (3) Said plea does not show that any part of the \$1,750 so paid was applied upon or intended by the parties thereto as a payment of the note sued upon. (4) The receipt shown by said plea does not purport to be an instrument executed between plaintiffs and defendants, and the facts set out in the plea do not show any consideration for plaintiffs' agreeing to accept a less amount than \$2,250, which said plea confesses the defendants to have owed the plaintiffs, and neither does said plea aver that the said \$1,750 were applied or directed to be applied by the defendants as a payment of the note sued upon. (5) The facts alleged in the plea do not show that defendants were parties to said receipt, nor is it averred that R. Tillis acted as the agent of said defendants in receiving said receipt. (6) It appears from said plea that the plaintiffs have only paid \$1,750 upon a debt of \$2,250, and it fails to aver that any part of said sum was applied or directed to be applied upon the notes sued upon."

It is unnecessary to set out plea 5. The note which is the subject of the suit is for \$500, and the contention of the defendants is that the payment made by Tillis was in full of all demands including the note sued on. It seems from the evidence that, while the receipt given to Tillis recited a payment of \$2,250, the facts were that Tillis only paid \$1,750.

Espy & Farmer and J. F. Sanders, for appellant. H. L. Martin and M. Sollie, for appellee.

DOWDELL, J. The complaint is on a promissory note. The defendant filed eight pleas. Demurrers were interposed to pleas numbered 3, 5, 1a, and 3a, which were overruled by the court. These rulings are here separately assigned as error.

Plea 1a is neither in form nor substance the general issue. It merely states as a conclusion of the pleader that the defendant does not owe the demand sued on, without the statement of any facts. Under this plea, if the plaintiff should be forced to join issue on it, the defendant might offer evidence of matter in support of the same, as that of failure of consideration, or payment, which should be specially pleaded, and to which the plaintiff would be entitled to specially reply. The plea fails to inform the plaintiff of what he is to meet, and is therefore bad, and subject to demurrer. Plea numbered 1, to which a demurrer was overruled, is subject to like criticism; but this ruling is not assigned as error.

Plea No. 3 as a plea of payment has its infirmities, but is not open to any of the grounds of demurrer assigned. It fails to aver that the payment was made before suit commenced.

Plea 3a, when construed, as the rule requires, most strongly against the pleader, is subject to the demurrer interposed. This plea by its averments sets up as a defense a parol agreement on the part of the creditor to accept, and the payment by the debtor of, a less sum than the real debt, concerning which there was no dispute, and which the plea admits. The rule is well settled in this state that such an agreement is nudum pactum. *Singleton v. Thomas*, 73 Ala. 205; *Hodges v. Tenn. Improvement Co.*, 123 Ala. 572, 26 South. 490; *Hand Lumber Co. v. Hall*, 147 Ala. 561, 41 South. 78. The plea on its face confesses that the receipt set out in the plea does not speak the truth. While the receipt recites the payment of \$2,250, the plea admits in fact only \$1,750 was paid. There was no dispute or controversy about the indebtedness of \$2,250. The note sued on, it is admitted, represented in part this debt; that is, to the extent of \$500. The note was not surrendered upon the giving of the receipt, though it is averred in the plea that there was an agreement to surrender it, which, however, was a mere verbal agreement. Under these facts we are unable to discover anything more than a simple verbal agreement to accept a less sum than the amount of the debt in payment of the same, which was without any consideration to support it, and consequently nudum pactum.

The assignment of error in reference to the ruling on the demurrer to plea No. 5 is not insisted on, and hence we do not consider it.

There are other assignments of error, but what we have said above as to the ruling on the pleadings sufficiently indicates the er-

rors committed, and will prove a sufficient guide on another trial.

For the errors indicated, the judgment is reversed, and the cause is remanded.

Reversed and remanded.

TYSON, C. J., and ANDERSON and McLELLAN, JJ., concur.

WESTERN UNION TELEGRAPH CO. v. BENSON.

(Supreme Court of Alabama. Dec. 17, 1908.
Rehearing Denied Feb. 5, 1909.)

1. TELEGRAPHS AND TELEPHONES (§ 36*)—OPERATOR AS SENDER'S AGENT.

Where a telegraph operator at the sender's request writes the message on one of the company's blanks, he is the sender's agent for writing the telegram, and the sender is bound by the terms of the contract.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 36.*]

2. TELEGRAPHS AND TELEPHONES (§ 66*)—DELAYED MESSAGES—BURDEN OF PROOF.

In an action against a telegraph company for delay in delivering a death message, the burden was on the sender to show that the addressee lived within the free delivery limits of the terminal office, where the sending operator had no information whether the addressee resided within such limits, and the sender imparted no information on that point, and paid no extra toll to secure delivery outside the limits.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 61; Dec. Dig. § 66.*]

3. TELEGRAPHS AND TELEPHONES (§ 74*)—DELAYED MESSAGES—ACTION FOR DAMAGES—INSTRUCTIONS.

In an action against a telegraph company for delay in delivering a death message, it was proper to refuse to instruct that the company's duty to make free delivery was conditioned on the addressee's residence within the free delivery limits, and that until that condition was shown the company was not in default "under the pleadings and evidence," where there was an issue as to whether the company had exercised reasonable diligence to make delivery within the limits.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 74.*]

4. TELEGRAPHS AND TELEPHONES (§ 74*)—DELAYED MESSAGES—ACTIONS FOR DAMAGES—INSTRUCTIONS.

In an action against a telegraph company for delay in delivering a message, an instruction that, unless the addressee lived within the free delivery limits of the terminal office, the sender could not recover, was properly refused, as tending to mislead the jury to believe that, if the sender failed to show the location of the addressee's residence, he could not recover, though the company did not exercise reasonable diligence in seeking to make delivery within the limits.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 74.*]

5. TELEGRAPHS AND TELEPHONES (§ 68*)—DEATH MESSAGES—DELAYED DELIVERY—DAMAGES—MENTAL ANGUISH.

Damages are recoverable for mental pain and anguish, following a telegraph company's

failure to deliver a message sent by one to his brother, announcing the death of a third brother.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 69, 70; Dec. Dig. § 68.*]

6. TELEGRAPHS AND TELEPHONES (§ 68*)—DEATH MESSAGES—CONSTRUCTIVE NOTICE.

A telegram, announcing a death and directing the addressee to "come at once," charged the telegraph company with notice of the relationship of the parties, and of the consequences of a possible failure to deliver according to contract, and that mental pain and anguish would probably result, where the surnames of sender, addressee, and decedent were identical.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 70; Dec. Dig. § 68.*]

7. TELEGRAPHS AND TELEPHONES (§ 68*)—DEATH MESSAGES—DELAYED DELIVERY—DAMAGES RECOVERABLE.

If the sender of a message announcing the death of a brother of addressee and sender, and summoning the addressee, suffered mental pain through being deprived of the presence of the addressee before and during the burial as a proximate consequence of the company's failure to deliver promptly, such pain is an element of damages recoverable by the sender; but the mental anguish naturally arising from the death should not be confounded with that resulting from the company's negligence.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 69, 70; Dec. Dig. § 68.*]

8. TELEGRAPHS AND TELEPHONES (§ 66*)—DELAYED MESSAGES—MENTAL ANGUISH—EVIDENCE.

To authorize recovery for mental anguish caused by a telegraph company's negligent delay in delivering a death message, it is not necessary that there be positive or direct evidence of mental pain, such as expressions or exclamations by plaintiff indicative of such suffering; it being proper for the jury to apply their own knowledge of human nature and experience to the attendant facts and circumstances.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 66.*]

9. TELEGRAPHS AND TELEPHONES (§ 73*)—DEATH MESSAGES—DELAYED DELIVERY—MENTAL ANGUISH—JURY QUESTION.

Even where there is evidence of mental suffering caused by negligent delay in delivering a death message, the question whether it existed as a basis for damages should be left to the jury.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 73.*]

10. TRIAL (§ 240*)—ARGUMENTATIVE INSTRUCTIONS.

In an action against a telegraph company for delay in delivering a death message, an instruction that the jury should consider the fact that plaintiff was one of six living brothers, and that five of them and all four of the sisters were at the burial, in determining whether plaintiff suffered great mental pain as a result of the absence of the sixth brother, was properly refused as argumentative.

[Ed. Note.—For other cases, see *Trial*, Dec. Dig. § 240.*]

11. TRIAL (§ 240*)—ARGUMENTATIVE INSTRUCTIONS.

An instruction that, in allowing a recovery for mental suffering, the law does not authorize the jury to guess at the amount, but requires them to consider very carefully the evidence, and decide first whether plaintiff suffered any real mental anguish, and if the suffering was

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

trifling, and such as men of ordinary manhood and self-reliance would overlook and ignore, substantial damages could not be allowed, was properly refused as being argumentative.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 240.*]

12. TELEGRAPHS AND TELEPHONES (§ 74*)—DELAYED MESSAGE — ACTION — CONFUSING INSTRUCTIONS.

An instruction, in an action against a telegraph company for delay in delivery of a death message, that the allowance of damages for mental pain or anguish should be considered by the jury only after mature and careful deliberation, and that none could be awarded unless all the jurors agreed that plaintiff actually suffered mental pain because the addressee was not at the funeral, and that the proper amount to be allowed the sender for such mental pain must be agreed upon by all the jurors, and that, if they were unable to agree on the amount to be allowed, they could award only nominal damages, was properly refused, as being involved and confusing.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 74.*]

13. TRIAL (§ 240*)—ARGUMENTATIVE INSTRUCTIONS.

In an action against a telegraph company for delay in delivering a death message, instructions that, in determining whether damages should be awarded for mental suffering, the jury must consider all the circumstances, and recall what other aid and assistance plaintiff had at the funeral; that if, as reasonable men, the jury concluded that plaintiff did not suffer any mental pain, they would violate their oath by awarding damages greater than the sum paid as toll; that, before damages could be awarded for mental pain caused by the addressee's absence, the jury must carefully and with due regard for their solemn oath consider what aid, comfort, and assistance addressee would have rendered sender individually on the day of the funeral; that the jury could consider that there were four sisters and five brothers at the funeral in determining what aid, etc., addressee could have rendered to sender; that the jury must conclusively presume that the sender was a man of ordinary self-reliance and force of mind, and no more emotional than any grown man of ordinary strength, firmness, and manhood; and that such facts should be solemnly and conscientiously considered—were properly refused as being argumentative.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 240.*]

14. TRIAL (§ 191*)—INSTRUCTIONS — ASSUMPTION OF FACTS.

An instruction, in an action against a telegraph company for delay in delivering a death message, that the burden was on the sender to show when and where the message might reasonably have been delivered, "and your minds are left confused and uncertain as to whether ordinary and reasonable diligence would have succeeded in finding him, then your verdict must be for defendant," was properly refused, as assuming that the jurors' minds were confused and uncertain.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 191.*]

15. TELEGRAPHS AND TELEPHONES (§ 74*)—DELAYED MESSAGE — ACTION — CONFUSING INSTRUCTIONS.

An instruction, in an action against a telegraph company for delay in delivering a message, that the burden was not on the company, but on plaintiff "before you how" addressee might have been found within the free delivery limits of the terminal office by one not knowing

him by name, and that if the jurors' minds were confused and uncertain as to the addressee's movements on the day the message was received, and as to the probability of being able to find him within the free delivery limits, the verdict must be for defendant, was properly refused, as being confusing and uncertain.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 74.*]

16. TRIAL (§ 191*) — INSTRUCTIONS—ASSUMPTION OF FACTS.

In an action against a telegraph company for delaying delivery of a message, an instruction that if, within a reasonable time after the addressee came within the free delivery limits, etc., was properly refused as assuming that addressee lived outside the limits.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 191.*]

17. TRIAL (§ 244*) — INSTRUCTIONS — UNDUE PROMINENCE TO EVIDENCE.

In an action against a telegraph company for delaying delivery of a message, an instruction that, if the jury believed the testimony of a particular witness, they must find that reasonable diligence was used to deliver the telegram after the addressee came within the free delivery limits of the terminal office, was properly refused for giving undue prominence to part of the evidence and ignoring other parts.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 244.*]

18. TRIAL (§ 191*)—INSTRUCTIONS—PROVINCE OF JURY—INVASION.

The instruction is also objectionable as invading the province of the jury.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 191.*]

19. TELEGRAPHS AND TELEPHONES (§ 37*)—DELIVERY LIMITS.

Where the free delivery limits of a telegraph office extended to a radius of half a mile, if the addressee's residence was within that radius, he was entitled to free delivery, though the usual route in going from the office to his residence was more than half a mile.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 37.*]

20. APPEAL AND ERROR (§ 758*) — BRIEFS — SUFFICIENCY.

Statements in a brief that a specified instruction refused was correct on the effect of the evidence and could not be disputed, that specified instructions assert correct propositions of law and should have been given, that a specified instruction refused was a correct statement of the measure of proof required, and that other specified instructions were supported by the evidence and should have been given, present nothing for review by the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 758.*]

21. TRIAL (§ 251*) — INSTRUCTIONS UNSUPPORTED BY PLEADINGS—REFUSAL PROPER.

Instructions were properly refused, where they depended upon pleas to which demurrers had been sustained.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587, 588; Dec. Dig. § 251.*]

22. TELEGRAPHS AND TELEPHONES (§ 69*)—MESSAGES—DELAYED MESSAGES — PUNITIVE DAMAGES.

Exemplary or punitive damages are not recoverable from a telegraph company for breach of contract to promptly deliver messages.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 71; Dec. Dig. § 69.*]

23. TELEGRAPHS AND TELEPHONES (§ 74*)—MESSAGES—DELAY IN DELIVERY—INSTRUCTIONS—DAMAGES.

An instruction that, if defendant telegraph company's conduct in failing to deliver a message was such as to be wholly in disregard of the sender's right, the jury could consider that in assessing damages, was erroneous, as authorizing recovery of exemplary or punitive damages.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 74.*]

24. TELEGRAPHS AND TELEPHONES (§ 66*)—DEATH MESSAGES—DELAYED DELIVERY—ACTION FOR DAMAGES—EVIDENCE.

In an action against a telegraph company for delay in delivering a death message, it was proper to allow the addressee to testify that he would have gone to the burial if he had received a telegram earlier, and that he could have connected with the trains, where the complaint charged that the addressee would have attended the burial if a telegram had been delivered promptly.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 66.*]

25. EVIDENCE (§ 122*)—RES GESTÆ.

In an action against a telegraph company for delaying delivery of a death message, it was proper, as a part of the *res gestæ* of the delivery, to show what the telegraph company's agent read to the addressee as the telegram, where the addressee was blind, and it was read to him before being handed to him.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 122.*]

26. TELEGRAPHS AND TELEPHONES (§ 66*)—DELAYED MESSAGES—EVIDENCE.

In an action against a telegraph company for delay in delivery of a death message, plaintiff could show that witness asked the company's agent who was looking for the addressee whether the message was important, that he replied that he did not know whether it was, that witness told the agent that he would deliver it, that the agent took the message away, and that witness told the agent where he could find the addressee.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 66.*]

27. TRIAL (§ 241*)—ARGUMENTS—READING FROM REPORTS.

In presenting the law of the case to the court, counsel may read the report of the facts from another case, in connection with the opinion.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 562, 563; Dec. Dig. § 241.*]

Appeal from Law and Equity Court, Walker County; T. L. Sowell, Judge.

Action by J. R. Benson against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The pleadings and the facts are sufficiently stated in the opinion of the court.

The following charges were requested by, and refused to, defendant:

"(3) I charge you that you cannot find a verdict for plaintiff if you believe plaintiff's evidence, and if you believe further that Bill Benson did not live within the free delivery limits of defendant's Carbon Hill office."

"(15) I charge you that the burden rests upon plaintiff to prove to your reasonable satisfaction that Bill Benson did not live over one-half of a mile from the telegraph

office, and that unless you believe from the evidence that he lived within that distance you must find a verdict for the defendant.

"(16) I charge you that plaintiff's only evidence with reference to the distance from Bill Benson's office near Carbon Hill to the telegraph office in Carbon Hill is substantially set forth in the statement of Bill Benson to the effect that he lived somewhere between a quarter and a half mile, near a half a mile, from the depot, and that with this you are to weigh the testimony of all of the other witnesses on that point, and from all the testimony determine the question of distance; and I charge you that unless you are reasonably satisfied that Bill Benson lived within the half-mile limit, then plaintiff has failed to meet the burden resting upon him."

"(19) I charge you that the burden of proof as to whether Bill Benson lived within the free delivery limit rests upon plaintiff."

"(23) I charge you that free delivery is a conditional obligation on part of the defendant, contingent upon Bill Benson's residence being within the area of free delivery, and until that condition is shown the telegraph company is not in default under the pleadings and evidence in this cause."

"(28) I charge you that you cannot assume that plaintiff suffered mental pain on account of his brother's absence merely because his brother was not present at the funeral."

"(30) I charge you that the fact that plaintiff was one of six living brothers, and that five of the brothers and all four of the sisters were present at the burial, may be considered by you in determining whether or not this plaintiff suffered great mental pain at the absence of the six brothers."

"(32) I charge you, gentlemen of the jury, that in allowing a recovery in certain instances for mental suffering the law does not authorize you to guess at the amount, but does require you to consider very carefully the evidence, and decide first of all whether or not plaintiff suffered any real mental anguish, and if this suffering was trifling, and such as men of ordinary manhood and self-reliance would overlook or ignore, then you would be prohibited from awarding any substantial damages for the alleged mental suffering."

"(33) I charge you that the allowance of damages for mental pain or anguish is not to be considered by you, except after mature and careful deliberation, and you cannot award any such damages unless all of you shall agree that plaintiff actually suffered from mental pain because Bill Benson was not at the scene of the funeral as alleged, and the proper amount to be allowed plaintiff for such mental pain must be agreed upon by all of you, and if you are unable to agree on the question as to what amount should be allowed plaintiff, if anything at

all, you cannot award anything but nominal damages.

"(34) I charge you that in deliberating upon the question as to whether you will award any damages at all to plaintiff for mental suffering you must consider all the circumstances and recall what other aid and assistance plaintiff had at the funeral, and if, as reasonable men, you conclude that plaintiff did not suffer any mental pain himself, you would be violating your oath if you awarded him any damages greater than 25 cents, the sum he paid for the message."

"(37) There is no presumption whatever that plaintiff suffered mental pain simply because his brother was not present at George Benson's funeral.

"(38) I charge you that there is no evidence in this case that plaintiff suffered any mental pain on account of the absence of his brother Bill Benson from the funeral.

"(39) I charge you that, before you can award any damages whatever to plaintiff for mental pain caused by his brother's absence, you must carefully and with due regard for your solemn oaths consider what aid, comfort, and assistance Bill Benson would have rendered J. R. Benson individually on the day of George Benson's funeral.

"(40) I charge you that you are authorized to consider the fact that there were present four sisters and five brothers at the funeral of George Benson in determining what aid, comfort, society, and assistance Bill Benson could have rendered J. R. Benson, had Bill Benson been present."

"(42) In determining whether or not plaintiff suffered mental pain on account of the absence of Bill Benson, you must conclusively presume that plaintiff is a man of ordinary self-reliance and force of mind, and are not authorized to presume that he is any more emotional than any grown man of ordinary strength and firmness and manhood; and you must solemnly and conscientiously consider these facts before you can arrive at a just verdict."

"(48) I charge you that the burden rests upon plaintiff to show when and where the message in question might reasonably have been delivered to Bill Benson within the free delivery limit of Carbon Hill, and your minds are left confused and uncertain as to whether ordinary and reasonable diligence would have succeeded in finding him then your verdict must be for the defendant.

"(49) I charge you that the burden is not upon the defendant, but upon plaintiff before you how Bill Benson might have been found within the free delivery limits of Carbon Hill, by a person not knowing him by name, and if your minds are confused and uncertain as to the movements of Bill Benson on July 3d, and as to the probability of being able to find him in the free delivery limits of Carbon Hill, your verdict must be for the defendant."

"(51) I charge you that if you are reasonably satisfied from the evidence that the defendant's messenger, S. D. Patterson, within a reasonable time after Bill Benson came within the free delivery limits of Carbon Hill, Ala., on the morning of July 3, 1907, went to the store of G. L. Wakefield with the message for the purpose of making delivery, and that the said Bill Benson was absent, then your verdict must be for the defendant.

"(52) I charge you that, if you believe the testimony of S. D. Patterson, then you must find that reasonable diligence was used by the defendant to deliver the telegram after Bill Benson came within the free delivery limit of the terminal office, and your verdict must be for the defendant, provided that you further find that the residence of said Bill Benson was more than one-half mile from defendant's office in the town of Carbon Hill.

"(53) I charge you that, in ascertaining the distance from defendant's office in Carbon Hill and the residence of Bill Benson, the route traveled from said office to said residence is to be considered, and not a direct line between said points.

"(54) I charge you that, in determining the distance between defendant's office in Carbon Hill and the residence of Bill Benson, you are to consider the most available route that could have been traveled between said points, and not a direct line."

"(58) I charge you that under the evidence in this case there was no train leaving Carbon Hill after the message was delivered to defendant at Nauvoo, and that the said Bill Benson came within the free delivery limits of defendant's office at Carbon Hill, by which said Benson could have come to Jasper, or any other point, and take a train that would have reached Nauvoo in time for him to have gone to George Benson's house before the funeral party left.

"(59) I charge you that, if the evidence is evenly balanced as to whether defendant was or was not negligent in the delivery of the message, then your verdict must be for the defendant."

"(68) I charge you that the damage ordinarily resulting from the breach of contract to deliver messages of the kind in question do not include mental pain of the sender at being deprived of the addressee's consolation, and in order to entitle the sender to recover such peculiar damages it must be first shown that at the time of the receipt of the message for transmission the defendant had notice of the fact that mental pain to the sender would be the natural or probable result of its failure to deliver; and I charge you that the terms of the message in this case are not sufficient predicate to serve as the basis for the recovery of damages for mental pain caused the sender by

being deprived of the addressee's consolation and solace.

"(69) I charge you that, if the evidence should disclose that the defendant did not use reasonable diligence in and about the transmission of the message in question, then Bill Benson, upon showing the necessary facts, might sue and recover damages for any mental pain he may have sustained by reason of his enforced absence from his brother's burial; but the message in this case did not disclose the fact that its purpose was for the purpose of obtaining for the sender the consolation and solace of Bill Benson, and I therefore charge you that no damages can be awarded to plaintiff which may have been caused him by his brother Bill's absence from the funeral.

"(70) I charge you that before plaintiff is entitled to recover damages for mental pain caused by the absence of his brother Bill, as alleged in the complaint, the evidence must first reasonably satisfy your minds that defendant had notice of the fact that under the circumstances J. R. Benson would suffer such mental pain if his brother Bill did not attend the funeral, and the mere sending of the message in question was not sufficient to give notice to the defendant of that fact.

"(A) I charge you that if you are reasonably satisfied from the evidence that the residence of Bill Benson on July 3, 1906, was more than one-half mile from the office of defendant in Carbon Hill, then defendant has proved its ninth plea, and your verdict must be for defendant."

(B) Same as charge 9, with reference to the tenth plea.

"(24) I charge you that there is no evidence in this case to support the averment in the complaint that plaintiff was caused to suffer great mental pain by reason of defendant's alleged breach of contract.

"(25) I charge you that the mental pain alleged by plaintiff to have been suffered by him is entirely too remote to be made a basis for damages in this case.

"(26) I charge you that you cannot award any damages to plaintiff for alleged mental pain.

"(27) I charge you that mental pain must be proven by evidence, just as any other fact in the case, before you can award damages therefor."

The following charges were given at the request of plaintiff:

"(1) I charge you, gentlemen of the jury, that although you believe that Bill Benson did not live within the free delivery limit in the town of Carbon Hill, Ala., yet, if you further believe from the evidence that defendant, by the exercise of due diligence, could have delivered the telegram to him within the free delivery limit in time for him to have been present at his brother's burial, then I charge you plaintiff would be entitled to recover."

"(4) If you find from the evidence that Bill Benson had a place of business within the free delivery limits in the town of Carbon Hill, Ala., then I charge you that it would be defendant's duty to use due diligence in attempting to deliver said message to him at such place of business, and if you further believe that the failure to do so deprived Bill Benson from being at his brother's funeral, then I charge you plaintiff would be entitled to recover.

"(5) If you believe from the evidence that Bill Benson was in the town of Carbon Hill within the free delivery limits from 8 a. m. to 11:30 a. m. on the day of July 3d. and by the exercise of due diligence defendant could have delivered the telegram to him in time for him to have attended his brother's funeral, and failed to exercise due diligence, then I charge you plaintiff would have been entitled to recover."

"(10) I charge you, gentlemen, that if you believe from the evidence that the defendant's conduct in failing to deliver the message was such as to be wholly in disregard of the plaintiff's right, then I charge you that you would have a right to consider this on assessment of damages, if you find from the evidence the plaintiff is entitled to recover."

The insistence in counsel's brief with respect to charges 58, 59, 60, 71, 73, and 75, referred to in the opinion, is as follows:

"Charge 58 is a correct charge upon the effect of the evidence and cannot be disputed. Charges 59 and 60 assert correct propositions of law and should have been given. Charge 75 is a correct statement of the measure of proof required. Charges 71 and 73 were supported by the evidence and should have been given. Plaintiff's counsel asked the witness Wakefield if he did not ask the defendant's agent, Patterson, if it was an important message, and if he did not reply that he did not know whether it was or not, and if he did not tell the agent he would deliver it, and that the agent took the message and went off with it, and if he did not tell the agent where he could find Benson. The bill of exception shows that his evidence was in rebuttal, and that the same questions had been asked the witness Patterson, defendant's agent, and that he had denied that such was the case."

Campbell & Johnson, for appellant. W. T. McElroy, J. D. Acuff, and M. B. McCollum, for appellee.

DENSON, J. This is an action by the sender of a telegraphic message against the defendant, Western Union Telegraph Company, to recover damages for an alleged breach of the contract on its part in not promptly delivering the message. George Benson, a man of family, who was residing about four miles from Nauvoo, in Walker county, Ala., was assassinated on the morn-

ing of July 2, 1906, while walking a foot log over the creek about a mile distant from his home. The plaintiff, his brother, was soon informed of the killing, and went immediately from his work, about 2½ miles distant, to where the remains of the deceased were lying on the bank of the creek. He then went to his deceased brother's home, and from there to Nauvoo, to notify a justice of the peace for the purpose of having an inquest held. It was late in the afternoon when the justice left Nauvoo and went to where the remains were. Plaintiff, while at Nauvoo that day, between 5 and 7 o'clock p. m., went to the defendant's telegraph office and had the defendant's operator to write out for him, on one of the company's blanks, a telegram addressed to Bill Benson, at Carbon Hill, in Walker county, Ala., about 8 miles distant from Nauvoo. Plaintiff paid the toll on the message and directed the operator to send it. The message is in this language: "Nauvoo, Ala., 7/2/1906. Bill Benson, Carbon Hill, Ala. George Benson shot and killed. Come at once. [Signed] J. R. Benson."

The complaint, among other things, avers that the message was not delivered until about 3 o'clock p. m. July 3, 1906; that if it had been delivered promptly, in accordance with defendant's agreement, Bill Benson would have received same in time to attend the funeral of George Benson, and in time to aid and advise in "planning and executing said funeral," and would have aided and advised in planning said funeral. The complaint then concludes with the following averments: "Plaintiff avers, further, that he was damaged on account of defendant's said breach of said contract, in that he lost the consideration paid for the sending and delivery of said message, and was deprived of the aid, comfort, society, and assistance of Bill Benson while his brother George was a corpse, before burial, and in the burying of said brother George, and was caused thereby to suffer great mental pain, wherefore he sues."

The telegram was not received by Bill Benson until about 3 o'clock p. m. July 3, 1906. That was a time when and after which there was no train, due to leave Carbon Hill for Nauvoo, that would convey him to Nauvoo in time to attend the funeral and burial. The tendency of the evidence was to show that if he had received the message by 1:30 p. m. he could and would have made connection by train and gone to the burial. He could not obtain a private conveyance, so he and his wife set out on foot to attend the funeral, and late in the afternoon met the family returning from the place of burial. Bill Benson then went to the home of the plaintiff and remained with him two or three days. At the house of the deceased, and attending the funeral and burial along with the plaintiff, there were five sisters and four brothers. Bill Benson, who is blind and a

minister of the gospel, is the eldest of this family.

The record shows that the issues were joined on the plea of the general issue and special pleas 4 and 5; demurrers having been sustained to pleas 6, 7, 8, 9, and 10. Special pleas 4 and 5 both set up, as a defense, the usual clause of the contract in respect to the free delivery limits of the terminal office, setting it out in *hæc verba*, and aver that the sender did not pay any extra toll for delivery outside of the free delivery limits, and that defendant's agent used reasonable diligence to make the delivery of the message inside of the limits. The fifth plea contains the additional averments that Bill Benson lived beyond the corporate limits of Carbon Hill, and was not known by name to defendant's agent at Carbon Hill.

The principal controversy of law and of fact, so far as the mere right of recovery was concerned, arose on the issues presented by these pleas. Under the undisputed facts of the case, Shepherd, the defendant's operator at Nauvoo, at plaintiff's request, wrote out the message on one of defendant's blanks. This constituted him plaintiff's agent for writing the telegram, and bound the plaintiff by the terms of the contract. *Western, etc., Co. v. Prevatt*, 149 Ala. 617, 43 South. 106.

In construing this free delivery clause, on contracts for the transmission of telegraphic messages, this court, through Stone, C. J., said: "When a message is handed in for transmission, the presumption must be and is that the sendee lives within the limits of free delivery, or that the sender takes the risk of delivery unless he makes arrangements for delivery at a greater distance; and handing such message, without explanation, casts no duty on the terminal employé or operator other than to copy the message correctly and deliver it with all convenient speed, if the sendee resides within the free delivery limits." *Western, etc., Co. v. Henderson*, 89 Ala. 510, 517, 7 South. 419, 18 Am. St. Rep. 148; *Western, etc., Co. v. Merrill*, 144 Ala. 618, 39 South. 121, 113 Am. St. Rep. 66; *Western, etc., Co. v. Whitson*, 145 Ala. 426, 41 South. 405. It was also said in the *Henderson Case*: "Free delivery within a half mile is not a restriction of a right, but a qualified privilege granted. It is not an inherent right; for, if it were, in the absence of restriction, it would have no limits." It was expressly held in that case that the burden of proving the residence of the sendee to be within the limits was upon the plaintiff. This ruling has been recently reaffirmed in the *Whitson Case*, *supra*. In the case in judgment, the evidence without conflict showed that the company's established free delivery limits at Carbon Hill were embraced within the radius of a half a mile from the company's office at that place; that the sending agent had no information that the sendee resided outside of the free delivery limits (if he did so reside) of the terminal office;

that if plaintiff knew it he said nothing about the fact, and paid no extra toll to secure delivery outside the limits. In this state of the proof, and in the light of the authorities cited above, it seems clear that the burden of proof on the issue as to whether the sendee resided within the free delivery limits was upon the plaintiff; and it must follow that the trial court erred in refusing written charge 19, requested by the defendant.

But it does not follow, from the premises, that charge 23, refused to the defendant, should have been given. The pleas on which the cause was tried contained the averment that reasonable diligence was exercised by defendant's agent, to make delivery of the message within the free delivery limits. It was therefore an issuable fact in the cause, and evidence was offered in support of and against it; and in this connection there was evidence tending to show that the sendee had a place of business within the free delivery limits. On these considerations, notwithstanding free delivery may be "a conditional obligation on the part of the defendant, contingent upon Bill Benson's residence being within the area of free delivery," it is inapt to say that the defendant, "under the pleadings and evidence in this case," is not in default until that condition is shown. *Walter v. Alabama, etc., Co.*, 142 Ala. 474, 482, 39 South. 87.

For similar reasons, the court did not err in refusing charges 3 and 15, requested by the defendant.

Charge 16, refused to the defendant, was properly refused, if for no other reason, because it is misleading, in that the jury might have concluded from its language that, if the plaintiff had failed to meet the burden resting upon him in respect to the residence of Bill Benson, a verdict should follow for defendant, notwithstanding they might also have believed from the evidence that defendant's agent did not exercise reasonable diligence in seeking to make delivery of the message within the free limits.

Under our decisions it cannot be questioned that the relationship of brotherhood (as shown between all the parties concerned in the message) brings this cause within the class of cases where damages are recoverable for the mental pain and anguish consequent upon failure to promptly deliver the message. *Western, etc., Co. v. Ayers*, 131 Ala. 391, 31 South. 78, 90 Am. St. Rep. 92; *Western, etc., Co. v. Crocker*, 135 Ala. 493, 33 South. 45, 59 L. R. A. 398; *Western, etc., Co. v. Haley*, 143 Ala. 593, 39 South. 386.

The message relating, as it did, to death, there accompanied it a "common-sense suggestion that it was of importance," and that the persons concerned (that is, sender and sendee) had in it a serious interest; and the surnames of sender, sendee, and person referred to in the message being the same, we

do not doubt that the company was charged with notice of the relationship of the parties; and withal, the message was sufficient to reasonably apprise the defendant of the consequences of a possible failure to deliver it according to the contract, and that mental pain and anguish would probably result. *Western, etc., Co. v. Long*, 148 Ala. 202, 41 South. 965; *Cowan v. Western Union Tel. Co.*, 122 Iowa, 379, 98 N. W. 281, 64 L. R. A. 545, 101 Am. St. Rep. 268; *Western, etc., Co. v. Carter*, 85 Tex. 580, 22 S. W. 961, 34 Am. St. Rep. 826; *Western, etc., Co. v. Moore*, 76 Tex. 66, 12 S. W. 949, 18 Am. St. Rep. 25; *Bright v. Western, etc., Co.*, 132 N. C. 317, 43 S. E. 841; *Lyles v. Western, etc., Co.*, 77 S. C. 174, 57 S. E. 725, 12 L. R. A. (N. S.) 534; *Thurman v. Western, etc., Co.*, 105 S. W. 155, 32 Ky. Law Rep. 26, 14 L. R. A. (N. S.) 499, and cases cited in the notes to the text of the opinion. If, then, the plaintiff suffered mental pain, by reason of being deprived of the presence of Bill Benson while the brother "was a corpse, before burial, and in burying said brother," as a proximate consequence of the defendant's negligence, we are of the opinion that such mental pain is an element of recoverable damages. *Western, etc., Co. v. Henderson*, 89 Ala. 510, 519, 7 South. 419, 18 Am. St. Rep. 148.

In arriving at such damages, the jury should not confound the mental anguish naturally arising from the loss of the deceased brother with that which is claimed to result from the defendant's negligence. *Hancock v. Western, etc., Co.*, 137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403. That the jury may have a foundation for the assessment of such damages, it is not indispensable that positive or direct evidence of mental pain be produced—such as expressions or exclamations, uttered by the plaintiff, indicative of such suffering—for the jury may bring into requisition their own knowledge and experience of human nature, and, applying that to the attendant facts and circumstances, estimate damages proceeding from mental anguish. *Western, etc., Co. v. Adams*, 75 Tex. 531, 12 S. W. 857, 6 L. R. A. 844, 16 Am. St. Rep. 920; *City Nat. Bank v. Jeffries*, 73 Ala. 183, 193; *Western, etc., Co. v. Crocker*, 135 Ala. 492, 33 South. 45, 59 L. R. A. 398; *Willis v. Western, etc., Co.*, 69 S. C. 531, 48 S. E. 538, 104 Am. St. Rep. 828, 2 Am. & Eng. Ann. Cases, 82.

This does not conflict with the recent case of *Western, etc., Co. v. Leland*, 47 South. 62. The facts of that case evolve no evidence, either direct or circumstantial, of mental anguish suffered. Indeed, according to the opinion of the court, the attendant facts and circumstances were not such as to warrant the inference that the mental anguish for which damages were claimed was occasioned, or augmented, by the negligence of the defendant—the nondelivery of the mes-

sage. In other words, the effect of that decision is that where a person's status or circumstances are not changed or affected, by reason of the negligence of the company in not delivering a message, the jury are not authorized to consider mental pain as an element of recoverable damages; and even where there is evidence of mental suffering, the question as to whether it existed as a basis for damages should be left to the jury. *O'Neal v. McKinna*, 116 Ala. 607, 620, 22 South. 905.

Looking to the evidence in the case, and upon the foregoing considerations, charges 24, 25, 26, 27, 28, 37, and 38 were properly refused to defendant, each being invasive of the province of the jury.

Charge 30 is argumentative, and, besides, leaves out of consideration other phases of the case.

Charge 32 is argumentative, if not otherwise bad, and was properly refused.

Charge 33 is involved and confusing, and was properly refused.

Refused charges 34, 39, 40, and 42 are argumentative, and were properly refused.

Referring to charges 48 and 49, appellant's counsel in their brief say it has been expressly decided by this court that, "if the minds of the jury are left confused and uncertain, they should not find for the plaintiff." Counsel neglected to cite the case. Doubtless they had in mind *Calhoun v. Hannan*, 87 Ala. 277, 6 South. 291, as explained in the cases of *A. G. S. R. R. Co. v. Hill*, 93 Ala. 514, 9 South. 722, 30 Am. St. Rep. 65, *Brown v. Master*, 104 Ala. 451, 464, 16 South. 443, and *L. & N. R. R. Co. v. Sullivan Timber Co.*, 126 Ala. 95, 103, 27 South. 760. Without stopping to discuss those cases (*Rowe v. Baber*, 93 Ala. 422, 8 South. 865), but conceding their correctness, both of the charges in question (48 and 49) were properly refused in this instance. Charge 48 assumes that the minds of the jurors are confused and uncertain, while charge 49 is confusing and uncertain in its terms.

Charges 51 and 52 were properly refused. Charge 51 pretermits consideration of one phase of the case, and of the evidence tending to support it (that the residence of Bill Benson was within the free delivery limits). In other words, the charge assumes that his residence was outside the limits. No. 52 gives undue prominence to a part of the evidence, and ignores other parts, and, besides, invades the province of the jury.

The proof shows, without conflict, that the free delivery limits fixed by the company for its Carbon Hill office were embraced in a radius of half a mile from the office, so that all persons residing within the radius are entitled to free delivery privileges; and if Bill Benson's residence was within that radius, it makes no difference that the usual route, in going from the office to his resi-

dence, covered more than half a mile. In this view, charges 53 and 54 were properly refused.

What is said by counsel in brief in respect to charges 58, 59, 60, 71, 73, and 75 fails to reach the dignity of an insistence upon the grounds of error covering them. 5 Mayf. Dig. p. 32, § 32.

What has been said *supra* in respect to the effect of the verbiage of the message as notice to the defendant condemns charges 68, 69, and 70 in defendant's series of refused charges.

The record shows that demurrers were sustained to the ninth and tenth pleas. They were not in the case. Therefore charges A and B were properly refused to defendant. Besides, what is said of these charges is not an insistence upon the grounds of error covering them. 5 Mayf. Dig. p. 32, § 32.

All that is said by appellant's counsel in respect to the grounds of error which cover charges 1, 4, and 5, given for the plaintiff, is that they ignore the issues made by pleas 9 and 10. It suffices to repeat: The record shows that demurrers were sustained to these pleas, and that issue was not joined thereupon.

If by charge 10, given for the plaintiff, it is meant that exemplary or punitive damages might be assessed (and we fail to see that any other reasonable construction can be placed upon it), the charge asserts an erroneous principle as applied here. The action is *ex contractu*, and such damages are not recoverable. *Western, etc., Co. v. Rowell* (Ala.) 45 South. 73.

The court, over objection of the defendant, allowed Bill Benson to testify that he would have gone to the burial if he had gotten the telegram in the morning. The complaint avers that Bill Benson would have attended the burial if the telegram had been delivered with proper dispatch; and, it being necessary that such fact be proved, we fail to discern how it could be established otherwise than by the affirmative testimony of the person directly concerned. He was properly allowed to testify. *Bright v. Western, etc., Co.*, 132 N. C. 326, 43 S. E. 841; *Hancock v. Western, etc., Co.*, 137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403; *Western, etc., Co. v. Heathcoat*, 149 Ala. 623, 43 South. 117. Plaintiff was also properly allowed to prove by Bill Benson that, if he had gotten the message between 8 and 9 o'clock in the morning, he could have made connection on the trains. Authorities *supra*.

The evidence showed that Bill Benson was blind, and that when he called for the telegram at defendant's office it was read to him by defendant's agent before being handed to him. Under these circumstances we think it was competent, as a part of the *res gestæ* of the delivery, for this witness to testify to what the agent read to him as the telegram.

Moreover, the telegram was offered in evidence, and there was no dispute as to its contents.

There is no merit in the exceptions reserved to the testimony of witness Wakefield, in regard to what occurred between him and Patterson (defendant's agent), who was seeking Bill Benson for the purpose of delivering the message. The questions asked were substantially in the language of the predicates.

While it may not be permissible for counsel to read the facts from the report of another case to the jury as a part of his argument to them (Williams' Case, 83 Ala. 68, 3 South. 743), it is not a breach of propriety for counsel, in presenting the law of the case to the court, to read the report of the facts of the case in connection with the opinion. This is frequently necessary, to give the court a clear understanding of the law. It may be that the court would have the right to exclude the jury from hearing while the

law is being thus discussed, and this, we find, the court finally did in the instant case.

As the case must be reversed for the errors pointed out, we deem it unnecessary to discuss the objections reserved to the argument of counsel to the jury, further than to say that in some respects the argument was extreme, and that counsel should restrain themselves, so as to keep well within the record and leave no room for valid complaint.

We have not given seriatim consideration to the myriad grounds of error assigned. Time and energy would have failed us, had we attempted it. We have, however, considered the matters of vital importance which have been insisted upon, and feel that the opinion will be a helpful guide on another trial.

Reversed and remanded.

TYSON, C. J., and DOWDELL and SIMPSON, JJ., concur.

CLARK v. J. L. MOYSE & BRO. (No. 13,371.)

(Supreme Court of Mississippi. March 8, 1909.)

1. TRIAL (§ 168*)—DIRECTION OF VERDICT—WHEN AUTHORIZED.

The court may direct a verdict, where no other verdict can reasonably be allowed to stand.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 376; Dec. Dig. § 168.*]

2. LANDLORD AND TENANT (§ 262*)—RENT—LIEN—ENFORCEMENT—QUESTIONS FOR JURY.

Where, on the issue whether a grantor, who conveyed land to the grantee under an agreement to repurchase and who executed notes for the price, should pay rent for a certain year, the evidence showed that no rent note was executed for that year, and the grantor denied that he was to pay rent, since he had given notes for the price, the court erred in giving a peremptory instruction that the grantee was entitled to rent.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 262.*]

Appeal from Circuit Court, Lincoln County; M. H. Wilkinson, Judge.

"To be officially reported."

Action by J. L. Moyse & Bro. against F. L. Clark. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

The declaration in this case, filed by J. L. Moyse & Bro., averred that they were the owners of a certain parcel of land, which was rented to one Hanes for one bale of cotton, and that said tenant raised certain cotton thereon and delivered it to the defendant Clark, and that said Clark appropriated the proceeds to his own use; that the delivery of the said cotton was without the knowledge or consent of the plaintiffs; wherefore he prayed the benefit of a landlord's lien and judgment. The record shows that Hanes had been the owner of this land, and there had been a foreclosure of a mortgage, and Moyse had purchased the land. Hanes afterwards filed a bill in chancery to set aside said sale; but the suit was compromised by an agreement, and Hanes deeded the property to Moyse, and executed two notes for the purchase price, in order to repurchase the land from Moyse. There was an agreement that rent for 1906 should be paid, which was done. Moyse claimed rent for 1907, but the testimony on this point is conflicting; no rent note being executed, and the defendant below denying that he was to pay rent for that year, since he had purchased the land and given notes for the purchase money. The court gave a peremptory instruction to find for plaintiffs, and defendant appeals.

Green & Green, for appellant.

WHITEFIELD, C. J. The clear preponderance of the testimony is in favor of the appellant on the proposition whether the appellees had any rent note or rent contract of any kind whatever for the year 1907. Indeed,

the court might very properly have given a peremptory instruction for the appellant on that issue, since no other verdict could reasonably have been allowed to stand. It was therefore manifest error to give, as the court did, peremptory instruction for the appellees. Reversed and remanded.

(35 Miss. 303)

CASTON v. TURNER. (No. 13,406;)

(Supreme Court of Mississippi. March 8, 1909.)

1. INTERPLEADER (§ 43*)—STATUTORY SUBSTITUTION—STATEMENT OF CLAIM—CONCLUSION.

The statement of claim by one brought in as defendant by interpleader, under Code 1906, § 772, does not have to conclude with a verification or to the country.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. § 82; Dec. Dig. § 43.*]

2. INTERPLEADER (§ 43*)—STATUTORY SUBSTITUTION—STATEMENT OF CLAIM—DEMURRER.

Irrelevant matter in the statement of claim of one brought in as defendant by interpleader, stating substantially and clearly his right, should be disregarded, and is not ground for demurrer.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. § 82; Dec. Dig. § 43.*]

Appeal from Circuit Court, Pike County; M. H. Wilkinson, Judge.

Suit by H. G. Turner against the McComb City Mercantile Company. W. L. Caston, administrator, was made defendant by an interpleader, and from an adverse judgment, he appeals. Reversed and remanded.

H. G. Turner filed suit against the McComb City Mercantile Company for the sum of \$375 for the value of certain cotton alleged to have been converted by it, and upon which plaintiff claimed a landlord's lien for rent. At the next term of court before plea, the said company made affidavit that W. L. Caston, administrator of the estate of C. A. Brown, deceased, without collusion had a claim to the subject of this action, and averred its readiness to dispose of the proceeds of said cotton as the court might direct. The court thereupon ordered Caston to be made defendant, and the mercantile company, having paid into court the sum of \$233.50, the value of the cotton alleged to have been converted, filed a plea reciting this fact and denying liability as to the balance sued for. Caston thereupon filed a plea of nil debet, and afterwards filed a plea of set-off against Turner for \$150, alleged to be due him as administrator. Turner afterwards filed a demurrer to the several pleas, which was sustained. Appellant thereupon set out at length his claim to the proceeds of the cotton upon which appellee claimed a lien, and appellee then demurred, alleging that the plea contained irrelevant matter, did not present a concise issue, and concludes neither with a verification or to the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

country. This demurrer was sustained, and judgment final rendered for appellee, and this appeal is prosecuted.

Section 772 of the Code of 1906, under which this procedure was had, is as follows: "Upon affidavit of a defendant before plea filed in any action upon contract, or for the recovery of personal property, that a third party, without collusion to him, has a claim to the subject of the action, and that he is ready to pay or dispose of the same as the court may direct, the court may make an order for the safe-keeping or payment, or deposit in court, or delivery of the subject-matter of the action to such person as it may direct, and an order requiring such third party to be summoned to appear in a reasonable time and maintain or relinquish his claim against the defendant. If such third party, being duly summoned, or in case he be a nonresident or absent from this state, if publication of summons shall have been made for him as prescribed by law for nonresident or absent defendants in chancery, shall fail to appear, the court may declare him barred of all claim in respect to the subject of the action against the defendant therein; but if such third party appear, he shall be allowed to make himself defendant in the action at law instead of the original defendant, who shall be discharged from all liability to either of the other parties, in respect to the subject of the action upon his compliance with the order of the court for the payment, deposit or delivery thereof. If the claim of such third party extend to only a part of the subject-matter of the action, similar proceedings may be had respecting the part so claimed, and the action shall proceed as to the residue as in other cases."

Geo. Butler and Mixon & Cassidy, for appellant. Cassidy & Cassidy, for appellee.

WHITFIELD, C. J. Most manifestly the procedure here was under section 772, Code of 1906—interpleader procedure, pure and simple. The claim, as finally propounded by the administrator, stated substantially and clearly his right. It is true there is much surplusage and immaterial matter in it, and it is true that it did not conclude either with a verification or to the country. But the statement of claim did not, under section 772, have to so conclude, and the irrelevant matter should have been disregarded. The demurrer to this claim thus propounded ought to have been overruled, and the case disposed of on its merits.

The matter of set-off, insisted upon by the administrator, was perfectly proper to be deducted from any proportionate amount of rent, if any at all, due to Turner, appellee. There is nothing else worthy of notice in the record. What we have said indicates the

true course the case should take on the hearing on the merits.

Reversed and remanded.

GULFPORT LAND & IMPROVEMENT CO. v. AUGUR. (No. 13,829.)

(Supreme Court of Mississippi. March 1, 1909.)

MORTGAGES (§ 413*)—FORECLOSURE—INJUNCTION—DISSOLUTION—DAMAGES.

Where an injunction restraining the foreclosure of a trust deed was obtained after the property had been advertised for sale, and was thereafter dissolved, defendant was entitled to recover counsel fees for services in procuring the dissolution of the injunction and for the printer's fees paid for the advertisement.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1201; Dec. Dig. § 413.*]

Appeal from Chancery Court, Harrison County; T. A. Wood, Chancellor.

Suit for injunction by F. A. Augur against the Gulfport Land & Improvement Company. From the decree, complainant appeals, and defendant files cross-appeal. Decree affirmed on direct appeal, decree on cross-appeal reversed, and cause remanded.

F. A. Augur filed suit in the chancery court to enjoin the foreclosure of a certain deed of trust held by the appellee to secure an indebtedness of \$8,000, evidenced by a note of the appellee. After the trustee had advertised the property for sale, naming a date on which the sale should occur, the appellant filed his bill for injunction, the chancellor issued his fiat, which appellant held until within three days of the date set for the sale and filed same, not allowing sufficient time to give the five days' notice for dissolution before the date of sale. The bill was thereafter demurred to by appellee, the demurrer sustained, and complainant given three days in which to amend his bill of complaint, and seven days in which to give bond according to law; the court ordering that on failure to do it, or both, the injunction should stand dissolved. The complainant's attorney made certain interlineations in the bill of complaint, but did not file an amended bill. After the expiration of the time granted by the court, the property was again advertised for sale, and appellant then filed contempt proceedings; but said proceedings were filed so late that the matter could not be disposed of before the date set for the sale, which could not be had. Thereafter the defendant answered, denying the allegations of the bill, moved to dissolve the injunction, and gave notice of damage. At the hearing the court entered a decree dissolving the injunction, but failed to award damages. From this decree the complainant prosecutes an appeal, and the defendant a cross-appeal from that part of the decree failing to allow damages by way of attor-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ney's fees and printer's fees for advertising the sale.

J. H. Mize, for appellant. Barrett & Taylor and T. M. Evans, for appellee.

WHITFIELD, C. J. There is no merit whatever in the assignment of error on the direct appeal. So far as we can discern, this has been a contest for delay, pure and simple. Wherefore the decree on the direct appeal is affirmed.

On the cross-appeal we think the court erred in not allowing counsel fees for such services as were rendered in procuring a dissolution of the injunction, and in not allowing the printer's fees proven to have been paid for the advertisement. Of course, no such sum as \$800 should be allowed. Only such a fee as is proper for the services rendered in and about the procuring of the dissolution should be allowed. The counsel fees on the merits are secured in the note itself, and are not to be confused with the mere services on the hearing of the motion to dissolve.

The decree on the cross-appeal is reversed, and the cause remanded for further proceedings in accordance with this opinion.

MAGEE v. MISSISSIPPI CENT. R. CO. (No. 13,668.)

(Supreme Court of Mississippi. March 15, 1909.)

1. MASTER AND SERVANT (§ 89*)—RAILROADS—TRESPASSERS—RIDING ON ENGINE.

A section foreman, riding on a locomotive tender, was not a trespasser, as affecting the company's liability for his death, caused by the tender jumping the track, where, after completing work, he was ordered or invited to board the train, which consisted of a flat car, caboose, and the engine; the cars being crowded.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 155; Dec. Dig. § 89.*]

2. MASTER AND SERVANT (§ 279*)—RAILROADS—ACCIDENTS—WANTON NEGLIGENCE—EVIDENCE—SUFFICIENCY.

Evidence in an action against a railway company for the death of an employé, caused by the locomotive tender on which he was riding jumping the track, held to tend to show wanton negligence by the employés in charge of the train.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 978-980; Dec. Dig. § 279.*]

Appeal from Circuit Court, Forrest County; W. H. Cook, Judge.

Action by Mrs. E. L. Magee against the Mississippi Central Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

This is a suit by the appellant, who was plaintiff in the court below, for damages for the death of her husband, Tom Magee, who was killed by the defendant railroad company. After all the testimony for the plain-

tiff was in, the court sustained a motion to strike out the testimony and instructed the jury to find for defendant. Tom Magee was a section foreman of the defendant, and on the day of the accident was in charge of a gang of workmen engaged in clearing up the track after a severe storm, which had blown trees across the track. After this work had been completed, the trainmaster, who was on the scene in charge of a special relief train, consisting of a flat car, caboose, and engine, took all of the gang, together with a large number of passengers who had been stranded at the scene of the wreckage, back toward the town of Brookhaven. The flat car and caboose were both crowded, as was the tender on the engine, and the deceased took a seat on the tool box at the rear end of the tender. The engine was backing at a very rapid rate, estimated at 30 or 40 miles an hour, when the tender jumped the track, threw deceased between the tender and caboose, and so injured him that he died. The testimony shows that the trucks of the tender were defective, in that they were too near the center, causing the flanges of the wheels to ride the rails, so as to make it dangerous to go at a rapid rate of speed. The appellant contends that Tom McGee was ordered by the trainmaster to get aboard this relief train, while the defendant contends that it was only an invitation, since their work had been completed, and deceased could have waited and boarded the regular passenger train to go home. The defendant also contends that the plaintiff was guilty of contributory negligence in voluntarily taking a seat on the tool box, instead of getting in a safer place. Appellant contends that the railroad company was guilty of wanton recklessness and gross negligence in running the train at a high rate of speed, knowing the tender to be defective and dangerous.

Alexander & Alexander and Sullivan & Tally, for appellant. Jeff Truly and T. Brady, Jr., for appellee.

MAYES, J. Under our view in this case it is not material for us to decide what was the exact legal status of Mr. Magee toward the railroad company at the time he received the injury causing his death. It is certain that he was not a trespasser. We have examined the facts with great care, and have also examined the citations of counsel for appellee. The distinction between the facts in the authorities cited by appellees and the facts of this case easily distinguish the cases and demonstrate the inapplicability of the authorities relied on for affirmance. In all the cases cited for appellees the liability turned upon a question of mere negligence, and not willful negligence or reckless disregard of duty on the part of the railroad company. The case here tends, at least, to show the most wanton and reckless disregard of all

prudence and caution on the part of the employees of the company in charge of the train. This case is controlled by the case of Railroad Company v. Brown, 77 Miss. 388, 28 South. 949. This case, supra, contains such a clear statement of the law applicable to this case that it need not be here repeated.

No peremptory instruction for the railroad company should have been given.

Reversed and remanded.

(95 Miss. 300)

WEATHERSBY v. STATE. (No. 13,768.)
(Supreme Court of Mississippi. March 22, 1906.)

CRIMINAL LAW (§ 945*)—TRIAL—NEWLY DISCOVERED EVIDENCE.

Where, in a prosecution for homicide, accused, after conviction, applied for a new trial for newly discovered evidence of F., whose testimony, if true, would seriously shake a material part of the state's evidence in chief, and it appeared that the rules respecting applications for a new trial on that ground had been complied with, the court erred in denying the application.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2324-2327, 2336; Dec. Dig. § 945.*]

Appeal from Circuit Court, Lincoln County; M. H. Wilkinson, Judge.

"To be officially reported."

Julius Weathersby was convicted of murder, and he appeals, assigning, among other errors, the action of the court in overruling his motion for new trial on the ground of newly discovered evidence, and offering in evidence the affidavit of one French, an eyewitness of the killing. Reversed and remanded.

The killing occurred on May 22d, during the term of the court, and appellant was promptly indicted, and tried and convicted on June 3d. The attorneys' affidavits state these facts, and state, further, that they did not learn, for several days after they had been employed, that French saw the killing, and that they at once took steps to get him in attendance at the trial, but failed to do so, and that he did not arrive for two days after appellant had been convicted. The affidavit of French is filed, stating that he saw the homicide, and setting up what his testimony would be.

A. C. & G. W. McNair, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

WHITFIELD, C. J. If the testimony delivered in chief for the state be looked at alone, undoubtedly the verdict is correct; but, if the facts are as stated in the testimony of French on motion for a new trial on the ground of newly discovered evidence, then certainly a material part of the evidence for the state in chief will be seriously shaken. The affidavits of the counsel and of the defendant himself complied fully with

the rules in respect to applications for new trials on the ground of newly discovered evidence.

Looking to the whole case, we feel safer, on the issues of life and death, in reversing the case because of the refusal to grant a new trial on this ground; and for that reason the judgment is reversed, and the cause remanded.

(35 Miss. 307)

BLOMQUEST et al. v. GARDNER et al.
(No. 13,755.)

(Supreme Court of Mississippi. March 15, 1906.)

CANCELLATION OF INSTRUMENTS (§ 47*)—FORGERY OF SIGNATURE TO DEED—SUFFICIENCY OF EVIDENCE.

As against persons in possession of land, claiming under a deed, the witnesses to which are dead, and which has been undisputed for upwards of 15 years, the widow and son of the grantor, suing to cancel the title on the ground that her signature was forged, must sustain their case by the most undoubted proof.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 102, 103; Dec. Dig. § 47.*]

Appeal from Chancery Court, Jackson County; T. A. Wood, Chancellor.

Suit by Mrs. C. C. Gardner and another against Gus Blomquest and others. From a decree for complainants, respondents appeal. Reversed.

The appellees, who are the widow and son and only heirs at law of one Axum Gardner, deceased, filed a bill in chancery seeking to cancel the title of the appellants to the land in question, alleging that said Axum Gardner had acquired title from the United States under the homestead laws, and that in 1889 he attempted, without the knowledge or consent of his wife, to deed said land to one Orrell, through whom appellants claim title; that Mrs. Gardner's signature to said deed to said Orrell is a forgery. Wherefore title to said land, which was the homestead, never passed to said Orrell, but that appellees are the true and lawful owners. The defendants answer, denying that Mrs. Gardner's signature was a forgery, and averring that they and those through whom they claimed title had owned said property since the deed to Orrell, which was recorded in 1892, up to 1906, the date of the death of Axum Gardner, and that their title to said property had never been disputed. The chancellor heard the testimony, and entered a decree canceling appellants' title, and they appeal.

May & Sanders and Ford, White & Ford, for appellants. H. B. Everitt and Denny & Denny, for appellees.

MAYES, J. On a careful consideration of this whole case, we cannot assent to the findings of the chancellor that Mrs. Gardner did

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

not sign the deed in question. On the facts of this case, with the witnesses who could clear up this transaction all dead, it should be made to appear by the most undoubted proof that the deed was never signed, and in this we think the testimony falls.

The case is reversed, and bill dismissed.

(35 Miss. 53)

McPHAIL v. BLAUN. (No. 18,508.)

(Supreme Court of Mississippi. March 22, 1909.)

JUSTICES OF THE PEACE (§ 159*)—APPEAL—APPROVAL OF APPEAL BOND.

Under Code 1906, § 83, providing that either party to a justice case may appeal, on bond given and approved by the justice, the bond must be presented to and approved by the justice who tried the case; and where a case was begun before one justice, who upon suggestion of his disqualification transferred the case to another justice as provided by law, and did not further participate, an appeal bond filed with and approved by the first justice was of no effect.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 159.*]

Appeal from Circuit Court, Leake County; J. R. Byrd, Judge.

Action between J. S. McPhail and J. A. Blaun. From the judgment, McPhail appealed. The appeal was dismissed, but was afterwards reinstated on the docket. Former opinion, dismissing appeal, affirmed.

The appeal in this case was dismissed by this court. See 47 South. 666. The case was afterwards reinstated on the docket, and the argument is then presented that, inasmuch as the case was instituted in the court of one Moreland, a justice of the peace, but was transferred to another justice of the peace, Gilbert, and since the record shows that the appeal bond was filed and approved by Moreland within the five-day limit allowed by law, the appeal had been properly effected.

W. A. Ellis, J. M. Scott, and Pressley Groves, for appellant. McMillon & Howard, for appellee.

FLETCHER, J. The sole question here for decision is as to the power of Justice Moreland to approve an appeal bond in a case tried by another justice. Section 83 of the Code of 1906, as construed many times by this court, makes it necessary to the validity of an appeal from a justice's court that the appeal bond shall be presented to and approved by the justice who tried the case within five days after the rendition of the judgment. This rule is recognized by the appellant, who insists that he is absolved from its operation by reason of the fact that the case was begun before Moreland, and that Moreland in fact sat as part of the court on the trial. But Moreland, upon suggestion of his disqualification by reason of kinship, had, as provided by law in such

cases, transferred the cause, and the circuit judge had found as a fact that he did not further participate as a justice in the trial. We cannot overthrow this finding on the showing made by this record.

The appeal was properly dismissed, and the case is affirmed.

(34 Miss. 365)

AILS v. STATE. (No. 18,652.)

(Supreme Court of Mississippi. March 22, 1909.)

1. CRIMINAL LAW (§ 823*)—INSTRUCTIONS—CREDIBILITY OF TESTIMONY.

If an instruction in a homicide case that the jury, in determining the weight to be given the testimony, could consider the interest of each witness and the reasonableness of the testimony, was erroneous as pointing out accused, the error was cured by an instruction that accused was a competent witness, and that his testimony could not be arbitrarily disregarded merely because he was the defendant, and that his testimony should be considered the same as the testimony of any other witness, etc.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1894; Dec. Dig. § 823; Homicide, Cent. Dig. §§ 718, 719.]

2. CRIMINAL LAW (§ 785*)—INSTRUCTIONS—CREDIBILITY OF TESTIMONY.

An instruction that, in determining the weight of the testimony of each witness, the jury could consider his interest or lack of interest and the reasonableness or the unreasonableness of the testimony, etc., was not objectionable as pointing out accused, where his brother-in-law testified in his behalf.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 785.*]

Appeal from Circuit Court, Sunflower County; Sydney Smith, Judge.

Will Vails was indicted for murder, convicted of manslaughter, and appeals. Affirmed.

Chapman & Quin and Chas. L. Garnett, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

WHITFIELD, C. J. On the testimony in this case, not only were the jury well warranted in rendering the verdict which they did render, but it does not seem to us at all probable that any other verdict could be rendered on a new trial. We think, therefore, the right result, so far as the testimony is concerned, has manifestly been reached.

The chief contention of learned counsel for appellant is that the court committed error—reversible error—in giving the fourth instruction for the state. That instruction is in the following words: "The court instructs the jury, for the state, that they are the sole and exclusive judges of the weight of the evidence and the credibility of the witnesses, and in determining the weight to be given to the testimony of each witness they may take into consideration the interest or the lack of interest, the reasonableness or the unreasonableness, of the testimony;

and, if they believe from the evidence that any witness has willfully sworn falsely to any material matter in this case, then the jury may disregard the whole testimony of such witness or witnesses, if they believe it untrue." This instruction must be taken in connection with instruction No. 8, given for the defendant: "The court instructs the jury, for the defendant, that the law makes the defendant a competent witness for himself, and permits him to testify in his own behalf, and his testimony you cannot arbitrarily, under your oaths, disregard, simply because he is the defendant in the case; but it is the duty to consider Valls' testimony, as you consider the testimony of any other witness in the case, and, if you have no other reason to disbelieve him as a witness than the fact that he is the defendant in the case, then it is your sworn duty to believe him, and believe that he spoke the truth, and if it is sufficient, in connection with the other testimony in the case, to raise in your minds a reasonable doubt of his guilt, then you should promptly find him not guilty." The objection urged to this instruction is that it directly points out the defendant alone, and is therefore within the condemnation of various cases cited in the brief of learned counsel for appellant, especially the case of *Buckley v. State*, 62 Miss. 705.

We remark, first, that if there was any error in this fourth instruction given for the state on this point, it was certainly cured by the eighth instruction, just above set out, given for the defendant on the same point. It would be difficult, indeed, to frame an instruction on this point more favorable to the defendant than this said eighth instruction is. But, second, we remark that in nearly all the cases cited by appellant's counsel the instruction condemned either directly referred to the defendant alone, or by necessary implication, and in nearly all the cases the defendant was the only witness on his behalf in the case. This last observation is true of the cases of *Smith v. State*, 90 Miss. 111, 43 South. 465, 122 Am. St. Rep. 313, *Gaines v. State*, 48 South. 182, *Wood v. State*, 67 Miss. 575, 7 South. 495, and practically *Glenn v. State*, 64 Miss. 725, 2 South. 109, since in that case the defendant was the only person who made a statement which he had denied under oath. In this case *Lloyd*, the brother-in-law of the defendant, testified in his own behalf to nearly all the material facts. So that it is not true of this case, either that the defendant was the only witness testifying in his own behalf, or that this instruction necessarily pointed to him and him alone. The instruction in the *Buckley Case*, supra, which was condemned, was as follows: "It is true that under the laws of his state the defendant is a competent witness in his own behalf; but in weighing his testimony the jury should consider the in-

terest he has in the result of the same, and they may disregard it altogether." It is perfectly manifest that the difference between that instruction and the instruction in this case is as wide as the distance between the poles.

There was not only no reversible error, but no error at all, in giving instruction No. 4, for the state. Wherefore the judgment is affirmed.

(94 Miss. 250)

LONG v. STATE. (No. 13,706.)

(Supreme Court of Mississippi. March 22, 1909.)

CRIMINAL LAW (§ 260*)—CONTINUANCE—NEW TRIAL.

After a prosecution the circuit court on appeal from a justice had been continued, defendant was notified by her attorney that she would not be needed until the next term of court, and the witnesses were discharged. Within two hours thereafter the circuit judge set aside the continuance and notified defendant's counsel that the case would be tried at that term of court. Defendant's attorneys made a reasonable effort to notify their client, but failed, and on the last day of the term, a week and a half after the continuance was set aside, the case was called, the appeal dismissed, and a writ of procedendo issued. *Held*, that accused was entitled to a reinstatement of the appeal and to a trial on its merits.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 260.*]

Appeal from Circuit Court, Yazoo County; W. H. Potter, Judge.

Mary Bell Long was convicted before a justice of the peace for selling cocaine. She appealed to the circuit court, where her appeal was dismissed, and she appeals. Reversed and remanded.

Holmes & Holmes, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

FLETCHER, J. This case originated in the court of a justice of the peace and was appealed to the circuit court. In that court it was agreed between the district attorney and the counsel for the defendant that the case should be continued. This agreement was reported to the circuit judge, who made an entry to that effect on the trial docket. Thereupon the defendant was notified by her attorney that she could go home, and that she would not be needed until the next term of court, and the witnesses were discharged. It seems that the district attorney, in making this agreement, acted under a misapprehension as to the attitude of counsel. The circuit judge, for reasons satisfactory to himself, set aside the order of continuance within two hours after it was made, and promptly notified defendant's counsel that the case would be tried at that term of court. It appears that the attorneys made a reasonable effort to get word to their client, but failed to do so, and on the last day of the term,

some week and a half after the order of continuance was set aside, appellant's case was called, the appeal dismissed, and a writ of procedendo issued to the justice's court.

We are not able to resist the conclusion that injustice was done the appellant by this proceeding. Her attorneys show that they were unfamiliar with her place of residence, and both the mails and the telephone were employed in a vain effort to get into communication with her. We think the justice of the cause demands that the case be reinstated and tried on its merits.

Reversed and remanded.

DAY LUMBER & MFG. CO. v. CITIZENS' BANK. (No. 13,769.)

(Supreme Court of Mississippi. March 8, 1909.)

JUDGMENT (§ 17*)—PROCESS TO SUSTAIN—EFFECT OF APPEARANCE.

Where service of process in a case was not sufficient to support a default judgment against a nonresident corporation defendant, the defect was not cured as to that defendant by the entry of appearance by other defendants sued jointly with it.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 17.*]

Appeal from Circuit Court, Hancock County; W. H. Hardy, Judge.

Action by the Citizens' Bank against the Day Lumber & Manufacturing Company and others. There was a judgment by default against the mentioned defendant, and it appeals. Reversed and remanded.

The Citizens' Bank brought suit against the Day Lumber & Manufacturing Company and others on a certain promissory note. Service was had upon all of the parties defendant except the appellant, a nonresident corporation. The record fails to disclose that service was had either by process or by publication, and there is no entry of appearance or waiver of service in the record. There was a judgment by default against the appellant, and this appeal is prosecuted.

Will A. Parsons, for appellant. Shivers & Shivers, for appellee.

FLETCHER, J. It is conceded by appellee that the service of process in this case will not support a judgment by default; but it is insisted that appellant entered an appearance in the cause, which cures the defect in the service. Doubtless this view of the law is correct; but the trouble is that there is no evidence in the record to show that this particular appellant entered such appearance. The appearance was manifestly entered by the other defendants, sued jointly with appellant; but it is too clear for argument that this appearance cannot affect appellant.

Reversed and remanded.

(95 Miss. 56)

BOARD OF SUP'RS OF KEMPER COUNTY v. NEVILLE. (No. 13,528.)

(Supreme Court of Mississippi. March 22, 1909.)

APPEAL AND ERROR (§ 790*)—DISMISSAL—MOOT QUESTION.

Appeal from a judgment holding that proceedings to lay out a road were void, so that the right by prescription to use of the road was subject to the right to maintain gates at the ends thereof, will be dismissed as involving only a moot question; it appearing that pending the appeal regular proceedings to lay out the road and remove the gates had been had.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 790.*]

Appeal from Chancery Court, Kemper County; J. F. McCool, Chancellor.

Action by Mrs. Maria Giles Neville against the Board of Supervisors of Kemper County. From an adverse judgment, defendant appeals. Dismissed.

Geo. H. Ethridge and R. V. Fletcher, Atty. Gen., for appellant. Geo. B. Neville and R. E. Wilbourne, for appellee.

WATKINS, Special Judge. One Mrs. M. F. Giles, the mother of the appellee, owned a large tract of land in Kemper county, Miss., which, at her death, descended to the appellee, who now owns the same. In the year 1887, during the lifetime of Mrs. Giles, the board of supervisors of Kemper county opened up a public road through the pasture land of Mrs. Giles. The road is said to extend about a mile through the land in question. Since the opening up of this road gates have been maintained by Mrs. Giles, and after her death by the appellee, where the public road enters this pasture. At the regular meeting of the board of supervisors of Kemper county in October, 1907, an order was passed by the board directing the clerk to issue an order to the sheriff of the county to remove the gates at once. The appellee obtained an injunction restraining the county from carrying out this order. The chancellor, at the final hearing of the cause, held that the proceedings taken by the board of supervisors of Kemper county in laying out this road through the land of Mrs. Giles were void, because the provisions of the Revised Code of 1880 in reference to laying out of public roads were not complied with, and that the rights exercised by the public over the same during the time which elapsed since the laying out of the road were commensurate with the user thereof, or, in other words, that the public only acquired the right by prescription to use the road subject to the appellee's right to maintain gates across the same, and made perpetual the injunction restraining the authorities of Kemper county from removing the gates, unless compensation was made the appellee.

An appeal was prosecuted from this decree

by the appellant. The appellee makes a motion in the court to dismiss the appeal, because the appellant had, since the rendition of the final decree in the court below and since the prosecution of this appeal, conformed in every respect to the decree of the chancellor by proceeding to lay out a public road across said land in the manner provided in the present Code, and then proceeded to have said gates removed in the manner provided by law. It affirmatively appearing from the proof in this record that this course has been taken, the court, finding that there only remains to be settled a mooted question of law, with no rights to be affected thereby, is of the opinion that the motion to dismiss the appeal should be sustained; and it is accordingly ordered.

(95 Miss. 28)

BRAME v. LIGHT, HEAT & WATER CO.
(No. 13,455.)

(Supreme Court of Mississippi. March 22, 1909.)

1. TORTS (§ 15*)—PROXIMATE CAUSE.

A tort-feasor is liable for the natural consequences that will probably result from his wrongful act.

[Ed. Note.—For other cases, see *Torts*, Cent. Dig. § 20; Dec. Dig. § 15.*]

2. WATERS AND WATER COURSES (§ 206*)—WATER COMPANIES—NEGLIGENCE.

A water company, contracting with a city to supply water, obligated itself to keep the hydrants in repair, and had the right to cut off the water flow to make repairs. It cut off the water supply for 30 minutes to repair a hydrant without notifying a patron who had installed a gas heater, highly dangerous if left burning after the water supply ceased. The patron lit the gas and turned on the water, and in consequence of the company cutting off the water supply a fire was set, causing substantial damages. The company had no knowledge of the installation of the heater. *Held*, that the failure of the company to notify the patron of the cutting off of the water supply was not actionable negligence.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 301; Dec. Dig. § 206.*]

Appeal from Circuit Court, Hinds County; W. H. Potter, Judge.

Action by Mrs. L. T. Brame against the Light, Heat & Water Company. From a judgment for defendant, plaintiff appeals. Affirmed.

L. Brame and Harris & Willing, for appellant. Green & Green, for appellee.

FLETCHER, J. Appellant was the owner of a handsome residence situated in the city of Jackson, and had installed therein in the bathroom a device known in this record as an "instantaneous gas heater." This heater was so arranged that it was comparatively safe as long as there was a continuous flow of water, but highly dangerous if left burning after the water supply

had ceased. On a certain afternoon appellant had lighted the gas and turned on the water, and then left the bathroom for a few moments. During her absence the flow of water ceased, and as a result the house was set afire and substantial damage resulted. The cessation in the flow of water was due to the fact that the water company, in order to repair a leaking hydrant, had cut off the water along the street in front of appellant's residence, and no notice of the intention so to do had been given. The flow of water was suspended for about half an hour. It was shown on the hearing that the water company had no notice of the fact that the heater had been installed in Mrs. Brame's residence. From a peremptory instruction in appellee's favor, Mrs. Brame appeals.

Several reasons are urged here in support of the action of the circuit court. It is said that the liability of the company towards its patrons must be measured by the terms and stipulations of the contract between the company and the city. This contract provides in effect that the water company shall at all times maintain a sufficient supply of water, except when suspended for necessary repairs. The contract further provides that the fire hydrants mentioned shall be kept in good order, and it is made the duty of the company to repair such hydrants forthwith, when notified that they are out of repair. It being shown in the instant case that a particular hydrant needed repairing, we are told that the contract with the city permitted, and, indeed, demanded, that the water should be cut off for a short time, since the hydrant could not otherwise be repaired. It is argued that the citizen, contracting with the company for water and joining his service pipe to the mains constructed by the company, has his rights determined by the contract with the city, and is therefore in no position to complain if there has been a temporary suspension of water service, due to the making of necessary repairs. On the other hand, it is said that this water company, under its franchise, contracts, and mode of operation, is a public service corporation, charged with certain obligations to the public, and especially its patrons, and that it must use all necessary and reasonable precautions, in conducting its business, not to so operate it as to lead to injury; that these instantaneous heaters are in common use in the city of Jackson, of which fact the company either was or should have been informed; that the company is charged with knowledge of the fact that it will lead to disastrous conflagrations if the water is cut off; that, knowing this, notice should have been given of such intention, and the failure to do so is an actionable tort. Hence it is argued

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the contract with the city is quite outside of this case.

We are not prepared to gainsay the soundness of appellant's contention on this phase of the case; but we do say that, while the contract may not contain the full measure of appellant's rights and appellee's duties, yet it may be looked to as valuable in determining whether the company has in this case been negligent. For this contract obligates the company to keep the fire hydrants in repair and permits a suspension of the water flow for this purpose. It can, therefore, not be argued that the company was negligent in cutting off the water for thirty minutes. The wrong must consist rather in failing to notify users of the particular device here involved. This narrows the compass of the inquiry to this: Was it actionable negligence to suspend the flow without notifying Mrs. Brame? Liability for tort is predicated upon the view that the tort-feasor must be held liable for the natural consequences that will probably result from his wrongful act. Keeping this elementary truism in mind, we can see the importance of the admitted fact that the water company had no knowledge that this heater had been installed in this particular residence; for, if knowledge of the existence of such a fixture was wanting, how could the company reasonably anticipate that a temporary cessation of the water flow would lead to disastrous consequences? The only possible method of avoiding this obvious obstacle to recovery is to say that it was the duty of the water company to keep abreast with the march of modern progress, and that it must be charged with knowledge of the fact that these heaters had come into general use; that, knowing that many citizens had installed these devices, it was the duty of the water company to search out these persons and notify them of the intention to shut off the water, or that some system of signaling or other manner of giving notice should have been adopted. To our mind this view imposes too high a duty upon the company. It calls for a degree of vigilance far beyond what may be characterized as ordinary or reasonable. It would charge the company with notice of every improvement which the fruitful ingenuity of an inventive age might devise, provided it depended in any degree upon the flow of water. To hold the company liable in this case, we must conclude that the company might reasonably have anticipated, first, that Mrs. Brame had one of these instantaneous heaters; second, that she would undertake its operation during the particular half hour that the water was shut off; third, that it would be left unguarded while in operation; and, fourth, that the cessation in the flow would cause a fire. We think the chain of causa-

tion is too lengthy here to connect the loss with the failure to give notice.

We cannot see the relevancy of the cases cited by appellant. Reliance is had upon the case of *Coy v. Indianapolis Gas Company*, 146 Ind. 655, 46 N. E. 17, 36 L. R. A. 535. This case is authority for the proposition that a failure to supply gas is a tort; but it deals with the primary duty of the public service corporation not to breach its contract to supply in a reasonable manner its patrons with fuel, known to be for heating purposes. But here the damage resulted, not proximately through the failure of the company to supply water, but because of the interposition of an unfamiliar mechanism, the existence of which was unknown to the company. The case of *Guardian, etc., Trust Company v. Fisher*, 200 U. S. 57, 26 Sup. Ct. 186, 50 L. Ed. 367, does no more than to decide that, if damages are recoverable for a failure of a water company to supply water, such damages are properly recovered in an action of tort. The somewhat familiar greenhouse cases referred to have their origin in special contracts to furnish a supply of water for particular purposes, well known to the water company. We are without direct precedent to guide us; but, applying familiar and general principles to the facts before us, we are constrained to uphold the action of the lower court.

We have not thought it necessary to discuss the question of contributory negligence, based either upon the failure of the appellant to watch the heater or upon the alleged defective construction of the vent pipe.

Affirmed.

(34 Miss. 653)

CITY OF BILOXI et al. v. BILOXI REAL ESTATE CO. et al. (No. 13,867.)

(Supreme Court of Mississippi. March 22, 1909.)

TAXATION (§ 449*)—EQUALIZATION—BOARD—TIME OF MEETING.

Code 1906, § 4291, requires the assessor to complete and deliver the tax roll to the clerk of the board of supervisors on or before the first Monday in July of each year; section 4294 requires the board of supervisors at its July meeting to examine and determine whether the assessment is to be approved; and section 3422 declares that the mayor and board of aldermen of a city, town, or village may, at a regular or special meeting, to be held in September or October of each year, increase or diminish the value of property assessed for taxation. *Held*, that the mayor and aldermen had no power to equalize assessments after the expiration of the month of October, though the meetings held in the succeeding month were adjournments of a meeting begun on October 31st.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 449.*]

Fletcher, J., dissenting.

Appeal from Chancery Court, Harrison County; T. A. Wood, Chancellor.

Suit by the Biloxi Real Estate Company and others against the City of Biloxi and others. Judgment for complainants, and defendants appeal. Affirmed and remanded.

This is a bill for injunction seeking to restrain the city of Biloxi and its officials from collecting a tax levied by the municipal authorities upon the property within the city limits; it being alleged that said tax levy is in violation of law, because the mayor and board of aldermen met on October 31, 1908, for the purpose of raising and lowering the values of the taxable property in the city, and continued their sessions during the month of November, which is alleged to be in violation of section 3422 of the Code of 1906, which is as follows: "The mayor and board of aldermen of a city, town, or village may, at a regular or special meeting, to be held in September or October in each year, increase or diminish the valuation of property as assessed for taxation. Ten days' notice of the meeting at which such changes are to be made shall be given by posting written notices thereof in five or more public places in the municipality, and in cities the notice shall also be published in a newspaper, if there be one published therein. Any person aggrieved by the action of the mayor and board of aldermen may appeal therefrom to the circuit court as in other cases of appeal, and the same shall be tried de novo in the circuit court."

L. H. Doty and W. F. Elmer, Jr., for appellants. Dodds, Leathers & Goldman, for appellees.

MAYES, J. If the injunction in this case is maintainable, it must be on the sole ground that the mayor and board of aldermen had no power, under section 3422 of the Code of 1906, to increase or diminish the valuation of any property assessed for taxation after October, the time limit fixed by the Legislature for such action. We have examined, very carefully, all the other contentions of counsel for appellees on the questions urged, and it is our judgment that there is no merit in any of them, since the facts alleged, if true, as to all other matters not indicated above, are mere irregularities, and not subject to impeachment by any collateral proceeding.

If section 3422 of the Code of 1906 limited the mayor and board of aldermen in the time within which they should meet for the purpose of increasing or diminishing the valuation of property assessed for taxation to a regular or special meeting to be held in September or October and no other time, then any meeting held for this purpose, even though it be an adjourned meeting beginning on the 31st day of October, which extended the sitting time fixed by the statute for this purpose, is utterly void as to anything done by them after that date. In order to determine this, we cannot look alone to the chap-

ter on municipalities, but must also consider the general revenue laws of the state. Indeed, by section 3423 of the Code of 1906 it is required that the tax collector of the municipality shall collect municipal taxes during the time, and in the same manner, and under the same penalties as the state and county taxes are collected, and shall in all particulars, in so far as not otherwise provided, be governed by the general revenue laws of the state. The whole scheme of the revenue laws clearly contemplates that the tax rolls shall be made up and ready for collection about November of each year, and the process of preparation is not to be indefinitely protracted. By section 4291 of the Code of 1906 it is made the duty of the assessor to complete and deliver the rolls to the clerk of the board of supervisors on or before the first Monday in July in each year. By section 4294 it is made the duty of the board of supervisors at its July meeting to examine and determine whether or not the assessment is to be approved. By section 4314 of the Code of 1906 it is made the duty of every person assessed to pay his taxes on or before the 15th day of December.

We merely cite these sections of the Code for the purpose of showing that it was plainly the purpose of the Legislature to limit the time in which there shall be a preparation of the rolls for the purpose of taxation, since it is necessary, before the time arrives for the payment of taxes, that all rolls should be complete and in the hands of the tax collector. In the case of *Tierney v. Brown*, 67 Miss. 109, 6 South. 737, where the board of supervisors approved an assessment roll three days after the time limit allowed by law under section 1353 of the Revised Code of 1871, which only allowed the supervisors to remain in session four days, and no longer, it was held that such action was void and could not support a tax sale of lands made under it. In the case of *New Jersey Zinc Company v. Sussex County Board of Equalization*, 70 N. J. Law, 186, 56 Atl. 138, it was held that, where the board of equalization was limited in the time for the completion of its work to the last day of September, the board could not act upon assessments on October 1st, and that, if it did, such an action was a nullity. To the same effect are the cases of *Auditor General v. Sessions*, 100 Mich. 343, 58 N. W. 1014; *Auditor General v. Chandler*, 108 Mich. 569, 66 N. W. 482; *Wiley v. Flournoy et al.*, 30 Ark. 609; *Sioux City & Pac. Ry. v. Washington County*, 3 Neb. 30; *State v. Cent. Pac. Ry. Co.*, 21 Nev. 270, 30 Pac. 693. In the case of *Matador Land & Cattle Co. v. Custer County*, 28 Mont. 286, 72 Pac. 662, it is held that, the life of a board of equalization being fixed by the Legislature, they can hold for no longer time than that prescribed.

The Legislature of the state never contemplated that the mayor and board of aldermen would undertake to extend the time ap-

lowed them by law for increasing or diminishing valuations by undertaking to fix their first meeting on the last day in the month, and then protract the session beyond the time by adjourned meetings. That cannot be done without defeat of the legislative purpose. We only decide in this case that the action of the mayor and board of aldermen, under section 3422, after October, was a nullity; but we do not hold that the assessment as returned by the special assessor appointed for this purpose was not valid in so far as this proceeding is concerned, and furnishes a true roll as a basis for the collection of taxes.

The case is affirmed and remanded.

FLETCHER, J. (dissenting). I am driven to dissent. I cannot bring myself to agree that section 3433 is so peremptory in its meaning that the additions and corrections to an assessment roll made at a meeting begun in October but extending beyond that month are absolutely void. No case has been called to my attention which so holds either directly or by fair inference. The cases cited in the majority opinion deal with statutes which in effect prohibit the continuance of the session beyond a named date. But the statute here requires no more than that the meeting shall be held in September or October. The meeting was in fact held in October, but it being impossible to complete the business at the initial session, the sitting was protracted into the month of November. This at most was in my judgment no more than an irregularity of which advantage must be taken, if at all by appeal. Hereafter municipal boards must see to it that in spite of unavoidable accidents, impossible to foresee, their meetings must be concluded before the first of November. I can find no warrant in the statute for such a rigid holding.

(34 Miss. 587)

BANK OF MEADVILLE et al. v. HARDY.
(No. 13,359.)

(Supreme Court of Mississippi. March 22, 1909.)

1. RECEIVERS (§ 5*)—APPOINTMENT—PENDING CAUSE.

Since there must be a cause pending in court before a receiver can be appointed, an appointment in advance of filing the bill is void. [Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 5; Dec. Dig. § 5.*]

2. RECEIVERS (§ 54*)—APPOINTMENT—JUDICIAL RECORD—CONTRADICTION BY PAROL.

Where an order appointing a receiver showed on its face that the appointment was not made until after the bill had been filed, and that the order was not signed until the day after the filing of the bill, such order, on being filed and entered, became a judicial record importing absolute verity, which could not be impeached, either by parol, by a statement of the chancellor, or otherwise, except for fraud.

[Ed. Note.—For other cases, see *Receivers*, Dec. Dig. § 54.*]

Appeal from Chancery Court, Franklin County; J. S. Hicks, Chancellor.

"To be officially reported."

Suit by Mrs. Norma M. Hardy against the Bank of Meadville and others. From a decree appointing a receiver and overruling a motion to vacate the receivership, defendants appeal. Affirmed.

Stone Deavours and Bennett & Torrey, for appellants. H. Cassidy, for appellee.

FLETCHER, J. On or about February 15, 1908, the Bank of Meadville found itself in a failing condition, due partly to the general financial condition of the country and partly to mismanagement on the part of the cashier. Indeed, it is contended by appellants that the cashier was guilty of criminal peculations. However that may be, at a stockholders' meeting held on February 15th it was determined, among other things, that the bank should make a general assignment, since it was deemed impossible that it could be continued as a going concern. Thereupon Mrs. Norma M. Hardy, who owned certain shares of stock, prepared a bill, alleging that she was a stockholder; that at the stockholders' meeting held on February 15th 50 shares of stock, owned as it was claimed by a rival bank in violation of law, were voted; that the president of the bank had been permitted to withdraw certain collateral, to the injury of general creditors and stockholders; and that a scheme had been devised to reorganize the bank in such a way as to destroy the value of complainant's stock holdings. There were other allegations not now necessary to set out fully. The prayer of the bill was for a receiver, for an injunction against the reorganization scheme, for a cancellation of the stock alleged to be held illegally by the rival bank, for the return of the collaterals alleged to have been improperly withdrawn by the president, and for general relief. This bill was filed at 11:15 o'clock p. m. on February 16th. At 6 o'clock on the morning of February 17th there was filed in the office of the chancery clerk of Franklin county an order, signed by the chancellor, reciting that the foregoing bill of complaint had been presented to him, that it appeared to the court that said bill had already been filed and that the cause made thereby was a pending one, and that an emergency existed which justified the appointment of a receiver without notice. The order appointed a receiver and approved the bond. This order appointing a receiver was dated February 17th. Upon the filing of the decree, the receiver took charge of the assets and property of the bank, and has, for more than a year, been engaged in the discharge of the duties of his office. The defendants to the bill answered, and filed an applica-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion to vacate the receivership. From an order overruling the motion to vacate the receivership, the bank of Meadville and its codefendants prosecute this appeal.

Upon the hearing of this application the chancellor made the following statement: "On the 16th day of February, 1908, Judge Jeff Truly, an attorney, presented to him (the chancellor) the bill of complaint, then unsworn to, and the chancellor and Judge Truly discussed the bill of complaint, as to whether upon its face it was sufficient in its allegations to justify the court in appointing a receiver without notice, and the chancellor expressed himself that it was sufficient, but that he would not appoint a receiver until a bill should be filed. This conference was held about 12 o'clock on Sunday, February 16th. Afterwards Judge Truly and Judge Deavours met the chancellor, about 7 o'clock p. m., and stated that the bill of complaint had been sent to Meadville to be filed, and presented a draft of the decree, and the bond of the receiver to be appointed, and the bond of the complainant. The chancellor at that time, at 7 o'clock p. m. on the 16th day of February, signed the decree, with the direction that it was not to be filed until after the bill had been filed in the clerk's office in Meadville. It was suggested that the chancellor keep the draft of the decree, and that, when word had been received that the bill of complaint had been filed, the chancellor would then sign the decree, but the chancellor stated that he did not desire to be awakened late at night, and so signed the decree then at 7 o'clock p. m., the 16th, and delivered it to Judge Truly, an attorney and officer of the court, to be filed after the filing of the bill of complaint, which directions were complied with, as shown by the record."

It is insisted that the appointment of a receiver was void, since it appears from the above statement of the chancellor that the order appointing the receiver was in fact signed before the bill was filed and before any cause was in fact pending. Therefore appellants invoke the authority of *Hardy v. McClellan*, 53 Miss. 511, *Barber v. Manier*, 71 Miss. 728, 15 South. 890, and *Smith v. Valley Dry Goods Co.*, 79 Miss. 276, 30 South. 653. These cases unquestionably hold, what is universally accepted as the law, that there must be a case pending in court before a receiver is appointed, and that an appointment in advance of the filing of the bill is void. The point before us must be considered in the light of the recitals of the order appointing the receiver. Upon its face it shows that the receiver was not appointed until after the bill had been filed, and that in fact there was a cause pending when the appointment was made. It further appears from the order that it was signed on the day after the bill was filed. This order, being duly filed and entered, becomes a judicial record in the cause, which

is now sought to be contradicted and overthrown by parol. In this view of the matter, we are face to face with the familiar principle that a judicial record imports absolute verity, and cannot be impeached or contradicted, except for fraud. As a matter of fact, there is no suggestion of fraud in the case under consideration, and no hint thereof in the application to vacate the receivership. So that we have the case of a decree regular on its face, and, if taken as true, rendered in a pending cause after suit filed, upon which no attack is made, except as shown by the statement of the chancellor contradicting its recitals. We are of the opinion that the validity of the decree cannot be attacked in this manner, and that we cannot look to the statement of the chancellor in determining the question of jurisdiction or the validity of the order. It was held in *Jones, Receiver, v. Williams*, 62 Miss. 183, that the minutes of the circuit court, when signed by the judge, could not be contradicted as to the real date of the adjournment of the court by the affidavit of the judge himself and members of the bar as to when the court did in truth adjourn. It is there said: "Judicial records, required by law to be kept, are said to import unerring verity, and to be conclusive evidence against all the world as to their existence, date, and legal consequences." So in *Childress v. Carley et al.*, 46 South. 164, it was held that no evidence would be received or considered tending to show that a judgment entry was in fact not made until after the minutes had been signed and the court had adjourned. This case goes fully into the question, and reaffirms with approval the doctrine of *Jones v. Williams*, *supra*.

The case under consideration falls squarely within the principles of these two cases. The statement of the chancellor is directed specifically to the point that, while the decree appointing the receiver bears date of February 17th, it was in fact made on the 16th. We have seen that under the authorities cited, in the absence of any fraud, we must look to the record, and to the record alone, for proof of the true date of its execution. The distinction must be kept in mind between an effort to show the error in the court's finding of facts as expressed in the decree and the effort to prove that a decree bearing one date was in fact executed on another date. It may be plausibly, and perhaps correctly, argued that parol evidence, or record evidence other than the decree itself, may be received to show that the decree or order erroneously recites that the bill has been filed and that the cause was pending. But, given the right to so contradict the decree, there still remains the impossibility of contradicting the recorded decree as to the date of its rendition. And when we accept as final and indisputable the recital to the effect that the decree was

entered on February 17th, coupled with the record proof that the bill was filed on the 16th, we must conclusively presume that the receiver was appointed in a pending cause, and that the appointment was not unauthorized.

We attach no importance to the fact that the chancellor, on the hearing of the application to vacate the receivership, made the statement above set out without objection from either litigant. We are not here concerned so much with questions of procedure and practice as we are with the fundamental postulate that the absolute verity which a judicial record imports cannot be in any wise assailed, except by a showing as to fraud. This court must look to the evidence now before it, and, as we have seen, it is bound by the face of the record, and must disregard wholly the statement of the chancellor, regardless of the circumstances under which it was made. The unimpeachable verity of the decree controls the action of this court, precisely as it must have controlled the action of the court below. We conclude, therefore, that there is no merit in the contention that the receivership should have been vacated on account of the statement of the chancellor as to the manner and time of the receiver's appointment.

It is earnestly insisted that the case should be reversed on its merits; that is to say, that the case made by the bill and answer did not warrant the retention of the receiver. We observe, in response to this contention, that the appointment and retention of a receiver rest largely within the discretion of the chancellor. The allegations of the bill and the admissions of the answer convince us that the bank was in a failing condition, and that both parties to the controversy were desirous of having its affairs administered by the chancery court. The only difference was as to method; the one faction contending for an assignee, and the other for a receiver. The result is practically the same, since both can act only under the specific direction of the court. This being the conceded status of the matter, we cannot see how appellants' rights can possibly suffer by the retention of a receiver, or what just cause can exist for displacing him. We must decline, in this state of the case, to interfere with the exercise of the chancellor's discretion.

Affirmed.

WHITFIELD, C. J. (specially concurring). I concur in the result reached in this case, and in the opinion in all respects save one, and that is this: I do not think that the case of *Childress v. Carley et al.*, 46 South. 164, has any application whatever to the facts of this case, and I adhere fully to my dissenting opinion in that case as the sound view of the law, on the facts of that case.

In this case now before us, the chancellor did read the application for a receiver, and did sign it, and did sign the minutes of the court in reference to it. In other words, the chancellor read the order after it was drawn up, and the minutes of the court relating thereto, and signed both; and the effort here is to contradict a record concededly made by the chancellor himself. In the *Childress-Carley Case* the circuit judge never saw the pretended minutes, never had them drawn up, never read them and never signed them. The effort in that case was not to contradict a record, but to show that the pretended record never had any existence. The effort here, in this case, is to contradict, by parol testimony, the recitations in an admitted record. This case, in my judgment, is controlled, on this point, by the case of *Jones v. Williams*, 62 Miss. 183.

(95 Miss. 358)

DAVENPORT et al. v. COLLINS et al.

(No. 13,661.)†

(Supreme Court of Mississippi. March 22, 1909.)

1. WILLS (§ 607*)—CONSTRUCTION—NATURE OF ESTATES—LIFE ESTATES—STATUTORY PROVISIONS.

Testator left all of his estate, with some specific exceptions, to be equally divided among his wife and three children, "to be theirs and each of theirs during their natural life, and to the children and heirs of their bodies, if any they have at the time of their death; if not, the same shall revert to my estate in gross and be again divided between my said wife and children, or such of them as shall survive, and to their heirs, share and share alike, they to take a life estate in the same only; and all the children of my deceased children, if any, to take only such share as their deceased parent would have taken; but, should any of my said children die without issue before such division, such division to be made among the survivors of my said children and my said wife." In another clause testator expressed a wish that his wife remain in possession of the home plantation, and have the use of the household furniture and stock, during her natural life, and that at her death "the same shall be divided as hereinbefore provided, in regard to other property, equally among my children." Hutch. Code, c. 42, art. 1, p. 609, § 24, provides that every estate which shall hereafter be created in fee tail shall be an estate in fee simple. *Held* that, on the happening of the contingency mentioned in the will, life estates would be created in testator's grandchildren who were not in being at the time of the execution of the will, and that under the statute testator's children were invested with the fee-simple title to the property devised to them.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1369; Dec. Dig. § 607.*]

2. WILLS (§ 508*)—CONSTRUCTION—"HEIRS"—"BODILY HEIRS."

In a will, by which testator left his property to his wife and three children in equal proportions during their natural life, "and to the children and the heirs of their bodies" at the time of their death, and providing that, if they have no children or heirs of their bodies, it

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Suggestion of error filed.

shall revert to testator's estate and be again divided between his wife and children, "or such of them as shall survive, and to their heirs, share and share alike, * * * and all the children of my deceased children," the words "heirs" and "bodily heirs" mean children.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1093; Dec. Dig. § 506.*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 817, 818; vol. 4, pp. 3241-3264; vol. 8, pp. 7591-7677, 7678.]

Appeal from Chancery Court, Jefferson County; J. T. Drake, Special Chancellor.

Action by W. L. Davenport and others against Markel M. Collins and others. Judgment for plaintiffs, and defendants appeal. Reversed and dismissed.

Mayes & Longstreet and Torrey & Logan, for appellants. W. C. Martin, for appellees.

FLETCHER, J. One Washington S. Burch, a citizen of Jefferson county and a gentleman of large means, made a will in 1843, undertaking to dispose of a large amount of landed property. This controversy involves the proper construction of the third and fifth clauses of the will.

The third clause is as follows: "It is my will and desire that all of my estate, both real and personal (except such as is particularly excepted, and otherwise disposed of in this will), be equally divided between my beloved wife, Adaline Burch, and my three children, to wit, Isaac W. Burch, Eliza Jane Burch, and Nancy Burch, share and share alike, and I do give and bequeath to them the same in equal proportions as aforesaid, to be theirs and each of theirs during their natural life, and to the children and heirs of their bodies, if any they have at the time of their death; if not, the same shall revert to my estate in gross and be again divided between my said wife and children, or such of them as shall survive, and to their heirs, share and share alike, they to take a life estate in the same only; and all the children of my deceased children (if any) to take only such share as their deceased parent would have taken; but, should any of my said children die without issue before such division, such division to be made among the survivors of my said children and my said wife."

The fifth clause is as follows: "It is my wish that my wife remain in possession of the plantation on which I now live, and that she have the use of the household and kitchen furniture and stock, for and during her natural life, and that neither shall be divided among the heirs without her express assent until after her death, when the same shall be divided as hereinbefore provided in regard to other property, equally among my children."

By another provision of the will the wife was given the right to withdraw her share of the estate at any time she might desire.

Mr. Burch, at the time of the execution of the will, had only the three children, mentioned in clause 3 of the will, and all of these children in 1843 were unmarried infants. By the sixth clause of the will any one of the children, upon attaining his majority, could have his share set aside to him.

The property in controversy is the home mentioned in the fifth clause. After the death of Mr. Burch, the widow remarried and withdrew her share, and at a later time, by appropriate proceedings, the home place was set aside to Eliza Jane Miller (née Burch). Mrs. Miller died in 1907, and her children, contending that their mother had only a life estate, with remainder to themselves, brought this suit against the persons now in possession, who are the successors in title to the vendees of the children of Washington S. Burch, who in 1856 had all joined in a deed to one Davenport, purporting to convey the fee-simple title. From a decree in favor of complainants, this appeal is prosecuted.

It will thus be seen that the question here for decision is whether the children of Burch, under the will, took the fee-simple title, or whether they took as life tenants, with remainder to their children. If the first be the correct view, that title has by the deed of 1856 passed to appellants, and they must prevail. If the second view be correct, then the grantees in the deed of 1856 took only the interest of Mrs. Miller, which was an estate terminable at her death, and appellees must win. It is here earnestly insisted on behalf of appellants that the fifth clause of the will is independent of the third clause, and that by the provisions of the fifth clause, standing by itself, the home place is to be divided among the children, without regard to the limitation for which the third clause provides. But we are unable to resist the conclusion that the phrase "as hereinbefore provided" refers this property back to the controlling provisions of the third clause, subject to all its restrictions and limitations. We do not elaborate this view, since, as we think, appellants must prevail upon another and distinct view.

We come to consider the meaning of the third clause. It is, of course, perfectly obvious that the testator by this clause created life estates in his wife and children, with remainder to their children; and, if this were the only provision, of course, appellees would now be entitled to the property, the life tenancy having terminated. But the will further provides that, in case any of the children shall die without "children and heirs of their bodies," then the share of such deceased child shall revert to the estate in gross, to be again divided "between my said wife and children, or such of them as shall survive, and to their heirs, share and share

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

alike, they to take a life estate in the same only; and all the children of my deceased children, if any, to take only such share as their deceased parent would have taken." It will thus be seen that, if the language of the will is to be construed according to its ordinary grammatical meaning, any property subject to a second division would be divided, not only among the survivors of that class designated as "wife and children," but also among the children of any deceased child, such grandchildren of the testator to take as life tenants, with remainder to the bodily heirs of such grandchildren, if any there be. Looking only to the language of this clause, we can see no reason why the word "they," in the phrase "they to take a life estate in the same only," does not refer to the heirs of the "survivors," as well as to the survivors themselves.

But it is said, and correctly said, that the will must be taken by the four corners, and rigidly examined as to all its provisions, in order that the intent of the testator may be thereby discovered, and, if such general intent appear, then the particular language of the third clause will be wrested from its plain, ordinary, and grammatical meaning, in order that the intent of the testator may prevail. We recognize the soundness of this rule of construction, and have searched this will in its every line and expression for evidence of any intent to have the creation of life estates stop with the wife and children. There is no such expressed or implied intention, as we view it. Indeed, there are, here and there, scattered throughout the will, indications that the testator meant to do precisely what the language of the third clause obviously imports. Thus the eighth clause, dealing primarily, it is true, with personal estate, is a clear effort to restrain alienation. So that we are without evidence of any intention on the testator's part at variance with the language of the third clause, taken in its usual sense. It may be said that it is a canon of construction that the will should, if possible, be so construed as to give effect to each of its provisions. This is true, but none the less is it the duty of the court to defeat a provision of the instrument which is forbidden by law, especially when it fairly appears that the testator intended to incorporate that precise feature in his will. We are clearly of the opinion that the intention of the testator, as gathered from the language of the will, was to provide for a contingency upon the happening of which life estates would be created in the testator's grandchildren, who were not in being at the time of the execution of the will. We remark here that it is evident that the words "heirs" and "bodily heirs," as here employed, are used in the sense of children. *Banking Co. v. Field*, 84 Miss. 646. 37 South. 139.

This conclusion reached as to the meaning of the testator's language, the case is ended; for it was the law in 1843 that: "Every estate in lands or slaves, which now is or shall hereafter be created an estate in fee tail, shall be an estate in fee simple; and the same shall be discharged of the conditions annexed thereto by the common law, restraining alienations before the donee shall have issue, so that the donee, or person in whom the conditional fee is vested or shall vest, shall have the same power over said estates, as if they were pure and absolute fees: Provided, that any person may make a conveyance or devise of lands to a succession of donees then living, and the heir or heirs of the body of the remainderman, and in default thereof to the right heirs of the donor in fee simple." *Hutch. Code*, c. 42, art. 1, p. 609, § 24. It will readily be seen that the will under consideration, as above construed, violates this statute, since it provides for the creation of life tenancies in donees not living when the will was executed. Indeed, it is not disputed that the will, if construed according to our view, violates the statute against perpetuities, and that the attempt to create life estates was futile. Since the children were invested with the fee-simple title, that title passed to appellees and their predecessors in title by the conveyance of 1856, and appellants have no claim to the property.

Reversed, and bill dismissed.

(95 Miss. 528)

MISSISSIPPI COTTON OIL CO. v. SMITH
et al. (No. 13,450.)

(Supreme Court of Mississippi. March 15,
1909.)

1. DEATH (§ 86*)—DAMAGES—ELEMENTS.

In an action for the negligent killing of plaintiffs' minor son and brother, the present value of his life expectancy was a recoverable element on being specifically claimed.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. § 113; Dec. Dig. § 86.*]

2. APPEAL AND ERROR (§ 197*)—WAIVER OF ERROR.

On appeal, defendant, in an action for negligent death, cannot complain of the admission of mortuary tables because the pleadings did not show the value of decedent's life expectancy, where objection was not made on that ground below, and defendant obtained an instruction that plaintiff could recover all damages shown to have been caused by the death.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 197; * *Pleading*, Cent. Dig. §§ 1428-1441.]

3. DEATH (§ 65*)—DAMAGES—EVIDENCE.

In an action for negligent death, it was improper to admit mortuary tables, where decedent was an asthmatic and asthmatics were not embraced by such tables.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. § 84; Dec. Dig. § 65.*]

4. DEATH (§ 95*)—DEATH OF CHILD—DAMAGES TO PARENT.

A mother, suing for the negligent death of her minor son, could not recover the value of

his prospective earnings before his arrival at majority, in the absence of proof as to her age, health, constitution, etc.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 109; Dec. Dig. § 95.*]

5. DEATH (§ 58*)—NEGLIGENT DEATH—ACTIONS—PROOF REQUIRED.

One suing for negligent death must not only show an injury, but how it occurred, and that it was due to defendant's negligence.

[Ed. Note.—For other cases, see Death, Dec. Dig. § 58.*]

6. MASTER AND SERVANT (§ 286*)—DEATH OF EMPLOYÉ—NEGLIGENCE—JURY QUESTION.

In an action for the death of a minor employé, held, under the evidence, a jury question whether defendant was negligent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1008, 1010-1050; Dec. Dig. § 286.*]

7. MASTER AND SERVANT (§ 293*)—MINOR EMPLOYÉ—ACTION FOR DEATH—INSTRUCTIONS.

In an action for the death of a minor employé, it was improper to instruct that an employer must see that an employé comprehends instructions given, where decedent was 15 years old and of average intelligence, and there was no showing that he did not fully comprehend all instructions given.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1160; Dec. Dig. § 293.*]

8. APPEAL AND ERROR (§ 197*)—OBJECTIONS—VARIANCE.

The variance between an allegation that injury occurred in one room of a mill and proof that it occurred in another room was immaterial, where it does not appear that defendant was prejudiced thereby, and the evidence was not specifically objected to.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 197.*]

Appeal from Circuit Court, Lauderdale County; R. F. Cochran, Judge.

"To be officially reported."

Action by Mrs. S. J. Smith and others against the Mississippi Cotton Oil Company. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

Green & Green, for appellant. G. Q. Hall, Hall & Jacobson, for appellees.

WHITFIELD, C. J. This is an action brought by the plaintiffs, Mrs. S. J. Smith and mother, and her four children, minors, for damages resulting from the killing of Willie Mack Smith, the son of the mother, Mrs. S. J. Smith, by the appellant. The decedent was caught and crushed in the machinery of the said appellant, and died some 24 hours later, after enduring manifestly very great physical and mental agony. There was a judgment in the court below for \$10,000 damages, from which this appeal was prosecuted.

Going at once to the vital points in the case, we first take up the alleged error in the admission of the mortuary tables. It will be necessary to deal with this assignment of error in two aspects: First, as regards the pleadings; and, second, as regards the evidence.

First, then, as to the pleadings, the declaration has six counts. Each of these counts closes with specifically enumerated elements of damage, all of which are practically alike, being substantially as follows: "For which pain, suffering, and anguish, mental and physical, and the loss to plaintiffs of his services, support, society, and protection, and the expenses of his last illness and burial," etc., the said plaintiffs sued. It is manifest that there is no specific express claim, therefore, in the declaration, for the recovery of damages, for the present value of the life expectancy of the deceased. This was a perfectly proper element to have been specifically claimed in the declaration. *Telephone Co. v. Anderson*, 89 Miss. 743, 41 South. 263. It may be correct to say that if the declaration had not specifically enumerated the elements of damage, but had simply declared for damages generally in a certain amount, the plaintiffs could have recovered all the damages named in section 721, Code of 1906; that is to say, all damages of every kind to the decedent, and all damages of every kind to any and all parties interested in the suit. We think that is a correct proposition. Whether, when the plaintiffs choose specifically to enumerate the elements of damage in this suit, they are to be limited to those elements only, as a matter of pleading alone, it is not in this case necessary to decide; for in this case the defendant made no objection to the testimony of Cameron, or to the introduction of the mortuary tables, based upon the ground that the declaration had not claimed this element of damages, the present value of the deceased's life expectancy, but, on the contrary, actually asked and obtained an instruction (No. 9), telling the jury they might award, if they found for the plaintiffs, such damages—that is to say, all such damages "as were shown to have been caused by the death of said Smith"—which charge is broad enough to cover this very element of damages. In view of this course on the part of defendant, in respect to testimony and its said charge, it cannot be held in this case that on the pleading alone the plaintiffs could not claim to recover this element of damages. On the pleadings, therefore, the objection is untenable in the case made by this record.

Turning, now, to the aspect of this assignment of error as regards the testimony, it is to be observed that the court admitted the mortuary tables in evidence, although the testimony clearly showed the decedent to be an asthmatic, and Cameron, the plaintiff's witness, expressly testified that, being an asthmatic, he was not in the class embraced by the mortuary tables. It was expressly held in the case of *Railroad v. White*, 82 Miss. 471, 34 South. 331, that these mort-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

uary tables only show the probable age which a sound and healthy person belonging to the class may expect to reach whose age is given, and that it would be error to permit the introduction of mortuary tables to show the life expectancy of one not within the class of persons for whom such tables are prepared. The same doctrine is laid down in *Telephone Company v. Anderson*, 89 Miss. 745, 41 South. 263, and *Railroad v. Crudup*, 63 Miss. 303, and is well settled. It was, therefore, manifest error to allow the introduction of the mortuary tables.

Another manifest error was committed in allowing the plaintiffs to recover the supposed value of the services or earnings of the decedent for the six years between the time of his death, when he was in his fifteenth year, and majority, so far as his mother was concerned, for the reason that there is not a particle of proof in the record about the age of the mother, or her health or constitution, or anything affecting the probable length of her life. Nor is there any evidence on these subjects as regards the minors, save only as to their ages. It was held in the *Crudup Case*, *supra*, that it is the expectancy of the one who would die soonest which must control, as, for example, here, between the mother and the son, so far as her right to recovery for his services is concerned. There could not, therefore, on the testimony in this record, under the authority of the three cases cited, the *Crudup Case*, the *White Case*, and the *Anderson Case*, *supra*, be any recovery for the earnings for these six years, as to the mother at least. To charge the jury, therefore, that she might recover for this element of damage, in the absence of any proof as to her age and health, constitution, etc., was manifestly error. And, under the authority of the cases to which we have just referred, these two errors we have thus far dealt with are reversible errors. It is impossible to say, with the mortuary tables in, and an expectancy on the part of the deceased of 45 years of life to come, how much of the \$10,000 the jury allowed for such expectancy thus erroneously proven; and it is also impossible to say how much the jury meant to award to the mother for the value of the earnings of her son for the said six years.

We turn, now, to the only other inquiry, vital in the case, which we think we ought to notice on the present appeal. It is very earnestly argued that a peremptory instruction should have been given for the defendant. We cannot concur in this view, after a most careful and scrutinizing examination of the testimony. The fair deduction from all testimony makes out this case: That this decedent was in his fifteenth year when killed; that he was employed by Emerson under the specific contract that he should pick up the grabbotts, and sweep and dust out the room where he was to stay in the

mill, and sack up hulls; that he did not actually do this work alone, but, in addition to this, was put in exclusive charge of the room in which he was killed, in which there was extensive machinery of the most complicated and dangerous character, and was directed by Emerson, as well as by Cotton, to apply to the belting a certain paste, the chief object of which was to keep the bands from sliding off the pulleys; that this he was required to do several times during the day; that it was a very dangerous thing to do this in the way in which alone he could do it, by ascending a little stairway to a platform, 26x14 inches, climbing, as one of the witnesses expresses it, "like a squirrel would" up there; that he was never instructed by Emerson, who employed him, and had the right to employ him, as to the danger of applying this paste to the belting; that he was actually killed whilst engaged in the application of this paste to the belting, in this way, to wit: That he went up on this stairway to this little platform, 26x14 inches, first applied the paste to the belting, and then swept up and dusted up, and then started to go down the stairs, but, observing the little belt was still working off, again stopped to apply the paste to the little belt, and whilst he was engaged in applying the paste to this little belt the second time he either slipped or fell over towards the cogwheels and was caught in the machinery and killed. This is the substantial case made out by competent evidence, as it went to the jury. We have said the fair inference is that Emerson directed him, on one occasion, to apply this belt paste. This is based upon the testimony of the young brother of the decedent, and we think the jury were warranted in deducing that inference; but, besides this, in *Ike Gandy's* testimony, it is stated as follows, at page 85 of the record: "They [that is, Cotton and Emerson] told him about those wheels up above the machinery there, to keep them greased." It was, therefore, a fair inference from the testimony, if the jury believed it, that Emerson did tell this boy to apply this paste. It may be scant testimony. It is in direct conflict with Emerson's testimony; but all that was committed to the jury for their decision.

It is most earnestly and forcibly argued, under the authority of many cases set out in the very learned brief of the counsel for the appellant, that it is the duty of the plaintiff, not only to prove an injury, but to show by the testimony how the injury occurred, and in so doing to show that it was due to negligence of the defendant. This is undoubted law; but we think that the testimony in this case, which we have just above set out, does tend sufficiently to show, if the jury accepted it as true, just how the decedent came to his death—that it was by reason of negligence of the defendant in placing this young and inexperienced boy, who knew

nothing about machinery, in exclusive charge of all this complicated machinery, directing him to apply this belt paste just when and where he did, and all this without proper instruction as to how it should be applied and the danger attending its application. Counsel for appellant pressed too far certain parts of the testimony of Ike Gandy. It is true that Ike Gandy testified, in answer to questions on cross-examination (pages 94 and 95 of the record), as follows: "Q. You saw him. He was putting dressing on. You say he was through that? A. Yes, sir. Q. And when he got through he turned around and started to go down, he slipped and fell, and he put his arm around the post when he slipped and fell, and when he did that the cog-wheels caught hold of the sleeve of the jumper? A. Yes, sir." But all this he makes much clearer in his previous testimony (at pages 90 and 91), where he testifies as follows: "Q. He went up there to dress that belt? A. Yes, sir; he was sweeping around up there after he got through dressing, after he got through sweeping, and he was fixing to come down, and he was dressing the belt as he come down * * * Q. He was up there dusting around, and, after he got through brushing the things up, then he put this little belt dressing on? A. Yes, sir; because that little thing kept coming off." In other words, the fair inference from his testimony is that he was in the act of applying this dressing when he fell over and was caught and crushed in this machinery. It is not, therefore, to be assumed from the testimony that, after he had completed the dressing and had turned to come down, he slipped and fell whilst merely coming down, and so the injury might have been called an accident. Whether this was so—that is to say, whether it was an accident—was a fact for the jury to determine; and the learned counsel for the defendant recognized this in the court below, by asking and obtaining charge No. 2, which is in the following words: "The court charges the jury, for the defendant, that if they believe from the testimony that Willie Mack Smith had ascended the stairway and greased the belt, and turned after greasing said belt, and his foot slipped and he fell down the steps, catching his arms around a post, and that in this attitude his arm was caught in the machinery and bruised or mashed, and that he was otherwise injured, and, from such injuries died, then the jury should find for the defendant." Under this charge, on this evidence, it is manifest that the jury did not believe that the injury was an accident, or that it occurred as set out in this charge; and on this testimony they might rightly have believed that it was not an accident, for it occurred whilst he was in the very act of applying this belt paste, stopping on his way down to apply it.

In respect to appellee's fourth instruction, it would be safer to leave off the last clause, to the effect that the employer should see to

it that the employé comprehends the instructions given. If there may be circumstances as to which we do now decide, in some peculiar case, warranting this clause, we think it would be safer on the new trial to omit this clause from this instruction. The boy here, whilst only in his fifteenth year, was a boy of fully average brightness and intelligence, and there is no evidence in the record whatever that he did not fully comprehend all the instructions that actually were given to him. For these reasons this clause should be omitted from this instruction. The rest of the instruction is unobjectionable. Nor do we think there was any error in the third instruction for the appellees.

Very much is said in the objections to the different counts in the declaration as to the allegation of the injury having occurred in the linter room, etc., when in fact and in truth it occurred in another room. We think all this immaterial as to the very right of this cause, even on this trial. Grant that there was a misallegation in this respect; it is not all clear, from this record, that this defendant sustained any injury by reason alone of this misallegation in the declaration as to the mere name of the room in which the injury occurred. The room was to be identified, not merely by name, but by the other descriptive matter in the count, and it was sufficiently identified. The evidence abundantly showed the exact room in which the injury did occur. There was no special objection made at the time the testimony was being detailed on this particular ground, nor any other exception, save in the general motion, to exclude all the evidence. Manifestly the defendant sustained no prejudice, arising out of the course of the trial in this matter.

We will notice very briefly the peremptory charges asked with respect to each of the six counts. We dispose of them all by saying, for the purposes of the next trial, that this request for peremptory charges should have been overruled as to all the counts except the fifth, and as to that it should have been sustained; or, what would have been better, that count should have been stricken from the declaration. But all this matter about the framing of a declaration can be attended to by proper amendment of the declaration on another trial.

There is no merit in the objection to the first instruction granted to the appellee. The necessity of the failure to warn, being the proximate cause of the injury, is fully set out in the charges elsewhere and the defendant's rights fully protected by a number of charges, most skillfully framed.

It would protract this opinion to an unpardonable length to attempt even to treat seriatim the numerous assignments of error. We have dealt with what we consider the vital points in the case, and we do not desire to be understood as having passed upon any assignments except those specifically men-

tioned by us. On the case as made by the testimony in the present record, we are clearly of the opinion that the plaintiff's cause is a meritorious one, and, but for the very serious errors committed by the court below, herein pointed out, we would affirm the judgment without hesitation.

Reversed and remanded.

(34 Miss. 700)

FAZOO & M. V. R. CO. et al. v. MARTIN et al. (No. 13,513.)

(Supreme Court of Mississippi. March 22, 1909.)

On suggestion of error. Suggestion overruled.

For former opinion, see 47 South. 667.

CAMPBELL, Special Judge. Duly appreciating the sincerity and earnestness of counsel and the importance of this case, we have laboriously reconsidered it in all its features, aided by the criticism of our opinion in the suggestion of error and the former arguments of counsel. The mistake made by counsel, as we think, is in assuming that there was a limit to the mileage of railway the company might build or acquire, or the amount of bonds it might issue. There is no warrant for this in the mortgages or bonds, or in the precedent agreements of parties. By the contract of April 26, 1882, between Johnston and Martin, there was a stipulation as to what each was to get out of the enterprise of 500 miles of railway, and by that of August 6, 1884, they provided for three companies named to consolidate and execute first mortgage bonds at the rate of \$30,000 per mile, secured by a first mortgage on the railroad, etc., "whether already acquired or hereafter to be acquired," and "nonaccumulative income bonds" at the rate of \$20,000 a mile, to be secured by a first mortgage on lands. Not a word is said about miles of railway which may be built or acquired, but it is stipulated that Johnston shall have first mortgage bonds to the amount of \$24,000 a mile and an additional amount, not specified, rated at 75 cents on the dollar. "The balance of the first mortgage bonds shall remain the property of the consolidated company, and to be used for its benefit," is a clause of this agreement. "Capital stock of said consolidated company at and after the rate of \$10,000 per mile" was provided for by this agreement, all which was to be delivered to Johnston, who was immediately to deliver to Martin and appointees income bonds to the amount of (at their face value) \$1,066,866.17 and capital stock to amount of \$533,333.34. This agreement was declared by it to be "in full compromise, settlement, satisfaction, and discharge of all claims and demands," except, etc., under two former agreements mentioned, and suits which each party had instituted against the

other were to be dismissed, injunctions were to be modified, etc. This was a most important contract, and yet nowhere in it is there any suggestion of any limitation of miles of railroad which might be built or purchased, or of bonds that might be issued or mortgages that could be issued to secure them.

The provision of this contract that the less than one-sixth part of the first mortgage bonds not to be Johnston's were to remain the property of the company, cited by counsel as supporting their view, in our view, has no such effect. It simply declares that what does not go to Johnston shall be the company's. This contract led to the consolidation of four companies into the Louisville, New Orleans & Texas Company and execution by it of first mortgage bonds to amount of \$20,550,000, payable after 50 years, with 5 per cent. interest per annum, payable semi-annually, and a mortgage on the railways of the Louisville, New Orleans & Texas Company, and its successors, constructed or to be constructed, until the length of such constructed railways shall amount in the aggregate to 800 miles, etc. The bonds issued were to be authenticated as provided for and delivered to the company at the rate of \$30,000 for each mile of main line of railway constructed, and \$20,000 for each mile of branch railway, etc., until 800 miles were reached, which was the extent provided for by the mortgage. The first mortgage for securing the income bonds was on lands described therein only, and for bonds at the rate of \$20,000 a mile of railroad ready for operation, with no limit as to the number of miles. This has the same date as the first mortgage for \$20,550,000. The second mortgage for securing income bonds (which was the result of the amended bill of Martin et al.), executed in 1885, conveyed the lands conveyed by the former mortgage for the income bonds, and their rents, issues, and profits, and also, subject to the lien of the first mortgage (for the \$20,550,000 of bonds), all incomes of the railways which the company had or might acquire. This supplemental income bond mortgage is made a security for \$10,000,000 of bonds, a fixed amount, which was not the case in the first mortgage for income bonds. Its provision that no more than \$10,000,000 of bonds shall be issued thereunder, referring to the first mortgage for income bonds, "and none other shall participate in the benefits & security thereof," means no more than that the mortgage is a security for them alone, and that no others can share in it, just as the limitation in the mortgage for the \$20,550,000 is as to the amount of bonds for which it is a security, and not a limitation of the right of the company to issue other bonds and secure them by other mortgages.

No other bonds can participate in that particular security, but the right to issue other

bonds and secure them by other mortgages is in no manner affected. It is thus manifest that there is not, in precedent agreements or in the mortgages executed to secure bonds, any warrant for the claim made that any limit was placed on the right of the company to construct railways, or buy railways, and issue bonds, and secure them by mortgages subordinate to those issued, and all contentions based on the assumption that there was a limitation as to mileage or bonds are unsound. If there had been a limit as to mileage, it could not control the express language of the bonds. It is quite likely that in 1884 the contemplation was that 800 miles would be about the length of the railway, just as in 1882, 500 miles were contemplated; but, as there was no limitation of mileage in 1882, there was none in 1884 or 1885. Since the view grew 300 miles in two years, a greater expansion of this great and growing enterprise might well have been thought of. Certainly there was no limit prescribed by any instrument shown by the record of this case to the growth of this railroad and its branches. The mortgage for \$20,550,000 of bonds and the mortgage of the same date for security of income bonds are independent instruments, each for the security of different bonds and conveying different property, and neither refers to the other, and the mortgage of 1885, supplemental to that of 1884 for income bonds, adds security for the income bonds, and provides a scheme for their retirement from time to time by competitive bidding for money from sales of land; but it makes no reference to the mortgage for \$20,550,000 of bonds, except to convey income of the railways subject to that mortgage. Counsel say this made the second mortgage for income bonds subject only to the lien of the first mortgage, and that the words "subject to the lien of the first mortgage" ought to be given that significance, etc. That is precisely the significance we give these words of "plain and simple English." The mortgage of 1885 containing these words is, "subject to the lien of the first mortgage," and subject to it only, a security for the income bonds, and for them only, and no other bonds can participate in that security.

The suggestion that we have held any other view is unwarranted, and we fail to see how such misconception could arise. But we fail to see what that has to do with the question as to the legal import of the terms of the income bonds as to interest on them. That the mortgage for their security is made subject to another mortgage throws no light on the terms of the bonds. It simply affects the security for them, and in no way aids the interpretation of their terms. The bonds are one thing; the security for them, another thing. What the bonds mean is one thing, and what the mortgage to secure them binds is another thing. It secures

the bonds according to their tenor and its legal effect. The question in this case is as to the meaning of the income bonds, as to interest on them, with reference to other bonds. There is no question about the security for them; but what bonds are entitled to have their interest paid before any shall accrue on income bonds? Is the question. We fail to perceive any force in the arguments, drawn from the provisions of the different mortgages, as to the meaning of the income bonds in their stipulation for interest after "first paying [many items and] the interest payable from time to time upon such other bonds of said company or its successors as shall be from time to time outstanding." The meaning of this provision is determinable alone by the terms of it. No light is furnished for its solution by anything in the mortgage.

What does the expression, "such other bonds of said company or its successors as shall be from time to time outstanding," mean? We are charged with interpolating, because of the use of the expression "issued from time to time," and are informed that there is "wide and deep" difference. We had supposed that a bond had to be issued before it could be outstanding, and that, if retired, it would not be outstanding; and we are of that opinion still. It is argued as if we found the right of the company to issue bonds in the terms of the bonds. This is unfounded. The power to issue bonds is not derived from the income bonds, and no such an idea is deducible from anything we have said; but as the question is, What claim to interest have the income bonds? it must be answered by their terms. They determine what may be claimed for them. Were a suit brought on the bonds, the question would not be as to their security, but as to their terms, unless the suit was to enforce the security for them, and in that case it would be enforced for them according to their terms. If their interest was absolute, it would be recovered; but, as it is contingent, in order to recover interest, it would be necessary to show that the contingency had occurred before its recovery could be had.

We have no guide to the meaning of the bonds except their language. All else is mere conjecture. Their language is plain, simple, and unambiguous. Interest on them is not payable until interest on "such other bonds of said company or its successors as shall be from time to time outstanding"—i. e., issued from time to time and not retired—shall be paid. Counsel say that "such other bonds" are the first mortgage bonds; but the income bonds do not say that. They say, "such other bonds"—i. e., all other, any other, bonds of the company or its successors. To limit that expression to first mortgage bonds is to deprive them of their full significance by interpolating. If they had

reference to the first mortgage bonds, or any other particular bonds, it may be justly supposed they would have been so worded. Besides, they were understood in 1885 to mean just what we say they mean, and were issued and accepted with that interpretation. It is not true that we based our view of them upon that urged by the amended bill set forth in our opinion; but we cited it to show the understanding of them before their issuance. No other view is maintainable; for no other is natural, lying on the surface, and giving full significance to bonds and mortgages. Whatever may have been thought or understood, the language employed is the only safe guide. All else is conjecture. We find what is to us a very reasonable explanation of the satisfaction of parties with the income bonds because of the greatly increased security for them by the supplemental mortgage of 1885; but our opinion is independent of that, and rests on the fact that no other view satisfies the language of the income bonds, and it must have its full meaning. The mortgage for the income bonds must have its full effect. It secures the \$10,000,000 of income bonds, and no others; and none can share with them in this security, but it secures them according to their tenor.

The effort of learned counsel to maintain their contention that the other bonds referred to by the income bonds are the first mortgage bonds, and no other, is contradictory, and demonstrates its unsoundness. In one part of the suggestion of error they affirm that the reason for the provision "from time to time outstanding" was "intended to subordinate the income bonds to the first mortgage bonds to an amount not exceeding \$20,550,000, whether actually issued and outstanding or not." Again they say: "These bonds [the first mortgage bonds] were to be issued as needed, and not all at once. Hence it necessarily followed that all these bonds were not to be treated as being prior to the income bonds, when it came to be ascertained whether interest on the latter had been earned or not, but that only such of them should be so considered as might be from time to time outstanding." Such are the difficulties in which learned counsel, deceived by their ingenuity, are involved in an effort to account for the language of the income bonds.

The suggestion of counsel that we overlooked the first mortgage for income bonds is a misapprehension. So far from overlooking it, it was an influential factor in our conclusion. It is entirely independent of the first mortgage, makes no reference to it, is for a different class of bond, and conveys different property. It is to be construed by itself, and has no bearing on the question involved, which is not as to the meaning of any of the mortgages, but what is the meaning of the income bonds as to

interest? We have overlooked nothing. It is true that we did not respond specifically to the oral argument claiming that the Yazoo & Mississippi Valley Company is not the successor of the Louisville, New Orleans & Texas Company, and we assumed that it is, because it is proceeded against as such in this suit, is sought to be held liable as such, and is described as such by the bill, and repeatedly so called in the brief of counsel for the appellees, and correctly, as we think. It certainly succeeded to all the belongings and obligations of the Louisville, New Orleans & Texas Company, and is its successor, and as such had the right to carry out and extend and complete the scheme of its predecessor as to the railways obtained from it. The Louisville, New Orleans & Texas Company ceased to be, and the Yazoo & Mississippi Valley Company took its place. There is now but one company, the Yazoo & Mississippi Valley Company. The company spoken of in our opinion, whose bonds, issued and outstanding, are entitled to precedence as to interest to that of the income bonds, is the Louisville, New Orleans & Texas Company, or its successor, the Yazoo & Mississippi Valley Company, and the bonds are such as were properly issued in the prosecution of the railroad scheme in which the Louisville, New Orleans & Texas Company was engaged. Our opinion admits of no such interpretation as to include bonds other than such as were or may be properly issued on account of the railways.

We did not and do not particularize the bonds entitled to precedence over the income bonds as to interest, leaving that for inquiry and decision in the future progress of the case. The Louisville, New Orleans & Texas Company had the right to acquire branches, feeders to the main line, and to issue bonds and give mortgages, and its right passed to the Yazoo & Mississippi Valley Company, its successor, which had the right it had as to its railways. The scheme of the Louisville, New Orleans & Texas Company was to possess the country east of the Mississippi river by a main line of railway from Memphis, Tenn., to New Orleans, La., with branches of indefinite length through an alluvial country largely undeveloped, liable to destructive overflows from the river, but a few years after the wreck and ruin of war and reconstruction, when the levee system was incomplete, and times were hard and money scarce, and the future seemed uncertain, and great public enterprises full of hazard. Bonds were relied on to furnish the money for the great enterprise. The first mortgage bonds, secured by 800 miles of the railway, its income, and its equipments and appurtenances, bearing 5 per cent. interest per annum, payable semiannually, having 50 years to run, were rated at 75 cents on the dollar in dealings between the promoters.

Income bonds to amount of \$10,000,000 were provided for, payable in 50 years, and with interest not to exceed 6 per cent. per annum, and that so contingent as to be very uncertain and hardly a factor in estimating value. In preparing these income bonds it is evident that the idea of future need for more money to be raised by more bonds was present, and that the interest on the income bonds was made contingent on various items, and among them the interest on "such other bonds of said company or its successors as shall be from time to time outstanding," thus providing a basis for credit for such bonds as should be found necessary in the future in the growth and maintenance of the enterprise. The security for the income bonds by the first mortgage for them was only lands in several delta counties, supplemented by a new mortgage of these lands and their issues and profits, and subject to the first mortgage for \$20,550,000 of bonds, the income of the entire railway, possessed or to be possessed, and a scheme for competitive bidding as often as \$25,000 were appropria-ble for the purpose from sales of the lands mortgaged, whereby it was probably expected that a large part, if not all, of the bonds would be retired long before maturity. The value of the lands mortgaged was expected to increase rapidly with the development of the country by the railroad, and the expectation of rapid retirement of the income bonds was not unfounded. This great railroad company, formed of four separate roads by consolidation, was continually looking to and providing for the future, and in the various instruments executed by it used the terms "successors and assigns," as if contemplating such and providing for them, and it is inconceivable that the terms employed in the income bonds as to interest could have any other meaning attached than that which we give them.

What counsel call our "surmises" are our deductions from the record. Counsel indulge in various surmises deduced from the record, which differ from ours because of the different perspective of court and counsel, as may be supposed. Eliminate all speculation and surmises as to why the particular language of the income bonds was employed, there it stands as written and unchanged, after it had been specifically objected to by the amended bill on the ground that it meant just what we say it means, and new and increased security for them as written and thus interpreted was accepted, and these bonds and capital stock to the sum of about a million dollars of bonds and half a million dollars of stock were issued and accepted without the change of a word in the bonds or any complaint of an erroneous interpretation of them, so far as we know, until this suit. With the history of these bonds contained in the record, it is incredi-

ble that their meaning as we declare it was not well understood by all dealing with them. Anyway they stand as the sole exposition of their meaning. The fact that the Louisville, New Orleans & Texas Company may not have had express grant of authority to consolidate gives no aid to the interpretation of the language of the income bonds. We find no warrant for limiting bonds which might be issued to bear interest payable before any on income bonds to those issued only for construction.

In the present state of the case we are not willing to grant the injunction asked for. All proper process may be obtained in the chancery court. Surely no one could have understood us to declare anything more, with reference to competitive bidding by holders of income bonds, than that, since delay had occurred for reasons shown, the scheme provided by the mortgage of 1885 may now be carried out as to the whole fund derived from sales of the lands.

Our decision as heretofore made will stand, with this explanation of our views as set forth in our former opinion.

DAY et al. v. TUCKER. (No. 13,424.)

(Supreme Court of Mississippi. March 8, 1909.)

1. APPEAL AND ERROR (§ 363*)—ALLOWANCE OF APPEAL—RULING ON DEMURRER—DISCRETION.

An appeal from a decree overruling a demurrer is not a matter of right, but its allowance is discretionary with the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1967; Dec. Dig. § 363.*]

2. APPEAL AND ERROR (§ 363*)—DISCRETION OF TRIAL COURT—ALLOWANCE OF APPEAL.

Where it was manifest that an appeal from a decree overruling a demurrer to the complaint would only serve to delay the cause, the chancellor abused his discretion in allowing the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1967; Dec. Dig. § 363.*]

Appeal from Chancery Court, Scott County; J. L. McCaskill, Chancellor.

Suit by Viola Tucker against R. N. Day and others. From a decree overruling a demurrer to the bill, defendants appeal. Affirmed and remanded.

This is an appeal from the action of the chancellor in overruling a demurrer to the bill of complaint filed by the appellee, who was complainant in the court below.

Green & Green, for appellants. William I. McKay, for appellee.

MAYES, J. The bill states a perfect cause of action, and the demurrer thereto was properly overruled. The mistake made by the chancellor was in allowing the appeal. As held in the case of *Fire Ins. Co. v. Morrison*, 48 South. 178, an appeal from a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

decree overruling a demurrer is not a matter of right, but is discretionary with the chancellor. To allow an appeal in this case was an abuse of discretion, since it is manifest that it could serve no purpose except to delay the cause.

Affirmed and remanded.

BRIDGES v. STATE. (No. 13,615.)
(Supreme Court of Mississippi. March 22, 1909.)

Appeal from Circuit Court, Harrison County; W. H. Hardy, Judge.
W. C. Bridges was convicted of murder, and appeals. Affirmed.

J. H. Mize, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

FULTON v. STATE. (No. 13,709.)
(Supreme Court of Mississippi. March 22, 1909.)

Appeal from Circuit Court, Yazoo County; W. H. Potter, Judge.

William Fulton was convicted of manslaughter, and appeals. Affirmed.

Brown & Norquist, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

BURKS v. STATE. (No. 13,895.)
(Supreme Court of Mississippi. March 22, 1909.)

Appeal from Circuit Court, Scott County; R. L. Bullard, Judge.

Chris Burks was convicted of manslaughter, and appeals. Affirmed.

Frank F. Mize, for appellant. Geo. Butler Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

PAGE v. STATE. (No. 13,479.)
(Supreme Court of Mississippi. March 22, 1909.)

Appeal from Circuit Court, Simpson County; R. L. Bullard, Judge.

Joe Page was convicted of manslaughter, and appeals. Affirmed.

J. J. Stubbs, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

BYRD v. BYRD. (No. 13,649.)
(Supreme Court of Mississippi. March 22, 1909.)

Appeal from Chancery Court, Copiah County; G. G. Lyell, Chancellor.

Bill between Alice Byrd and W. B. Byrd. From the decree, Alice Byrd appeals. Affirmed.

R. N. & H. B. Miller, for appellant.

PER CURIAM. Affirmed.

WILKINSON v. BRIDGES & WALKER.
(No. 13,848.)

(Supreme Court of Mississippi. March 22, 1909.)

Appeal from Circuit Court, Hinds County; W. H. Potter, Judge.

Action between J. D. Wilkinson and Bridges & Walker. From the judgment, Wilkinson appeals. Affirmed.

Mayes & Longstreet, for appellant. Ridgway & Taylor and Watkins & Watkins, for appellees.

PER CURIAM. Affirmed.

CINCINNATI EQUIPMENT CO. v. HALBURTON. (No. 13,605.)

(Supreme Court of Mississippi. March 22, 1909.)

Appeal from Circuit Court, Alcorn County; E. O. Sykes, Judge.

Action between the Cincinnati Equipment Company and J. H. Halburton. From the judgment, the equipment company appeals. Affirmed.

Lamb & Johnston, for appellant. J. M. Boone, for appellee.

PER CURIAM. Affirmed.

GRAHAM et al. v. CONSOLIDATED NAVAL STORES CO.

(Supreme Court of Florida, Division A. Feb. 16, 1909.)

1. MORTGAGES (§ 468*)—FORECLOSURE—RECEIVERSHIP.

Where the mortgage given to secure advances to be made to operators to enable them to produce naval stores apparently covers present leasehold lands and the crops to be thereafter produced thereon, and there is immediate necessity for the preservation of the property, a receivership may be proper, even though upon full hearing a different construction be possible.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1374; Dec. Dig. § 468.*]

2. MORTGAGES (§ 405½*)—FORECLOSURE—INJUNCTION.

A restraining order will not be reversed because it embraces naval stores not covered by the mortgage, the subject-matter of the suit, but, in fact, embraced in a similar suit before the same chancellor then pending in another county between the same parties.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 465½.*]

(Syllabus by the Court.)

Appeal from Circuit Court, Citrus County; William S. Bullock, Judge.

Mortgage foreclosure proceedings by the Consolidated Naval Stores Company against J. D. Graham and others. From an interlocutory order appointing a receiver and orders incident thereto, defendants appeal. Affirmed.

William Hocker and R. McConathy, for appellants. E. J. L'Engle and George Powell, for appellee.

COCKRELL, J. This is an appeal from several interlocutory orders appointing a receiver and temporary orders incident thereto in the enforcement of a mortgage lien given in part to secure advancements to enable the mortgagors to carry on the business of producing naval stores and other products.

The mortgage purports to convey, inter alia, certain leasehold interests in Citrus county, "together with all and singular the improvements, buildings, rights, members, appurtenances, hereditaments, easements, and privileges to the same or any of them in any wise appertaining or belonging, and all the estate, right, title, interest, claim, demand, property, and possession of the mortgagors and each of them, of, in, and to the same and every part and parcel thereof, and any and all lands and estates or interests therein, equitable and legal, situate in said county which shall hereafter be purchased, acquired, or leased by the mortgagors, or any of them, whether by deed, contract, lease, or otherwise, for the purpose of producing, farming, or manufacturing naval stores, and also all of their interest in the growing pine timber, the boxes cut thereon, or hereafter to be cut thereon, with all the crude gum and scrape, and all the rosin and spirits of turpentine, whether in process of manufacture or ready for shipment, that may accrue or be prepared or manufactured upon said above described land, or on any other lands now or hereafter owned or controlled by mortgagors jointly and severally."

The specific complaint here has reference to rosin manufactured upon the described lands subsequent to the execution of the instrument. The mortgagors are R. J. Knight and J. G. Rhodes, but the latter's interest was transferred to J. D. Graham, who had not only the constructive notice given by the recording acts; but for the purpose of this appeal we must hold had actual notice of the mortgagee's claim.

Little stress is laid against the appointment of the receiver. The mortgage itself made provision for such appointment, and the bill of complaint makes out a strong case for a receivership, had the contract of the parties been silent thereon.

It is strenuously urged that a proper construction of the mortgage instrument confines the future products to the after-acquired land, so that it does not embrace the rosin and turpentine thereafter to be produced upon the leaseholds then held. Such construction would destroy in a large measure the obvious intent of the parties which is to secure the crops to be produced through the aid of the advancements to be made. We need not, however, preclude entirely the construction that may hereafter be reached upon full consideration. The bill of complaint has not been fully passed upon, no order having as yet been made upon the

demurrer interposed thereto; but we are satisfied that for the purposes only of maintaining a status quo and preventing the destruction of the corpus of the property pending litigation the court was justified in yielding any doubt it might entertain to the importance and necessity of conserving the plant as a going concern, which could only be accomplished through a receivership.

These remarks apply to other criticisms of the mortgage.

The only other point we deem it essential to notice is that the injunction covered some naval stores not produced upon the lands mentioned in the mortgage, but upon lands in Marion county. There was some irregularity in bringing on the motion to modify the injunction in this respect, but, as it appears from the affidavit of J. D. Graham filed upon the application to dissolve the injunction that there was a similar suit before the same chancellor involving the Marion county lands, we do not consider the temporary order so extensive as to call for reversal.

Upon full hearing both of the law and the facts as they may be developed in regular course, the equities may be changed; but for the present we can find nothing to authorize us to interfere in the discretion so frequently adjudged by us, to be reposed in the circuit courts in these matters.

The orders appealed from are affirmed.

WHITFIELD, C. J., and SHACKLEFORD, J., concur.

TAYLOR and PARKHILL, JJ., concur in the opinion. HOCKER, J., disqualified.

SMITH v. STATE.

(Supreme Court of Florida, Division B. Feb. 16, 1909.)

1. CRIMINAL LAW (§ 1088*)—RECORD—MATTERS APPEARING ONLY AS PART OF MOTION FOR NEW TRIAL.

The assertions of fact contained as grounds of a motion for new trial are not self-varying before an appellate court; and, unless the truth of such assertions is elsewhere properly disclosed by the record, an appellate court cannot consider assignments of error predicated thereon.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2790; Dec. Dig. § 1088.*]

2. CRIMINAL LAW (§ 829*)—TRIAL—REQUESTED INSTRUCTIONS COVERED BY INSTRUCTIONS GIVEN.

There is no error in refusing to give requested instructions that have in substance been already given in charge to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

(Syllabus by the Court.)

Error to Circuit Court, Duval County; Rhydon M. Call, Judge.

O. D. Smith was convicted of murder in

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the first degree, and he brings error. Affirmed.

Scarborough & Scarborough, for plaintiff in error. Park M. Trammell, Atty. Gen., for the State.

TAYLOR, J. The plaintiff in error was indicted and tried for, and convicted of, the crime of murder in the first degree, and sentenced capitally in the circuit court of Duval county, and for review of this judgment comes here by writ of error. The sole assignment of error is the denial of the defendant's motion for new trial.

The first, second, third, fourth, fifth, and sixth grounds of this motion all question the sufficiency of the evidence to support the verdict returned, and will be considered last.

The seventh ground of the motion asserts error in the alleged refusal of the court to sustain a challenge for cause made by the defendant to a talesman, one J. L. Johnson. The transcript of record before us shows no such challenge and no such ruling by the court. Assertions of fact in a motion for new trial are not self-verifying, and amount to nothing before an appellate court, unless the truth of such assertions are elsewhere properly exhibited in the transcript.

The eighth ground of the motion for new trial complains of certain alleged remarks to the jury by the state's attorney in his argument. Here again the transcript fails to exhibit the fact that any such asserted remarks were either made by the state's attorney, or ruled upon by the court, or excepted to by defendant, save the assertion thereof in the motion for new trial itself. There is therefore nothing for our consideration in this ground. The ninth ground of the motion is for a new trial because of alleged newly discovered evidence. No affidavit verifying the alleged discovery of this new evidence appears to have been presented to the trial court in conformity with the rule on the subject. Therefore there was no error in the ignoring of such ground by the trial court.

The tenth ground of the motion for new trial complains of the refusal of the court to give six several instructions requested by the defendant. All of the matter in these several refused instructions had already been given in substance to the jury in more accurate form by the trial judge, and there was, therefore, no error in the refusal to reiterate them in different language.

We have carefully examined the evidence in the cause, and find that it abundantly and fully sustains the verdict found. There was a weak attempt to show insanity in the defendant at the time of the commission of the crime but the jury acted properly in ignoring such attempt.

Finding no error, the judgment of the court

below in said cause is hereby affirmed at the cost of Duval county; the plaintiff in error having been adjudged to be insolvent.

HOCKER and PARKHILL, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

(57 Fla. 391)

DE SOTO NAT. BANK v. ARCADIA ELECTRIC LIGHT, ICE & TELEPHONE CO.

(Supreme Court of Florida, Division A. Feb. 16, 1909.)

MECHANICS' LIENS (§ 189*)—PROPERTY SUBJECT—PARTNER'S INTEREST IN REALTY.

A partner's interest in realty may be subjected to a lien for labor and material, though his copartner be under coverture and the realty be sold to one with notice of the claim.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Dec. Dig. § 189.*]

(Syllabus by the Court.)

Appeal from Circuit Court, De Soto County; Joseph B. Wall, Judge.

Mechanic's lien foreclosure by the Arcadia Electric Light, Ice & Telephone Company against the De Soto National Bank. From an order overruling a plea interposed by the bank, it appeals. Affirmed.

Treadwell & Treadwell and J. W. Burton, for appellant. W. E. Leitner, for appellee.

COCKRELL, J. This is an appeal from an order overruling a plea interposed by the bank to a bill to enforce a lien for materials and labor upon a building purchased by it from Simmons, Langford & Co. The bill alleges service of the statutory notice upon Simmons, Langford & Co., the then owners of the building, of the complainant's intention to hold a lien on the property, and the knowledge of the bank of the lien before its purchase.

The plea avers that the firm of Simmons, Langford & Co. was composed of W. W. Langford and M. P. Simmons, and that said Simmons was and is a married woman, who prior to the filing of the bill had parted with all her interest in the property.

The court held the plea bad upon the theory that while, under the decision of this court in *Smith v. Gauby*, 43 Fla. 142, 31 South. 683, Mrs. Simmons' former interest in the property could not now be reached, yet Langford's interest might be; and the bank's contention here is that nothing less than the whole interest can be subjected, and relies upon a decision by the Supreme Court of Washington (*Wright v. Cowie*, 5 Wash. 341, 31 Pac. 878) as supporting the contention. That case holds that the Washington statute does not contemplate a lien upon a portion of a building—a splitting up of the building. There is no attempt here to subject a por-

tion of the lot or building, but Langford's undivided interest in the entirety. As a partner he was liable to creditors of the firm for all its debts—the entire debt, not a portion of it, and his title in the firm's realty must be taken to be a fee simple absolute to the whole, though he share his interest with another; and, whatever that may be worth, it is subject to the lien granted by the statute, in obedience to the express command of the Constitution, for the improvements placed thereon by his consent, and when the proper steps have been taken the lien attaches to the rem as against subsequent purchasers.

Section 2195 of the General Statutes of 1906 provides expressly that the lien shall be upon the interest of the owner, and, if that be less than the absolute interest, then upon that limited interest. Neither his personal liability nor his specific property interest will be permitted to hide behind a woman's skirts and claim nonliability by reason of the shield cast around her.

The order is affirmed.

WHITFIELD, C. J., and SHACKLEFORD, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

(57 Fla. 234)

THOMAS et al. v. WALDEN et al.
(Supreme Court of Florida, Division A. Feb. 16, 1909.)

1. CONTRACTS (§ 339*)—ACTIONS—PLEAS.

"Not guilty" and "never indebted" are not proper pleas in actions upon express contracts.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1709; Dec. Dig. § 339.*]

2. CONTRACTS (§ 343*)—ACTIONS—PLEADING—NONPERFORMANCE OF CONDITIONS.

The pleader should specify the condition precedent, the performance of which he intends to contest.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1697; Dec. Dig. § 343.*]

3. PLEADING (§ 211*)—DEMURRER ORE TENUS.

After issue has been joined upon a pleading not wholly bad, a demurrer ore tenus thereto is not a matter of right at the trial.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 472, 481; Dec. Dig. § 211.*]

4. APPEAL AND ERROR (§ 253*)—PRESENTATION AND RESERVATION OF GROUNDS OF REVIEW—REFUSAL OF PLEAS.

The refusal to permit the filing of additional pleas must be excepted to, and form part of the bill of exceptions, to be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1488; Dec. Dig. § 253.*]

5. VENDOR AND PURCHASER (§ 170*)—TENDER BY PURCHASER—EXCUSES FOR NOT MAKING.

When vendors are wholly unable to give title to a considerable portion of land contracted to be sold, strict legal tender by the vendee is not necessary.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 344; Dec. Dig. § 170.*]

(Syllabus by the Court.)

Error to Circuit Court, Jackson County; J. Emmet Wolfe, Judge.

Action by J. C. Walden and others against A. C. Thomas and others, copartners as Thomas Bros. & Co. Judgment for plaintiffs, and defendants bring error. Affirmed.

W. B. Farley and J. M. Calhoun, for plaintiffs in error. C. L. Wilson, for defendants in error.

COCKRELL, J. This is an action wherein Walden and others obtained judgment for the primary payment upon a contract to convey.

The declaration sets out the contract, the payment of \$1,000 upon its execution, and alleges the failure of the vendors to convey by reason of inability to give title to a substantial part of the lands. There was a demurrer interposed to the declaration, which does not appear ever to have been brought to the attention of the court, and will not be considered.

The pleas upon which issue was joined and trial had were, first, "not guilty," which has no place in actions for breach of contract; and, second, "that these defendants are now and have always been ready and willing to perform said contract according to the terms thereof, had the plaintiffs paid the amount they agreed to pay on the date thereof," the exact meaning of which is not clear to us. There appears on the record a plea of "never indebted," which it is asserted in the brief was stricken. We find no such order, but the plea is wholly inapplicable to counts on express contracts. Section 1467, Gen. St. 1906. Demurrers were sustained to two pleas that were in direct violation of the statutory requirement that the pleader shall specify the condition precedent the performance of which he intends to contest. Section 1436, Gen. St. 1906.

The fifth plea came near properly setting forth a defense. It alleges readiness and willingness to perform at the time; but that the plaintiffs did not tender the amount of money then due. To this plea was filed a replication of waiver of legal tender, upon which issue was joined. At the trial a proceeding in the nature of a demurrer ore tenus was attempted to be made to the replication. No showing was made to excuse the delay and irregularity in this attempt to question the legal sufficiency of the replication, and no request to withdraw the joinder of issue thereon. The replication set up new matter, and, while perhaps prolix, presents on its face no flagrant violation of good pleading.

We cannot consider the refusal of the court to permit during the trial the filing of an additional plea tendered, as no exception was taken at the time to such refusal.

The exceptions reserved upon the rulings upon testimony and the charges of the court

are numerous, but in our view of the case cut no figure. There can be no question that the vendors did not have title to a considerable portion of the land they contracted to convey, and could not within any reasonable time have acquired title thereto, it being government land subject to homestead, and as to part of which there is still pending action in the federal courts by the United States against those through whom the grantors hoped to acquire title.

The contract was an entire one, not to be cut down ratably according to the failure of acreage, and we cannot apply the doctrine of *de minimis*. The breach on the part of the grantors could not have been cured, and this fact was plainly apparent at the time set for performance, while the tender of a certified check instead of lawful money might have been cured if not waived, and under the circumstances the tender of the latter would have been a useless form.

Errors, if any, committed in the rejection or admission of evidence or upon the charges, were harmless. The judgment was clearly right, and it is affirmed.

WHITFIELD, C. J., and SHACKLEFORD, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

(57 Fla. 1)

DANIELS et al. v. STATE.

(Supreme Court of Florida, Division A. Feb. 23, 1909.)

1. CRIMINAL LAW (§ 1148*)—TRIAL—SEVERANCE—DISCRETION OF COURT—REVIEW.

When there are two or more defendants in a criminal prosecution, an order of the trial court granting or denying a motion for severance is largely discretionary, and in general will not be disturbed by an appellate court when the motion is unsupported and no abuse of discretion appears.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3050; Dec. Dig. § 1148.*]

2. CRIMINAL LAW (§ 406*)—EVIDENCE—STATEMENTS AT INQUEST—VOLUNTARY CHARACTER—CAUTION.

Before statements made at a coroner's inquest by a person when in custody of the sheriff can be shown in evidence against the defendant on his trial, it should clearly appear that he was fully advised of his rights in making the statements, and that, after being so advised, the statements were voluntarily made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 920; Dec. Dig. § 406.*]

3. CRIMINAL LAW (§ 518*)—CONFESSIONS—VOLUNTARY CHARACTER—CAUTION.

Testimony as to confessions of guilt, as distinguished from mere statements of other facts, should be received in evidence on a trial with caution, especially where the party is under arrest when the confession is made; and testimony as to confessions of guilt made to officers or when under arrest is not admissible in evidence at the trial, unless it is clearly shown that the confession was voluntarily made

after the party is fully advised of his rights under the law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1158; Dec. Dig. § 518.*]

4. CRIMINAL LAW (§ 516*)—"CONFESSIONS"—DEFINED.

A confession of guilt in committing a crime is an acknowledgment of the criminal act or of the facts that constitute the crime. Statements of facts or circumstances that do not in effect or by inference admit the commission of a crime do not in general constitute a confession of guilt of a crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1139; Dec. Dig. § 516.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1417-1419; vol. 8, p. 7811.]

5. CRIMINAL LAW (§ 406*)—ADMISSIONS—STATEMENTS BEFORE MAGISTRATE.

Statements other than confessions of guilt of a crime are in general admissible in evidence against the party making them as other admissions against interest; but, where the statements are made before a magistrate by a person when under arrest accused of the crime, evidence of such statements is in general not admissible unless it appears that the party was advised of his rights, and then voluntarily made the statements.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 920; Dec. Dig. § 406.*]

6. HOMICIDE (§ 166*)—EVIDENCE—MOTIVE.

In a prosecution for murder, evidence tending to show motive is admissible for that purpose.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 320; Dec. Dig. § 166.*]

7. CRIMINAL LAW (§ 781*)—TRIAL—INSTRUCTIONS—CONFESSIONS.

Where evidence as to a confession made by one of several defendants who are being tried jointly implicates the other defendants, who were not present when the confession was made, the court should then instruct the jury to disregard the reference in the confession to the defendants not present when the confession was made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1864; Dec. Dig. § 781.*]

8. HOMICIDE (§ 300*)—TRIAL—INSTRUCTIONS—SELF-DEFENSE.

Where there is no testimony as to self-defense, a charge upon that subject is not required.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 614; Dec. Dig. § 300.*]

9. HOMICIDE (§ 345*)—WRIT OF ERROR—DETERMINATION AND DISPOSITION OF CAUSE.

Where the evidence is sufficient to sustain a verdict of guilty as to one only of three defendants found guilty, the judgment of conviction as to the one may be affirmed and as to the others reversed.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 724; Dec. Dig. § 345.*]

(Syllabus by the Court.)

Error to Circuit Court, Walton County: J. Emmet Wolfe, Judge.

Mose Daniels, Luther Russ, and Silas Daniels were convicted of murder in the first degree, and they bring error. Affirmed as to Mose Daniels, and reversed as to Luther Russ and Silas Daniels.

Daniel Campbell & Son, for plaintiffs in error. Park M. Trammell, Atty. Gen., for the State.

WHITFIELD, O. J. The plaintiffs in error were convicted of murder in the first degree. Mose Daniels was sentenced to be hanged. Luther Russ and Silas Daniels, being recommended to mercy, were sentenced to the penitentiary for life. Writ of error was taken. At the trial the court denied a motion by Silas Daniels and Luther Russ for severance upon the grounds (1) that Mose Daniels had confessed his guilt and implicated movants; (2) that movants have a defense separate from that Mose Daniels may have; (3) that confessions of Mose Daniels implicating movants will be improper and injurious to movants. This motion was not supported by affidavit or otherwise.

While subsequent developments of the trial indicate that it would have been advisable to grant the severance, the court will not be held in error for denying the unsupported motion, since the granting or denial of a motion for severance is largely discretionary, and such rulings will not in general be disturbed where the motion is unsupported and no abuse of discretion is shown. See *Roberson v. State*, 40 Fla. 509, 24 South. 474.

Separate statements of testimony given and signed by Silas Daniels and Luther Russ at the coroner's inquest while in the custody of the sheriff were admitted in evidence over objection by the defendants. The parties were taken from jail three times and examined before the coroner. It appears that they were not advised of their rights each time they were examined, and it does not appear that the statements offered in evidence were made at the time the parties were advised of their rights as to testifying.

While the testimony of Silas Daniels was expressly admitted as evidence against him and for no other purpose, the testimony of Luther Russ was not admitted solely as evidence against him. Before statements made before the coroner by a person when in custody of the sheriff can be shown in evidence against him on his trial, it should clearly appear that he was fully advised of his rights in making the statements, and that, after being so advised, the statements were voluntarily made. See *Jenkins v. State*, 35 Fla. 737, 18 South. 182, 48 Am. St. Rep. 267.

Testimony as to confessions of guilt as distinguished from mere statements of other facts should be received in evidence on a trial with caution especially where the party is under arrest when the confession is made; and testimony as to confessions of guilt made to officers or when under arrest is not admissible in evidence at the trial, unless it is clearly shown that the confession was voluntarily made after the party is fully advised of his rights under the law. See *Green v. State*, 40 Fla. 474, 24 South. 537; *McNish v. State*, 47 Fla. 69, 36 South. 176.

A confession of guilt in committing a crime is an acknowledgment of the criminal act or of the facts that constitute the crime. State-

ments of facts or circumstances that do not in effect or by inference admit the commission of a crime do not in general constitute a confession of guilt of a crime.

Where a person is on trial for a crime, evidence of a confession of guilt of the crime previously made by such person is in general not admissible, unless it appears that the confession was entirely voluntary. If such confession is made while the party is under arrest or charged with the crime, evidence of the confession is not admissible on the trial, unless it is made to clearly appear that the party was fully advised of his rights, and that, after being so advised, the confession of guilt was freely and voluntarily made under circumstances that afforded no undue influence in procuring the confession.

Statements other than confessions of guilt of a crime are in general admissible in evidence against the party making them as other admissions against interest; but, where the statements are made before a magistrate by a person when under arrest accused of the crime, evidence of such statements is in general not admissible unless it appears that the party was advised of his rights, and then voluntarily made the statements. See *State v. Campbell*, 73 Kan. 688, 85 Pac. 784, 9 L. R. A. (N. S.) 533, 9 Am. & Eng. Anno. Cas. 1203.

The statements made before the coroner are not confessions, but, as the parties were in the custody of the sheriff when the statements before the coroner were made, they should have been fully advised of their rights when each statement was made; and, when the statements were admitted in evidence at the trial, the jury should have been then instructed that each statement is received only as evidence against the person making it, and that it is not evidence against any other person.

This is not a case where statements involving another are made in his presence when he was at liberty to respond to the statements.

Considering the character and meagerness of the whole testimony adduced against Silas Daniels and Luther Russ, it cannot be said the admission in evidence of the statements made before the coroner under the circumstances stated was not harmful to them. The entire testimony against Mose Daniels is such that the references made to him in the statements before the coroner appear not to have been harmful to him.

No error appears in the admission in evidence of an indictment against Silas Daniels on which the name of the deceased was indorsed as a witness for the state, or of an affidavit made by the deceased before a committing magistrate charging Luther Russ with a criminal offense. These documents tended to show motive as to Luther and Silas, and were admissible for this purpose.

West v. State, 42 Fla. 244, 28 South. 430. The indictment and affidavit were not harmful to Mose Daniels.

In relating a confession made to him by Mose Daniels not in the presence of Silas or Luther, a witness, after relating a confession by Mose of his guilt, in response to repeated requests to "go ahead and state the conversation between you and Mose Daniels," testified that Mose Daniels "said he had shot Jesse Jones, and the two boys that was with him broke and run, but that the two boys run. He didn't say whether they were with him or not." The defendants had objected to questions calling for evidence or statements made by Mose Daniels tending to implicate others if they were not present, and the testimony above quoted does not appear to be a necessary part of the confession of Mose as to his guilt. The court did not then expressly instruct the jury to disregard the reference to others in the confession made by Mose Daniels, even if that would have removed from the minds of the jury the effect of the testimony unnecessarily adduced. Louisville & N. R. Co. v. Collinsworth, 45 Fla. 403, 33 South. 513; Gardner v. State, 55 Fla. 25, 35, 45 South. 1028.

Where there is no testimony as to self-defense, a charge upon that subject is not required.

Neither of the defendants testified at the trial. The evidence is circumstantial, except as to the confession testified to as having been made to witnesses by Mose Daniels that he killed the accused. This confession was not contradicted, and is strongly corroborated by the circumstances. The evidence adduced against Luther Russ and Silas Daniels, even if in all respects properly admissible under the circumstances, is not sufficient to warrant a verdict of murder against them. See Baldwin v. State, 46 Fla. 115, 35 South. 220, where the judgment as to one defendant was affirmed, and as to the other reversed on the evidence.

There is evidence sufficient to sustain the verdict as to Mose Daniels, but not as to Luther Russ and Silas Daniels.

The judgment is affirmed as to Mose Daniels; and, as to Luther Russ and Silas Daniels, the judgment is reversed, and a new trial awarded.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

(57 Fla. 89)

LASSETER et al. v. ZAPF.

(Supreme Court of Florida. Feb. 23, 1909.)

1. APPEAL AND ERROR (§ 544*)—RECORD—NECESSITY FOR BILL OF EXCEPTIONS.

A motion to strike from the records of the trial court a judgment asserted in the motion to

be void, together with the order made upon the motion and the exception taken, should be presented to the appellate court for review by a duly authenticated bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2412; Dec. Dig. § 544.*]

2. EXCEPTIONS, BILL OF (§ 43*)—AUTHENTICATION BY JUDGE—MOTION TO STRIKE.

Where an order is made in vacation denying a motion to strike from the records a judgment, and the bill of exceptions taken is not authenticated by the judge at the time the order is made, and no special order is then made extending the time for authenticating the bill of exceptions as required by rule 97 of the circuit court rules, a motion to strike the bill of exceptions will be granted.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 72½; Dec. Dig. § 43.*]

3. APPEAL AND ERROR (§ 1133*)—AFFIRMATION OF JUDGMENT—STRIKING BILL OF EXCEPTIONS.

Where the bill of exceptions contained in a transcript of the record is stricken, and there remains in the record no other question or matter assigned, presented, or urged as error except such as can be presented or considered only through a proper bill of exceptions duly authenticated, the judgment will be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4451; Dec. Dig. § 1133.*]

(Syllabus by the Court.)

Error to Circuit Court, Dade County; Minor S. Jones, Judge.

Action between B. F. Lasseter and E. J. Lasseter and Joseph Zapf. From an order denying a motion to strike from the records a judgment as void, Lasseter and Zapf bring error. Affirmed.

Geo. M. Robbins and Geo. A. Worley, for plaintiffs in error. M. C. Jordan, for defendant in error.

PER CURIAM. A writ of error was taken to an order made by the judge of the Seventh judicial circuit in vacation denying a motion to strike from the records of the court a judgment asserted in the motion to be void. The only error assigned is the order denying the motion to strike the judgment. A motion is made to strike the bill of exceptions because it was not legally signed by the judge. The motion to strike the judgment and the order made thereon, with the exception taken, should be presented to the appellate court for review by a duly authenticated bill of exceptions. The purported bill of exceptions in the transcript does not appear to have been authenticated by the judge when the order denying the motion to strike the judgment was denied, or afterwards, by virtue of a special order then made extending the time for authenticating the bill of exceptions, as required by rule 97 of the circuit court rules, and the motion to strike the bill of exceptions is granted.

Where the bill of exceptions appearing in a transcript of the record has not been duly authenticated by the trial judge as required by the rules of court, it will upon motion be

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter's Index.

stricken from the record of the appellate court; and in such case, if there is in the remaining record no other question or matter assigned, presented, or urged as error except such as can be presented or considered only through a proper bill of exceptions, the judgment will be affirmed. *Horn v. State*, 40 Fla. 472, 24 South. 147; *Florida Cent. & P. R. Co. v. St. Clair-Abrams*, 35 Fla. 514, 17 South. 639; *Bardwell v. State*, 49 Fla. 1, 38 South. 511.

As the only error assigned cannot be considered without a proper bill of exceptions, and as there is no such bill in the transcript, the order to which the writ of error issued is affirmed.

PARKHILL, J., took no part.

(57 Fla. 155)

SEABOARD AIR LINE RY. CO. v. THOMPSON.

(Supreme Court of Florida, Division B. Feb. 16, 1900.)

CARRIERS (§ 316*)—CARRIAGE OF PASSENGERS—INJURIES—PRESUMPTIONS.

The presumption of negligence cast upon railroads by our statute in personal injury cases ceases when the railroad company has made it appear that its agents have exercised all ordinary and reasonable care and diligence. In the presence of such proof by the railroad company, the jury do not take any such presumption with them to the jury room in weighing the evidence and in coming to a determination. The statute does not create such a presumption as will outweigh proofs, or that will require any greater or stronger or more convincing proofs to remove it. All that the statute does in creating the presumption is thereby to cast upon the railroad company the burden of affirmatively showing that its agents exercised all ordinary and reasonable care and diligence, and here the statutory presumption ends. And when, in a suit for personal injury, the railroad company proves affirmatively by undisputed and uncontradicted evidence that it and its agents exercised all ordinary and reasonable care and diligence, and were not guilty of the negligence alleged, the plaintiff has no right to recover.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1283-1294; Dec. Dig. § 316.*]

(Syllabus by the Court.)

Error to Circuit Court, Baker County; James T. Wills, Judge.

Action by Joe Thompson, by his next friend, A. C. Budamire, against the Seaboard Air Line Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Geo. P. Raney and William J. Owen, for plaintiff in error. Kelley & Cone, for defendant in error.

TAYLOR, J. The defendant in error, as plaintiff below, sued the plaintiff in error, as defendant below, in the circuit court of Baker county in an action for damages for personal injuries. The trial resulted in a verdict and judgment for \$500, and this judgment the defendant below brings here for review by writ of error.

At the close of the evidence, the defendant moved the court for a peremptory charge to the jury to find for the defendant. This request was denied, and such ruling is assigned as error. This was error. The declaration in the case alleged that the plaintiff was a passenger on one of defendant's trains, and that while he was such passenger the defendant did not use due and proper care that he should be safely carried, but wholly neglected so to do, and then and there carelessly and negligently permitted and suffered a defective window to remain and be in said car at the seat where the plaintiff was sitting on said train, and also allowed the defective window to be raised, and, while the said plaintiff was sitting in said car, the said window, being defective, as aforesaid, fell on one of the plaintiff's hands with great force, which said hand was caught in and under said window, and which said window thereby crushed, bruised, and mangled the said hand and fingers of the plaintiff, which caused him much pain and suffering, and caused him to have fever, and to become sick, sore, crippled, and disordered for about two months.

The only negligence alleged against the defendant was that it permitted a defective window to be and remain in the car where plaintiff was riding as a passenger, and negligently allowed said defective window to be raised, and that, by reason of such defective window, the injury resulted to plaintiff. When we come to the proofs, there is not a scintilla of testimony tending to show that there was any defect in the window that caused the injury to the plaintiff, save the bare fact that such window fell and caught the plaintiff's hand. Several witnesses for the defendant testified, on the contrary, that said window was carefully inspected, one or them inspecting it immediately after the accident to the plaintiff, and that it and its fastenings were in perfect condition. There was nothing to contradict or question this proof for the defendant. The plaintiff planted his right to recovery on the alleged negligence of the defendant in having a defective window in its car. There was no proof to establish such negligence, but an abundance of un rebutted and undisputed proof that there existed no such negligence as alleged, but, on the contrary, that the window and its fastenings were in perfect condition. Addressing itself to the extent of the presumption of negligence cast by our statute against railroads in such cases, this court in *Atlantic Coast Line R. R. Co. v. Crosby*, 53 Fla. 400, 43 South. 318, said: "This presumption ceases when the railroad company has made it appear that its agents have exercised all ordinary and reasonable care and diligence. In the presence of such proof by the railroad company, the jury do not take any such presumption with them to the jury room in

weighing the evidence and in coming to a determination. The statute does not create such a presumption as will outweigh proofs, or that will require any greater or stronger or more convincing proofs than any other question at issue. All that the statute does is to cast upon the railroad company the burden of affirmatively showing that its agents exercised all ordinary and reasonable care and diligence, and here the statutory presumption ends." As before stated, the defendant railroad by an abundance of undisputed and uncontradicted evidence relieved itself of such presumption in this case, and there was no proof to establish the alleged negligence upon which the plaintiff relied for recovery, but, on the contrary, much uncontradicted affirmative proof that no such negligence existed as was alleged. Under these circumstances, the plaintiff had no right to recover, and, at the close of the evidence, the court should have given the affirmative charge requested by the defendant.

The defendant also moved for new trial upon the ground that the verdict was not sustained by the evidence, which motion was overruled, and it is assigned as error. It follows from what has already been said that this ground of the motion for new trial was well taken, and that the court erred in overruling such motion.

The judgment of the court below in said cause is hereby reversed at the cost of the defendant in error.

HOCKER and PARKHILL, JJ., concur.

WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

BLOUNT v. TOMLINSON.

(Supreme Court of Florida, Division B. Feb. 16, 1909. Headnotes filed March 26, 1909.)

1. PRINCIPAL AND AGENT (§ 190*)—COMMISSIONS TO BROKER—PERSONS LIABLE.

Where a real estate broker or dealer agrees by parol with a known agent of a known principal to obtain a purchaser for the real estate of the latter, and a sale is effected, the legal presumption is, if commissions on the sale are agreed to be paid the broker, that the principal is liable to pay the commissions rather than the agent of such principal, and this presumption will prevail unless it is made to appear by the evidence that credit for the commissions was given to the agent; and in a suit by the broker or dealer against the agent to recover the commissions the burden of proof rests upon such broker or dealer of showing that the agent agreed to be personally responsible for such commissions. But, where the contract or dealings between the parties are such as prima facie bind the agent, the burden of proof that in fact they bound the principal is upon the agent.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 718; Dec. Dig. § 190.*]

2. PRINCIPAL AND AGENT (§ 136*)—RIGHTS AND LIABILITIES AS TO THIRD PERSONS—LIABILITY OF AGENT.

A party dealing with an agent is not at liberty to fix the terms upon which he will deal with such agent without regard to the consent or promise of the latter.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 478; Dec. Dig. § 136.*]

(Syllabus by the Court.)

Error to Circuit Court, Hillsborough County; Joseph B. Wall, Judge.

Action by E. H. Tomlinson against B. W. Blount. Judgment for plaintiff, and defendant brings error. Reversed.

D. C. McMullen, for plaintiff in error. Macfarlane & Davis and Richard P. Marks, for defendant in error.

HOCKER, J. This case is here on writ of error from a judgment of the circuit court of Hillsborough county in favor of E. H. Tomlinson against B. W. Blount for \$4,300 and costs.

In March, 1906, the Peninsular Naval Stores Company, a Mr. Stucky, and a Mr. Henderson owned a tract of 24,000 acres of land near Umatilla, which is in Lake county, Fla., their respective interests being one-third each. Mr. B. W. Blount, the plaintiff in error, was the president and manager of the Peninsular Naval Stores Company. On the 19th day of March, 1906, the defendant in error, E. H. Tomlinson, wrote the following letter to B. W. Blount:

"Jacksonville, Fla. 3/19/06.

"B. W. Blount, Tampa, Fla.

"Dear Sir: I have a party to whom I can sell the sawmill timber on the 24,000 acres near Umatilla, and belonging to you and Mr. Henderson. Mr. Henderson said you wanted to retain the land. I had Mr. Henderson when here to meet Mr. Page (Cooney's man) and he gave a price of \$3.00 net, this was two months ago. I wish you would give me your very best price and let me know what commission you can pay. I believe I can sell at it \$3.25 and reserve the land. I usually charge 5% do not speculate on property placed with me for sale therefore I want your best price, and would like it with a map of the tract as early this week as you can give it. The tract I placed before you and Mr. Muller is cheap. Yours truly."

On the 21st Blount wrote the following letter to Tomlinson:

"Mar. 21, 1906.

"Mr. E. H. Tomlinson, Jacksonville, Fla.

"Dear Sir: I have yours relative to the Umatilla proposition. I am referring your letter to Mr. E. K. Nelson of Ocala for reply, who will send you map, prices, etc.

"Respectfully, B. W. Blount.
"B.W.R."

On the 22d of March, 1906, Mr. Nelson sent the following letter to Tomlinson in reply:

"Ocala, Fla., 3/22/06.

"Mr. E. H. Tomlinson, Jacksonville, Fla.

"Dear Sir: Yours of the 19th to Mr. Blount referred to me to-day. We have the exclusive handling of the Umatilla Timber and would be glad to sell you same; the price of this timber is \$3.50 per acre for the mill timber alone, does not carry any land or turpentine rights. There is 5 % commissions at this price, which we will divide equally with any one that will furnish a purchaser. If you have a party ready to do business we will be glad to take it up with you.

"Yours truly,

"The Blount Real Estate Company,

"Per E. K. Nelson, Secy. and Treas."

Mr. Tomlinson says in his testimony: "I consider that Mr. Blount's letter is the first that placed the property in my hands. This was the first letter I got from Mr. Nelson in reference to the matter. This correspondence so far constitutes the placing of this property in my hands for sale, but not exclusively because my correspondence continued with Mr. Blount." Mr. Tomlinson further says: "I do not claim these two letters I have introduced in evidence as the basis of my right to sell this property exclusively, because as the trade progressed changes developed. I do not base my claim on this correspondence, but there are subsequent changes that entirely changed the character of the contract. This original contract was for the timber only. Afterwards we changed the contract, and entered into negotiations for the timber and turpentine privileges, a sale of everything connected with the place. These negotiations were entered into by me with Mr. Blount and his agent, Mr. Nelson, who was supposed to carry out his principal's instructions." He further says: "I was informed that this property belonged and was owned by Mr. Blount, Mr. Henderson, and Mr. Stucky. I understood that Mr. Henderson and Mr. Stucky were interested in the property along towards the last of the trade. I did not know it at the beginning." He further says that, about six weeks after the negotiations began, he discovered from correspondence that a Mr. Lester was representing Mr. Blount. All the negotiations about the sale of the turpentine and timber privileges fell through on the prices of \$3 and \$3.50 per acre, but finally the whole 24,000 acres were sold to a Mr. McGehee for \$100,000. Mr. Tomlinson says he first got these figures from Mr. Lester, and that he presented them to Mr. Blount in front of the Law Exchange in Jacksonville, and Mr. Blount said that he would let the property go at \$113,000, and pay him, Tomlinson, 5 per cent. commissions. This he says was the beginning of the new deal which terminated in the sale to McGehee. Mr. Tomlinson testifies that he agreed to give Lester

one-fourth of his commissions of 5 per cent.; that he thought Lester was a good friend of Blount's, and he (Tomlinson) thought Lester could assist him in getting Blount to comply with his proposition to sell the turpentine privileges.

It is impossible to give any reasonably brief analysis of the long and confusing explanations of Mr. Tomlinson or of the other witnesses of the various letters and conversations which were had between the parties during these negotiations. Mr. Tomlinson admits that "as a matter of fact I knew before this deal was consummated that Mr. Stucky and Mr. Henderson were interested in this property, this Umatilla tract, notwithstanding I was dealing with Mr. Blount as owner. I knew and understood that Mr. Stucky and Mr. Henderson were also owners in it, but I was dealing with Mr. Blount as I understood him to be the owner and controller; that is, that he had the management and control of the property." He testifies that "Mr. Blount promised me personally to give me \$5,000," a commission of 5 per cent. on \$100,000.

Mr. McGehee testifies, in substance, that he purchased the Umatilla tract through Mr. Tomlinson's Real Estate Agency in Jacksonville; that, after various negotiations, he submitted the \$100,000 proposition to Mr. Blount in Tampa. He does not think any one was present but himself, Tomlinson, and Blount; that Blount said that he would have to get into communication with Mr. Nelson, but he afterwards closed the deal in Ocala on that basis.

Mr. Blount testifies that he never owned the Umatilla tract of land; that at the time the deal with McGehee was made the property was owned by Stucky, Henderson, and the Peninsular Naval Stores Company; that he was president and manager of the latter company, and that the only way he became connected with the deal was as such president; that the matter of selling the property was taken up with Mr. Lester; that Lester represented him in dealing with Tomlinson; that he never put the property in Tomlinson's hands for sale, but did place it in Lester's, and, when it was sold, he paid Lester the commissions according to the agreement with him; that he represented all the owners in selling the property; that he never placed the property in Tomlinson's hands, and never agreed to pay him a commission; that he knew Lester and Tomlinson were handling this deal together; that he never had a conversation with Tomlinson as to what his share of the commission should be; that he put the property in Lester's hands for sale; that Tomlinson was representing the buyer and Lester, the sellers; "that is what I thought, that he wrote to Tomlinson because Tomlinson wrote to him."

Mr. Lester testifies, in substance, that he effected the sale through Tomlinson and was entitled to the 5 per cent. commission, which

was to be divided in the proportion of one-third between himself, Tomlinson, and Mr. Blount. The latter says this was for the company of which he was president.

Many letters and telegrams passed between the parties, but they do not shed any particular light upon the controverted fact whether Lester or Tomlinson was entitled to the 5 per cent. commission. They tend to show the relation between Tomlinson and Lester immediately before the sale was concluded in July, 1906. For example the following telegrams and letters:

"Jacksonville, Fla. May 14, 1906.

"P. R. Lester, Ocala, Fla.

"Arrange with Blount for sale to McGehee as we talked. E. H. Tomlinson."

"Jacksonville, Fla. June 25—06.

"P. R. Lester, Ocala, Fla.

"Have Blount meet us Ocala Wednesday noon—answer quick.

"E. H. Tomlinson."

"Jacksonville, Fla. 5/9/06.

"P. R. Lester Esqr. Ocala, Fla.

"Dear Sir: I sent my man the plat of the 27000 and I will be glad for you to make the arrangement with Mr. Blount you and I were talking about. My party may be on the land now, so dont lose any time in letting me know. I want to write him what I can do.

"Yours truly, E. H. Tomlinson."

In a letter of Tomlinson to Lester, dated "Jacksonville, Fla., 6/21/06," he says: "I have asked Blount to wire and meet McGehee Monday or Tuesday as they may agree."

There are several other letters from Tomlinson to Lester written in June, in which he is endeavoring to bring about the meeting between Blount and McGehee through Lester. The testimony it seems to us is conflicting as to whether Blount was handling this property through Lester as his sole agent or through Tomlinson as his sole agent, or through Lester and Tomlinson together. It is clear, however, that Blount did not own the property himself, and that he was simply representing the owners in the transaction. The evidence shows that Tomlinson knew that Blount was not the owner before the sale was consummated. Blount positively denies that he ever promised to pay Tomlinson commissions for selling the property, and alleges that he put the property in Lester's hands for sale, and not in Tomlinson's. He says he thought they were acting together. Lester says the property was in his hands for sale, and he promised Tomlinson one-fourth of the commissions. Tomlinson says he had the sale of the property, and promised Lester one-fourth of the commissions. In this state of the evidence the judge charged the jury: "When a party deals with the known agent of a known principal and deals with the agent on his own personal responsibility, he has the right to ignore the

principal, and hold the agent responsible for the payment for his services." This charge was excepted to, and is assigned as error.

The defendant Blount requested the following instruction: "If it is shown in evidence that the property sold was not the property of B. W. Blount, and that the plaintiff knew this, and that Blount was only acting in a representative capacity, then the plaintiff cannot recover from Blount; but, if he has any rights, it would be against the owners of the property," unless you find B. agreed to pay the commission. The court refused to give this instruction, and this ruling is assigned as error.

There is no question here but that Mr. Blount was the authorized agent of the owners of the property in selling it to McGehee.

In the case of *Whitney v. Wyman*, 101 U. S. 392, 25 L. Ed. 1050, it is laid down as law in the body of the opinion: "Where the question of agency in making a contract arises, there is a broad line of distinction between instruments under seal and stipulations in writing not under seal, or by parol. In the former case the contract must be in the name of the principal, must be under seal, and must purport to be his deed, and not the deed of the agent covenanting for him (quoting *Stanton v. Camp*, 4 Barb. [N. Y.] 274). In the latter case the question is always one of intent, and the court, being untrammelled by any other consideration, is bound to give it effect. As the meaning of the lawmaker is the law, so the meaning of the contracting parties is the agreement. Words are merely the symbols they employ to manifest their purpose that it may be carried into execution. If the contract be unsealed and the meaning clear, it matters not how it is phrased, nor how it is signed, whether by the agent for the principal or with the name of the principal by the agent or otherwise. The intent developed is alone material, and, when that is ascertained, it is conclusive. Where the principal is disclosed and the agent is known to be acting as such, the latter cannot be made personally liable unless he agreed to be so."

In section 558, *Mecham on Agency*, it is said: "Where dealings are had with the agent of a known principal, the legal presumption is, as has been seen, that the credit was given to the principal rather than to the agent personally, and this presumption will prevail in the absence of evidence that the credit was given exclusively to the agent, and the burden of proof rests upon the party alleging it. Where, however, the contract or dealings are such as *prima facie* bind the agent, the burden of proof that in fact they bound the principal is upon the agent." See, also, *Reinhard on Agency*, § 206.

The charge given by the trial judge, it seems to us, liable to mislead the jury under the circumstances into supposing that a party dealing with a known agent may himself, and without regard to the consent of

promise of the agent, fix the terms upon which he will deal with the latter. It says nothing about the necessity of such a promise or agreement. If the jury took this view of the charge, and they may have done so, they were misled; for that is not the law. If Blount was acting in the premises as the agent of the owners of the Umatilla tract of land, and that fact was known to Tomlinson, he would not be personally liable to Tomlinson for commissions, unless he expressly promised Tomlinson to be personally liable. The burden was on Tomlinson to establish such a promise by the preponderance of the evidence. Blount emphatically denies that he ever made such a promise. That was the issue to be tried in this case, and the law applicable to this issue should have been given to the jury. We do not think the law applicable to the evidence is clearly stated in the judge's charge. What we have said of the charge of the judge which was excepted to applies to the instruction which was refused. While this instruction perhaps correctly states the general rule as to the personal liability of an agent, it does not recognize the fact that an agent by his express promise or agreement can make himself personally liable. This instruction did not, therefore, cover the real issue made in this case by the conflicting testimony of Blount and Tomlinson. We do not think the judge erred in refusing to give this instruction.

There are some other assignments of error relating to the admission and rejection of testimony, but we do not think them of sufficient importance to justify a further discussion.

The judgment of the circuit court is reversed.

TAYLOR and PARKHILL, JJ., concur.

SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

WHITFIELD, C. J., disqualified.

(57 Fla. 544)

WILLIAMS et al. v. CITY OF ST. PETERSBURG et al.

(Supreme Court of Florida, Division A. Feb. 16, 1909.)

1. PARTITION (§ 16*)—RIGHT TO.

In order to maintain a bill for partition, the complainants must show title or a right to partition.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 52; Dec. Dig. § 16.*]

2. PARTITION (§ 16*)—TITLE TO SUPPORT.

Where, in a partition proceeding, it appears that the complainants have no title to the lands sought to be partitioned, the bill should be dismissed, even though the complainants may have

an equitable interest in the lands, which may be enforced in proper proceedings.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 52; Dec. Dig. § 16.*]

(Syllabus by the Court.)

Appeal from Circuit Court, Hillsborough County; R. M. Call, Judge.

Bill by J. Mott Williams and others against the City of St. Petersburg and others. Decree for defendants, and complainants appeal. Affirmed.

F. M. Simonton, for appellants. H. S. Hampton and Sparkman & Carter, for appellees.

WHITFIELD, C. J. On July 8, 1904, J. Mott Williams, Emily E. C. Rowland, Mary S. Fisher, and Josephine W. Downey filed a bill of complaint in the circuit court for Hillsborough county against the appellees for the partition of lands. The bill of complaint was amended with reference to requiring the city of St. Petersburg and B. C. Williams to specifically perform an agreement mentioned in the bill of complaint. William D. Bain and Bessie T. Bain, by F. M. Simonton, her next friend, were substituted as complainants in lieu of Josephine W. Downey, deceased. The judge of the Sixth circuit being disqualified, the proceedings were had before the judge of the Fourth circuit. A motion to strike the amended bill was denied. A demurrer to the bill of complaint was overruled. Upon answer, replication, and testimony the equities were found to be with the defendants, and the bill was dismissed, July 22, 1908. The complainants appealed, and assign as error the decree dismissing the bill of complaint.

The decree was affirmed at the last term; but a rehearing was granted, so that the facts of the case may be more clearly stated.

It appears from the transcript that John C. Williams died in 1893 or 1894, leaving a large estate, all of which by will he gave to his wife, after the satisfaction of several specific legacies and provisions; the children of the testator being expressly excluded from benefit in the estate. The wife, Sarah Williams, was designated sole executrix of the will.

An agreement was entered into in 1894 between the widow and the children of the testator that the will be probated as the last will and testament of the deceased, and that after paying certain claims against the estate the widow should take one-third of the property; the remainder to be divided among the testator's descendants as agreed. It was also agreed that any property of the estate afterwards discovered should be similarly divided.

After an adjustment under these agreements an unsatisfied judgment indebtedness

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of the estate appeared, and several parcels of real estate, including that in controversy here, were discovered to have been omitted from the adjustments. Some of this property, not including that in controversy here, was sold under execution to pay the judgment debt, and was bought in for the widow for an amount much less than the judgment indebtedness. The widow conveyed one-half of the property so bought at the execution sale to J. C. Williams and B. C. Williams, two of the testator's sons, for one-half of the purchase price and expenses, and received from J. C. and B. C. Williams a mortgage to secure the payment by them of two-thirds of the judgment debt, which amount they eventually paid; the widow paying the other one-third. The other children of the testator paid no part of the judgment debt.

The interest of the widow in the property in controversy was quitclaimed by her to J. C. Williams and B. C. Williams before the debt of the estate was satisfied, and there is testimony that the consideration was the payment of the judgment debt. Subsequently the property was improved and greatly increased in value. J. C. Williams and B. C. Williams sold for a price exceeding the judgment debt the property conveyed to them; and J. C. Williams sold to the city of St. Petersburg his interest in the property in controversy as to which he and B. C. Williams had received a quitclaim from the widow and sole devisee.

This suit is for a partition among the descendants of the testator of the land quitclaimed by the widow to J. C. and B. C. Williams, as stated above.

Even if, under the agreement between the widow and the children of the testator, all the descendants are entitled to or have an equitable interest in the land involved here which was quitclaimed by the widow to two of the testator's sons, such interest has not been established or developed into a title, so as to be the subject of partition in this proceeding. In order to maintain a bill for partition, the complainants must show title or a right to partition. See *Dallam v. Sanchez* (decided at the last term) 56 Fla. —, 47 South. 871.

Under the will of John C. Williams, Sr., the legal title to all his property passed to the widow as sole devisee, and under the agreement made by her with the testator's children she may have been in equity bound to convey a portion of the property to the children as agreed, if the property was not rightly used for paying debts; but this proceeding is not properly brought to establish equitable rights and titles, and seeks in effect only a partition of property, though the amendments to the bill of complaint refer to a specific performance of an agreement. The city of St. Petersburg was not a party to the agreement, and all the parties

to the agreement, are not made parties to this proceeding.

The testimony is voluminous, and was passed upon by a careful circuit judge, who found for the defendants. A full consideration of the entire record shows nothing to indicate that the finding is not sustained by evidence presented. No clear and sufficient showing is made to warrant the decreeing of a trust relation and specific performance, even if such a decree would be proper in this proceeding and under the allegations of the bill of complaint. No useful purpose would be served by an extended discussion of the facts. There is ample evidence to sustain the decree, and no reversible errors appear in the transcript.

The decree is affirmed.

SHACKLEFORD and COCKRELL, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

(123 La. 38.)

No. 17,472.

STATE v. GARDNER et al.

(Supreme Court of Louisiana. March 1, 1909.)

CRIMINAL LAW (§ 555*)—NEW TRIAL—APPLICATION—STATEMENT OF FACTS.

A motion for a new trial on the ground that the accused was not represented by counsel, and was not permitted by the counsel for his codefendants to testify in his own behalf, is entitled to no consideration, where the statement of facts by the trial judge and the minutes show that the accused was represented by competent counsel appointed by the court.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 955.*]

(Syllabus by the Court.)

Appeal from Nineteenth Judicial District Court, Parish of Iberia; James Simon, Judge.

Sidney Gardner and others were indicted for burglary, and Gardner was convicted, and appeals. Affirmed.

John Robert Davis, for appellant. Walter Guion, Atty. Gen., and Anthony N. Muller, Dist. Atty. (Ruffin Golson Pleasant, of counsel), for the State.

LAND, J. Sidney Gardner and three other men were indicted for feloniously breaking and entering a box car in the nighttime with intent to steal, and for the larceny of five sacks of rice, of the value of \$25, then and there found in said box car.

The four defendants were tried, and the jury found David Alex not guilty, and Sidney Gardner, Buddy Lubin, and Issie Stokes guilty as charged. Sidney Gardner was sentenced to imprisonment at hard labor in the state penitentiary for a period of seven years, Lubin (alias Robertson) to like im-

prisonment for a period of five years, and Issie Stokes to like imprisonment for a period of four months. Sidney Gardner has appealed, and assigns as error the overruling of his motion for a new trial.

The grounds of the motion are substantially as follows:

That the accused was not represented by counsel when he was tried with the other defendants.

That two of the defendants were represented by counsel and testified in the case, that after their testimony had been given the accused expressed a wish to testify, and that said counsel consulted with him and without his permission refused to let him testify.

That the accused was not represented by counsel and was not allowed to testify in his own behalf, to all which he was entitled to under the law.

That the accused, if allowed to testify, can establish his innocence.

That the accused is an ignorant man, and his rights were not explained to him by the court.

That the accused had no defense made for him, nor was he protected and allowed to make a defense for himself.

That the accused was without means, was in jail, and that it was not until the day after his conviction that his sister came from Texas and employed counsel for him.

The trial judge states that the four defendants were arraigned on January 9, 1909, and the trial court fixed for the 19th of the same month; that, Gardner and Lubin being without counsel and unable to employ one, the court appointed Hon. T. D. Foster to defend them; that Mr. Foster accepted the appointment and ably defended the accused, making a defense for each one of them in his argument before the jury; that the proof against Gardner, consisting of his voluntary confessions made at different times to several persons, might have been the reason for his not testifying, but that was a matter left entirely with him and his counsel; that since his conviction Gardner has employed the counsel, who made the motion for a new trial; that Gardner is in error in the allegations set out in the motion which are not supported by the facts and minutes of the court.

The minutes of January 19, 1909, show that T. Don Foster, Esq., represented Sidney Gardner and Robertson (alias Lubin), "being appointed by the court" for that purpose. The minutes of January 20, 1909, show the presence of the four defendants and "their counsel T. Don Foster, Esq.," and that "after hearing the testimony of the witnesses sworn for the defendants and the arguments of counsel and the charge of the presiding judge the jury retired," and sub-

sequently returned into court and rendered their verdict.

As the record shows that the accused was represented by counsel appointed by the court, there is no merit in the motion for a new trial. On the facts of the case, as stated by the trial judge, there was no miscarriage of justice.

Judgment affirmed.

(123 La. 91)

No. 17,200.

W. L. NELSON & CO. v. ADOLPHE ROCQUET & CO., Limited.

(Supreme Court of Louisiana. Feb. 15, 1909.)

1. RECEIVERSHIP PROCEEDINGS.

A creditor instituted proceedings to have a receiver appointed.

2. APPLICATION FOR RECEIVER.

The board of directors passed a resolution favorable to the application. The corporation filed an answer praying for the appointment.

3. RECEIVER APPOINTED.

The receiver was appointed.

4. NO APPEAL TAKEN.

The president prayed for a new trial, which was refused. Testimony was taken and application heard. The application for a new trial was refused.

No appeal was taken, and no attack in the pleadings was made subsequently to have the appointment vacated and the order of appointment recalled and annulled.

5. RECEIVERS (§ 58*)—APPOINTMENT EX PROPRIO MOTU—VACATION.

Testimony on new trial had passed out; i. e., served its purpose.

The court, stating that an error had been committed, and referring to the testimony previously taken on the application for a new trial *ex proprio motu*, recalled and discharged the judgment previously rendered appointing a receiver.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 58.*]

6. JUDGMENT (§ 381*)—VACATION EX PROPRIO MOTU.

A judgment or decree cannot *ex proprio motu* be annulled in any material respect, much less can it be treated as an absolute nullity, the court having jurisdiction, and all the proceedings having been conducted contradictorily up to and including the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 725; Dec. Dig. § 381.*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Walter Byers Sommerville, Judge.

Action by W. L. Nelson & Co. against Adolphe Rocquet & Company, Limited. Judgment for defendant, and plaintiff appeals. Reversed.

David Sessler, for W. L. Nelson & Co., appellant. Lazarus, Michel & Lazarus, for Gaspar Rudolf, stockholder, appellant. Cage, Baldwin & Crabites (Ross Edmond Breazeale, of counsel), for appellees.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

BREAUX, C. J. The appointment of a receiver has given rise to the issues before us for decision.

W. L. Nelson & Co., creditors of Adolphe Rocquet Company, Limited, a corporation organized under the laws of this state, filed a petition in which they claimed that an amount over \$1,000 was due them. They said in the petition that the exact amount would be given and a statement submitted, if necessary.

They apprehend that on account of the asserted insolvent condition of their debtor they would lose their claim.

The Rocquet Company were cited. They answered and admitted their indebtedness to W. L. Nelson & Co. in the amount claimed, and averred that they were unable to meet their obligations as they matured and as per a resolution of the board of directors at a meeting of the board. They averred that the company is insolvent, and that a receiver was necessary to preserve and administer the affairs of the concern in the interest of the creditors.

The district court, after having considered the petition and the affidavit, the proof and the answer of the defendant, and resolution of the board of directors, appointed James A. Robin receiver of the company upon his taking the oath and furnishing a bond of \$5,000.

This was accordingly done, and Mr. Robin became the receiver of the Adolphe Rocquet Company, Limited. Letters of receivership were issued to him. He asked for an inventory, and also to be authorized to employ counsel, which was granted.

A few days thereafter, Adolphe Rocquet came on his own personal account into court by rule and suggested to the court that he was the owner of 30 shares of the capital stock of the Rocquet Company, Limited, and that being the owner of 50 per cent. of the capital of the corporation he was interested. He had an interest in keeping up the autonomy of the corporation, especially as it bore his name. He urged that the company was not insolvent at the date of the order of the court, mentioned above, appointing a receiver, nor at any time since the date of the order. He attacked the resolution of the board of directors, admitting the insolvency of the company as "invalid, illegal, and irregular"; that it had not been adopted at a legal meeting of the board or of the stockholders; that Robin, the receiver, was not a creditor of the firm.

A rule was accordingly issued, directing Robin, "de facto receiver," to quote the words of plaintiff in rule, to show cause why the appointment should not be vacated.

Insurance companies that were engaged in business here, through the agency of Rocquet Company, joined him in asking that the order appointing a receiver be vacated. The Citizens' Bank, another creditor of the company, also joined in his defense.

On the day that this rule was filed, Robin, receiver, asked of the court to be authorized to engage the services of an expert accountant to examine the books and make due return to the court of the result.

The court appointed W. A. Brand, an expert accountant.

The receiver also obtained from the court authorization to pay the monthly rent for May, 1908.

About this time, another insurance company, the Allemania Fire Insurance Company, of Pennsylvania, another creditor, joined Mr. Rocquet in his application to have the receivership vacated.

Rocquet personally filed another rule, to the same tenor as the first he filed, in which he alleged that the appointment of the receiver was fatally irregular on the face of the papers.

The creditors first above named (Nelson & Co.) at whose instance a receiver was appointed, again filed a petition and annexed to it a complete account of their claim against Rocquet & Co., Limited, which they stated in the first petition they would file, if necessary.

There was evidence taken on the rule to vacate the appointment of a receiver. The expert accountant, Mr. Brand, testified at length; so did another expert accountant, Mr. Moses.

After they had testified, Mr. Rocquet in his own behalf, as plaintiff in rule, offered to testify. To his testifying, counsel for the receiver objected, on the ground that the judgment appointing the receiver was conclusive; that it could only be attacked in a direct action of nullity, or by appeal from the order making the appointment.

The court sustained the objection and excluded the testimony.

The testimony having been heard (June 4, 1908), on the trial of this rule, all except that of witness Rocquet, which was excluded as just above stated, the court rendered judgment on the rule to set aside the order appointing a receiver.

The judge of the district court dismissed the rules June 4, 1908. Judgment of dismissal was signed, June 10, 1908.

The court on the day preceding the order of dismissal had all the attorneys in the case notified that on the next day of the court the court intended to set aside the order of May 21, 1908, appointing Robin receiver.

On the appointed day, ex proprio motu, the court issued an order recalling and setting aside the order of the date just above stated as having been issued in error.

The creditors, W. L. Nelson & Co., who had obtained the order appointing the receiver, filed a rule for a new trial, and alleged that the order setting aside the order appointing Robin receiver on May 21st preceding should not have been granted.

Their grounds are, briefly stated: That

the court had no authority *ex proprio motu* to recall and set aside the judgment of May 21, 1908; that the only way this judgment could be set aside was by appeal or direct action in nullity; that the estate was not solvent.

The new trial was refused.

The plaintiff creditor, Nelson & Co., having applied for an appeal from the judgment rendered on the 9th day of June, Rocquet, appearing in his individual capacity, filed a petition praying that a suspensive appeal be denied. Among the reasons assigned by him was that he had made a tender of the amount of the claim of Nelson & Co.

This petition, alleging tender, was presented after motion of appeal had been made, but before it had been acted upon.

The court *a qua* did not act upon the matter of tender nor consider the tender.

Whether it was possible, in accordance with the rules of practice, for the court to set aside *ex proprio motu* the order appointing a receiver, gives rise to the question to which we have given earnest consideration.

Manifestly a judgment after it has been duly signed by the court cannot be recalled and annulled *ex proprio motu*.

That question has been decided in several cases. Jurisprudence upon the subject has been formulated under article 539 of the Code of Practice.

Unquestionably, the general rule applying to all judgments, it may now be considered thoroughly settled.

In one of the cases of this court, it appears that the district judge rendered an opinion on one day which he recalled and annulled the next day *ex proprio motu*. A new trial from the annulling judgment was applied for. The court denied the motion for a new trial.

On appeal the judgment thus rendered was reversed. *Miller v. Chandler*, 29 La. Ann. 91.

In this connection, our attention has been attracted to article 547 of the Code of Practice.

Prior to Act No. 159, p. 312, of 1898, the proceedings in administering solvent corporations were conducted under the equity jurisdiction of the court, a jurisdiction in this respect not always well defined.

The decision cited with confidence by learned counsel for appellee (*State ex rel. Brittan v. City of New Orleans* (43 La. Ann. 832, 9 South. 643) is not in every respect controlling at this time.

In that case the court said:

"The power of courts to vacate such orders (orders appointing receivers), on motions of the party aggrieved or even on their own motion, is well established." (Italics ours.)

Since Act No. 159 of 1898, p. 312, was adopted, the jurisprudence on the subject is in the main controlled by statute. It is now on a firm statutory basis.

In any event the decision cited has not

the force and effect the appellee imagines it should have. The proceedings to vacate the receivership in that case were conducted contradictorily with all parties concerned. It was in no respect *ex proprio motu*, and the utterance in the decision regarding *ex proprio motu* is not pertinent to the issue in the case. In fact it is *obiter dictum*.

After having arrived at the conclusion just expressed, we took up the decisions of this court rendered since the cited statute was enacted, and a few decisions of a date prior to the statute.

They all hold, in effect, even including the 43d Annual decision before cited (containing the words "*ex proprio motu*"), that there is necessity to proceed contradictorily with all concerned in an application to vacate the appointment of a receiver.

We must stop here and decline to hold that a judgment or order of appointment can be vacated *ex proprio motu*.

Thus in *Brewing Company v. Judge*, 46 La. Ann. 100, 14 South. 615, the court specially mentioned the necessity of a rule.

To this we adhere.

We next, in the order of the issues presented, take up for decision the ground urged by appellee's counsel that the corporation is solvent.

To sustain this position, the appellee passes the judgment of June 4, 1908, ignores it entirely, and takes up the testimony which was taken on appellee's rule for a new trial (refusing it)—that is, the judgment of June 4, 1908—and contends that the corporation was solvent.

We do not think that the question of solvency can be considered at this time and on the appeal from the judgment signed on June 15, 1908.

If the order appointing the receiver was null and void, if it had been rendered without notice, without proof, the contention would have some merit. It has none.

When parties, as in this case, introduce their testimony before a court of competent jurisdiction, and the court finds insolvency and appoints a receiver, the proceedings are not null and void.

If there was error in weighing the evidence, it cannot be corrected *ex proprio motu*. The case having been tried on the merits, the judgment cannot be merely canceled as if it were nothing.

The rule laid down in article 548 of the Code of Practice is plain.

In argument, learned counsel for appellee cited decisions in other jurisdictions under different laws.

These decisions are not controlling, as they do not accord with our own laws regarding judgments and decrees.

Another ground presented by appellee is that Act No. 159, p. 312, of 1898, did not introduce a new system in our practice; it only embodied a rule, well defined in our jurisprudence at the time of the adoption

that purpose." This court, in construing this section, has held that a transfer in accordance therewith can only be had upon request of both parties plaintiff and defendant (*State ex rel. Hughes v. Walker*, 25 Fla. 561, 6 South. 169); that this statute must be strictly observed, and everything necessary to transfer jurisdiction under the statute must appear in the record of the cause (*Swepson v. Call*, 13 Fla. 337); that the order of transfer must direct the transfer of the cause and name the county to which the cause is transferred (*Bauknight v. Sloan*, 17 Fla. 281); and that the order of transfer must show reasons for making it (*Smith v. Gibson*, 14 Fla. 263).

If the validity of the action of Judge Palmer in ruling upon the motion for new trial, and in making an order extending the time for presenting a bill of exceptions and in signing same, depends upon article 5, § 19, of the Constitution, and upon section 1077 of the Revised Statutes of 1892, then in my opinion said action of Judge Palmer is null and void, and the motion herein being considered should be granted; for these provisions of the Constitution and statute were not complied with, and this cause was not legally transferred to be Third judicial circuit, of which Judge Palmer was the judge. But the validity of the action of Judge Palmer does not depend upon the provisions of article 5, § 19, of the Constitution, and upon section 1077, Revised Statutes of 1892. This cause was not transferred to Judge Palmer; and, in ruling and acting upon this motion for new trial, and in making the orders in connection therewith, he exercised no extraterritorial jurisdiction, as I will proceed to show. The action of Judge Palmer in ruling upon the motion for new trial, and making the orders herein, was authorized by the provisions of section 1078 of the Revised Statutes of 1892, which is as follows:

"1078. Substitution of Other.—Whenever the judge of any court, other than the Supreme and criminal courts of record, shall be unable from absence, sickness or other cause, or shall be disqualified from interest or any other cause to discharge any duty whatever appertaining to his office, which may be required to be performed in vacation or between terms, it shall be the duty of any other judge of a court of the same jurisdiction as the court in which the cause is pending, on the application of any party to perform such duties, and hear and determine all such matters, as may be submitted to him, and such judge may discharge such duties either in his own or any other jurisdiction, and shall be substituted in all respects in the place and stead, in the matter aforesaid of the judge unable or disqualified to act."

This statute has been construed by this court and declared to be constitutional. *Swepson v. Call*, 13 Fla. 337; *State ex rel. Florida Pub. Co. v. Hocker*, 35 Fla. 19, 16 South. 614. It is unnecessary to repeat here

all the reasons given by this court in those cases for holding this statute to be valid and constitutional. Suffice it to say, this court held that section 1078 did not confer extra-territorial jurisdiction upon the circuit judges, and that the determination in vacation by Judge Hocker in his, the Fifth, judicial circuit, of a demurrer in a cause pending in and coming before him from the Fourth judicial circuit, was not the exercise of extra-territorial jurisdiction; that section 19 of the Constitution and section 1077 of the Revised Statutes of 1892 had reference to the transfer of causes for trial and matters naturally coming up in term time; but that there was no prohibition in the Constitution of the power of the Legislature to enact section 1078 of the Revised Statutes of 1892, which gives an additional remedy to those expressly provided in the Constitution for an expeditious disposition of matters which can be disposed of in vacation or between terms. So the only question remaining to be decided is whether section 1078 had been complied with when the motion for a new trial was presented to Judge Palmer, and whether the reasons or the causes prescribed in that section existed to authorize the defendant to present his motion for a new trial to Judge Palmer, so as to require or authorize Judge Palmer to act thereon. Let us see. Turning to section 1078, it will be seen that the rights of the defendant, and the power of Judge Palmer to act thereunder, do not depend upon the contingency of the disqualification of Judge Wills. The section declares that, "whenever the judge of any court, other than the Supreme or criminal court of record, shall be unable from absence, sickness or other cause," etc., it shall be the duty of any other judge to act, etc. Was Judge Wills unable to act on the motion for new trial? Does the record in this case show the reason why Judge Wills was unable to discharge the duty of acting on this motion for new trial? Was the determination of this motion for new trial an act which may be performed in vacation or between terms? In order to sustain the power of Judge Palmer to act on this motion for new trial and to make the other orders, these questions must be answered in the affirmative.

It will first be well to note that this motion for new trial may be presented to Judge Palmer, under section 1078, by the defendant, without the concurrence therein of the other party. Consideration of this motion by Judge Palmer does not depend upon the request of both parties, as would be the case under section 1077, Revised Statutes of 1892. Section 1078 provides that "it shall be the duty of any other judge, * * * on application of any party, to perform such duties," etc. It will be profitable to note, also, that this section 1078 does not require the making of an order by Judge Wills for the presentation of the motion for new trial to Judge Palmer, as is required in the

Appeal from Twenty-Third Judicial District Court, Parish of St. Mary; Albert Campbell Allen, Judge.

Action by George H. O'Niell against Samuel R. Guyther. Judgment for plaintiff, and defendant appeals. Judgment amended, and, as amended, affirmed.

Foster, Milling & Godchaux, for appellant. Henry Darley Smith and Paul Kramer, for appellee.

LAND, J. The allegations of plaintiff's petition may be stated as follows:

In the year 1904, the defendant was one of three stockholders of the Trelue Lumber Company and of the Cypress Tank & Manufacturing Company of Patterson, La., and plaintiff was employed as bookkeeper for said corporations.

That about May 1, 1904, defendant, being obliged to leave Patterson on account of the bad health of his wife, employed the plaintiff to represent him in the management of the business of said corporations, and gave plaintiff a power of attorney. The plaintiff did represent defendant faithfully and to his great benefit and advantage, and defendant agreed to make plaintiff's salary thoroughly satisfactory.

That while defendant was away he decided to sell his interest in said corporations and also his interest in the mercantile firm of J. P. Muggah & Co., and requested plaintiff to represent him in the sale of the same. That defendant on his return in December, 1904, not being on amicable terms with his fellow stockholders and partners, and therefore unable to discuss with them matters pertaining to said sale, employed the plaintiff to act and speak for him, defendant agreeing at the time to pay plaintiff the sum of \$2,500, provided he got out of the business without legal proceedings, which amount the defendant agreed to invest with and on the same basis as he did his own money in the pine business, into which he contemplated going, further agreeing to arrange a loan to plaintiff so that he should invest in said business with defendant not less than \$5,000.

That such sale not having taken place up to February 13, 1905, defendant became impatient, and wanted to offer all his holdings for \$50,000 for a limited number of days, and, in case of failure to do so, to institute legal proceedings to dissolve the corporations.

That plaintiff dissuaded defendant from so doing, and requested further time in which to try and effect an amicable sale. That defendant agreed to this, if the plaintiff would take the matter entirely in hand and not bother him with the details of the transaction, and stated that the former proposition of \$2,500 as a remuneration for plaintiff's services would hold good, provided that the defendant receive \$60,000 or more for his interest in the two corporations and part-

nership. That defendant on the following day caused a power of attorney to be drawn up, which was afterwards verbally extended until the day of sale.

That plaintiff served defendant faithfully until the day of sale on April 19, 1905, and the defendant received more than \$60,000 for his interest in the Patterson properties.

That after the sale the plaintiff took three different trips to the Mississippi Coast, at the request of the defendant, in an effort to assist him in locating and purchasing a pine "proposition" to suit him, the greater portion of the expenses of said trips being borne by the plaintiff.

That in July, 1905, the defendant left Patterson to be gone for some months, and plaintiff, being in need of funds, wrote the defendant, "requesting him to send a settlement or check for what was convenient"; and that defendant in response wired the Bank of Patterson to pay plaintiff \$200, which was accepted on account.

That after said sale, plaintiff was about to accept a position in a sawmill in Jeanerette, but defendant followed him there and persuaded him not to accept the position, stating that he was about to purchase another sawmill and lands, and that he desired plaintiff to await such purchase and go into business with him, that he would see that plaintiff had a handsome interest in that business, and that the amount owed plaintiff would be given him as stock, and that defendant would assist plaintiff in obtaining a loan, which, with the amount already due, would give him an interest of some \$5,000 in the new business.

That plaintiff relied on these promises, and refused other overtures for positions; that defendant finally purchased a sawmill and timber lands at Inda, Miss.; that plaintiff worked for defendant, opening his books and straightening out his business at the new mill, but that defendant refused to carry out his promise to sell plaintiff an interest in the business at Inda or to pay the amount due for his services.

Plaintiff also sues for \$78.70, alleged balance of profits due him as a partner on a deal in shingles.

The petition finally alleges:

"That said services to Guyther, leaving out of account the expenses petitioner has incurred for him, are well worth the sum of \$2,378.70, and that petitioner should have judgment for that amount."

Defendant excepted to the petition as too vague and indefinite to allow an answer thereto, in that it was not possible to determine from the allegations of the petition whether the plaintiff was seeking to recover on a contract or a quantum meruit.

Defendant also excepted to the plaintiff's demand for one-half of the profits alleged to have accrued from the partnership venture referred to in the petition, on the ground

that the only remedy was by direct action for a settlement of the affairs of the partnership.

These exceptions were overruled, and defendant excepted. On the trial the defendant objected on the same grounds to all evidence offered to prove the allegations of the petition. These objections were overruled, and defendant excepted. On the trial the defendant objected to evidence to show the value of the services set forth in the petition. These objections were overruled, and witnesses were allowed to testify to such value. Defendant excepted.

Judgment was rendered in favor of plaintiff for the full amounts sued for, to wit, \$2,300 for services, and \$78.70 for profits. Defendant has appealed.

The allegations of the petition show that the plaintiff sues on a special contract for services rendered. The subsequent allegation of the value of such services does not change the nature of the action.

In *Gourjon v. Cucullu*, 4 La. 117, the court held that an agreement for the price of services does not preclude evidence of their value. In *Gribble v. McKleroy and Bradford*, 14 La. Ann. 806, the court said:

"Nor did the judge err in receiving evidence of the value of the services; for it has been held in several cases that, if the plaintiff sues for services on a special contract, he may give evidence of their value. See the case of *Gourjon v. Cucullu*, 4 La. 117.

"If a party can prove a fact on the trial of his cause, he may certainly allege it in his petition."

Hence the allegation of value in the petition does not imply that the plaintiff is suing on a quantum meruit.

The exception as to the demand for profits in the alleged partnership transaction is without merit, as it appears to have been a single venture, completed and leaving a net profit in the hands of the defendant.

We are of opinion that the exceptions were properly overruled.

The answer of the defendant, after pleading the general issue, admits that the defendant agreed to pay plaintiff some compensation for the extra work imposed on him by defendant's absence from his business for six months, but avers that such compensation was paid by a raise of \$25 per month in plaintiff's salary, and by the payment of \$200 in July, 1905, in full settlement of the claim. The answer denies that defendant ever employed plaintiff to sell his interest in the corporations and partnership, and avers that the power of attorney referred to in the petition was never delivered to the plaintiff. Defendant, for further answer, denies that he ever agreed to pay plaintiff \$2,500 or any other sum with reference to the sale of his properties, and he denies that he received \$80,000 from such sale.

Defendant, for further answer, admits that the partnership venture yielded a net

profit of \$59.46, and that plaintiff is entitled to one-half of said amount, but avers that said one-half has been tendered to the plaintiff and deposited in bank for his account.

Defendant was absent from Patterson about six months in 1905. Plaintiff had a power of attorney to represent him as a stockholder and director. Plaintiff also represented the defendant in the matter of the sale of his interest in the properties. The testimony of the plaintiff on this point is corroborated by defendant's letter of November 3, 1905, written at Los Angeles, Cal., from which we excerpt the following passages:

"Your plan of eliminating the book accounts &c. and selling only the mills, lands, lumber on hand, is a good one, and I don't see why it should hang fire, and I hope that there will be some results from your efforts. * * * And while we are on this subject I want to say that, if you can make a deal that will bring me a fair return, I will try to do the handsome hand-out for you when the thing is settled up. At all events, if I succeed in getting out, and have coin enough to start some other business, I shall want you with me, so don't get tied up with the new concern too quick."

Defendant returned to Patterson in December, 1904, and then, according to plaintiff's testimony, made the first agreement recited in the petition. The contemplated deal fell through, and subsequently the two co-stockholders of the defendant sold their stock to R. L. Riggs. Whereupon, according to plaintiff's testimony, the defendant made the second agreement referred to in the petition. It appears that on February 14, 1905, the defendant executed a notarial power of attorney authorizing the plaintiff to sell and transfer, at such prices as he might deem proper, all his stock in the corporations and all of his interest in the partnership. The notary, a brother of the plaintiff, remarking on the broad and sweeping character of the mandate, said that plaintiff ought to feel flattered, and that defendant trusted plaintiff further than he would. Defendant replied that:

"Mr. O'Niell was all right, and if he stuck to him in this matter he would fix him up in the world."

As to the power of attorney, the evidence shows its delivery to plaintiff. Mr. Riggs saw it in plaintiff's possession, and several witnesses testified that defendant told them that plaintiff had authority to represent him in the matter of the sale.

The situation was peculiar. The defendant was sick of the business. He wished to sell out, but his associates were not willing to buy his interest or to sell the property. Defendant went to California, leaving plaintiff as his representative to effect a sale, if possible. Plaintiff advised against selling the accounts, and they were reserved from all the subsequent negotiations. One deal fell through, but finally the two associates

of the defendant gave Mr. Riggs an option on their stock, and later the defendant sold his third interest to the same purchasers. The value of plaintiff's services consisted in inducing the associates to sell their interest in all the properties, and in assisting the sale of defendant's interest in the same. The defendant realized over \$60,000 from the sale of his interest. Plaintiff, according to Riggs' testimony, was a large factor in bringing about the sale of the interests of Muggah and Trellue, which paved the way to the sale of the defendant's interest in the same properties. Mr. Riggs on cross-examination stated that under similar circumstances he would expect to pay his own bookkeeper a commission of 5 per cent. Mr. Davis of the same company, testified to the same effect.

Plaintiff represented defendant for six months while he was absent from Patterson, and looked after his interest in the three concerns, besides discharging his duties as bookkeeper. The promises of handsome compensation and of fixing him up in life were made with reference to the sale of defendant's interest in the properties, and not for the mere management of the ordinary affairs of the concern.

In July 1905, plaintiff wrote to defendant:

"Would appreciate very much if you would send me a check for the work at the office while you were away and for attending to the matters pertaining to the sale of the T. L. Co. and O. T. & M. Co. Everything has been going out for the past six months, and nothing coming in, and I would not like to start out running short."

Defendant wired the Patterson Bank to pay plaintiff \$200, but made no other reply.

In December, 1905, plaintiff went to Inda, Miss., to keep books for the defendant, and stated to his representative that he had a claim against the defendant for \$2,500. Plaintiff served as bookkeeper for about 60 days, and then resigned. Plaintiff was offered \$5,000 of stock at 50 or 60 cents per dollar of par value, to be paid out of his salary and dividends. Plaintiff declined to take the stock. When the manager mentioned to the defendant that plaintiff had a claim of \$2,500 against him, he seemed surprised, and said that it was the first time he ever heard of it. This is the gist of the manager's testimony.

Plaintiff testified that, after having several unsatisfactory interviews with the defendant, the latter in December, 1905, or January, 1906, offered him \$1,200 in lieu of the stock promised. Plaintiff declined this offer.

Defendant's version of this offer is that plaintiff complained that defendant had caused him to lose \$1,200 by keeping him from accepting employment elsewhere, and that defendant replied that, if plaintiff thought that, he would give him that amount rather than to have him say that defendant was the cause of the loss.

Defendant's testimony is in effect that

he considered \$200 paid to plaintiff in July, 1905, was in full settlement of all extra services rendered in defendant's behalf, and that the only additional understanding was that defendant would give plaintiff employment and sell him \$5,000 worth of stock at 50 or 60 cents on the dollar, to be paid for out of the dividends.

The decided preponderance of the evidence shows that defendant employed plaintiff to bring about a favorable sale of defendant's interest in the three properties at Patterson, and promised him handsome remuneration, and that the plaintiff was instrumental in bringing about the sale made in April, 1905. In fact, the power of attorney proves the employment of plaintiff to sell the properties on such terms as he might deem best. The testimony of the plaintiff and of the notary shows that the plaintiff as agent was to receive a liberal compensation for his services. The trial judge gave credit to plaintiff's testimony as to the price to be paid.

The principal contention by defendant's counsel is that the evidence of plaintiff is insufficient to establish a contract for more than \$500, because the law requires such an obligation to be "proved at least by one credible witness and other corroborative circumstances." Civ. Code, art. 2277. It is further argued that the fact that a witness is a party in interest, such as plaintiff or defendant, may diminish the extent of his credibility. Civ. Code, art. 2282. "The testimony of one witness however credible is, per se, insufficient to prove a contract when the value exceeds five hundred dollars." *Lazarus v. Friedrichs*, 117 La. 714, 42 South. 230.

The question in this case is whether the evidence shows other "corroborative circumstances." To hold that such circumstances should be specific enough to cover the very terms of the parol contract would be tantamount to requiring the testimony of two witnesses.

In *Flower v. Millaudon*, 19 La. 192, it was held that a parol contract to take slaves at \$11,600 was sufficiently proven by the testimony of one witness and circumstances tending to show that the slaves were taken under an agreement and not by virtue of a subsequent judicial sale at a lower price.

In *Succession of Piffet*, 37 La. Ann. 871, a physician claimed a fee of \$2,000 for services to the deceased under a special verbal contract. The corroborating circumstances were that the patient was old and rich, and ardently wished for time and strength to dispose of her property, and that the physician gave up his other practice and devoted himself exclusively to the patient. Evidence was also adduced to prove that the services were worth the sum claimed. The court held that such evidence was admissible for the purpose of proving that the contract was one likely to be made under such circum-

stances and was reasonable in itself, and that the corroborating circumstances were sufficient to support the testimony of the physician as to the verbal contract.

In the case at bar there are a number of corroborating circumstances which support the testimony of the plaintiff that he was employed and rendered services of value under a verbal contract.

The question is therefore one of credibility, and not of sufficiency. The trial judge gave credit to the testimony of the plaintiff.

The contention that the interest of plaintiff in the properties did not sell for \$60,000 as provided in the alleged verbal contract, is without merit, since the price plus the reserved accounts realized about \$62,000.

As to the profits of the partnership venture, there is no evidence in the record except the admission of defendant that plaintiff's share amounts to \$29.73.

It is therefore ordered that the judgment below be reduced to \$2,329.73, and, as thus amended, be affirmed; plaintiff to pay costs of appeal.

(123 La. 110)

No. 17,267.

FILES v. RAILROAD LANDS CO.

(Supreme Court of Louisiana. March 1, 1909.)

ADVERSE POSSESSION (§ 43*)—PRESCRIPTION OF TEN YEARS—TACKLING POSSESSIONS.

Where, in the case of a sale, made in good faith by a vendor in actual possession, of a small tract of land, which, with a larger tract, owned by the same person, is surrounded by a fence, the vendor, after the sale, fails to segregate the tract sold, and fails to keep his stock from grazing on it by additional fencing, but does not pretend to hold possession, his possession, such as described, being subject to the pleasure of the owner, will be regarded as that of the owner, and, as such, may be united with his previous actual possession and the owner's subsequent civil possession for the purposes of the prescription of 10 years, *acquiriti causa*.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. § 218; Dec. Dig. § 43.*]

(Syllabus by the Court.)

Appeal from First Judicial District Court, Parish of Caddo; Thomas Fletcher Bell, Judge.

Action by R. M. Files against the Railroad Lands Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Wise, Randolph & Rendall, for appellant. Alexander & Wilkinson, for appellee.

Statement of the Case.

MONROE, J. Plaintiff alleges that defendant is slandering her title to a tract of land described as the W. ½ of S. E. ¼ of Sec. 5, Tp. 19, R. 16, in the parish of Caddo, which land she acquired by purchase from W. B. Ogilvie, as per deed, a copy of which is said to be annexed to and made part of

her petition; that Ogilvie owned and possessed said land under deed from Mrs. Julia B. Miles, recorded in Conveyance Book 14 of said parish, page 538; that Mrs. Miles owned and possessed under deed from Frank F. Jeter, recorded in Conveyance Book 11 of said parish, page 754; and that all of said parties, with petitioner, have had actual possession of said land more than 10 years. Wherefore, she prays for citation and for judgment "quieting her in her ownership and possession of said land, and ordering said company to stop slandering her title thereto"; also condemning it to pay \$200 as damages, etc.

Defendant denies that plaintiff is in possession, and "in the alternative," alleges that:

"If it be found that plaintiff is in possession, * * * your defendant, by asserting a claim of ownership, has not slandered petitioner's title, * * * because defendant is the owner of said property, having acquired same by mesne conveyance from the United States by the following chain of title: * * * Wherefore, defendant prays that plaintiff's demand be rejected, and that plaintiff be decreed not to be in possession of said land; but your defendant prays, in the alternative, that, if plaintiff should be decreed to be in possession of said land, defendant be recognized as owner thereof and entitled to possession."

Thereafter plaintiff pleaded the prescription of 10 years, as a possessor in good faith, under a title translativo of property.

The issue to be decided is presented by the following admission and statement of contention, to be found in the brief filed by counsel for defendant, to wit:

"We admit that plaintiff and her authors have had acts translativo of this property for more than 10 years, but we contend that they have not had the possession necessary to support the prescription."

Upon the subject of the possession, it is shown that F. F. Jeter bought the land in dispute, included in a much larger tract, the whole of which was fenced in, from his father, W. N. Jeter, in 1889, and that he took actual possession of it and remained in possession until he sold it to Mrs. Miles in 1891. As to the subsequent possession, F. F. Jeter gives the following testimony, which is practically uncontradicted, to wit:

"Q. When you sold to Mrs. Miles, she took possession of it? A. I think she sold it pretty soon afterwards; I don't know that she ever saw the land. I think Ogilvie bought it. Q. After you sold it, did you keep it in your possession any more? A. I had other land in that pasture. My fence did not run across that land; that land was in a body of the land where I owned. Q. I am trying to get at this: After you sold this 320 acres of land, now, did Mrs. Miles take possession? A. Never was on the land in her life. Q. Then, how did she take possession? A. She bought it and paid for it and then sold it. Q. Then, who represented her in the possession, when she was in possession? A. Her son-in-law, Menter. Q. He was on the land? A. No, sir; he came to my house and showed me land this side. Q. What arrange-

ment did you make with Mrs. Miles about this land of hers? A. Did not make any. Q. How was it inclosed—in the large inclosure? A. Yes, sir; and she did not object. Q. And you made no objection? A. No, sir. Q. After Ogilvie got it, did he go into actual possession of it? A. No, sir. Q. Did he make any arrangement with you? A. He tried to sell it; told me Mr. Cole was his agent. Q. I am asking you what arrangement you made with Ogilvie in regard to that 320 acres of land? A. Well, I do not know; they thought it was of such little value, did not think it worth looking after. Q. So you had no arrangement with him? A. No, sir. Q. About your possession, if you had it in possession, you had no arrangement with Ogilvie about it? A. No, sir. Q. Do you know when Mrs. Miles bought the land from Ogilvie? A. No, sir; I do not remember. Q. You never made any arrangement with Miss Files for the land? A. No, sir. Q. Never paid any rent for the land to Miss Files? A. No, sir; she could have fenced her land out if she did not want any stock on it; I had a fence on my land. Q. Was not her land inclosed in that general fence? A. Yes, sir. Q. Do you think she knew anything about your fences? A. I did not care about it. * * * Q. You fenced up the whole tract of 740 acres? A. It was under fence when I bought it. Q. It was under fence then? A. Yes, sir, an old rail fence. Q. What became of the old fence? Was it taken down or burned? A. Yes, sir, burned up. Q. Then you put a wire fence around the whole place? A. Yes, sir. * * * Q. The wire fence was all around this land in controversy here? A. Yes, sir."

There was judgment in the district court in favor of the plaintiff, save as to her demand for damages, and defendant has appealed.

Opinion.

It is not disputed that, if plaintiff can unite the civil possession flowing from her title with the actual possession of Jeter, the author of her title, the prescription upon which she relies is established; but it is said that Jeter's possession was adverse to that of his own vendee, and as mere civil possession which does not follow, and cannot be connected with, actual possession, is not a sufficient basis upon which to rest the prescription *acquirendi causa*, that she fails to sustain her position. This contention is not supported by the fact; the evidence showing that (whether such a thing be legally possible or not) the idea of holding any possession adverse to that of his vendee, or of his vendee's successors in title, never occurred to Jeter. He seems to have considered that, having sold the property, the purchaser and subsequent owners were at liberty to do with it as they pleased, but that he was under no obligation to segregate it from his land or to keep his stock from pasturing on it by fencing it in. He says, however (referring to plaintiff):

"She could have fenced her land out if she had not wanted my stock on it; I had a fence on my land."

Other than that he thus allowed his stock to graze on it, and that it formed part of

a tract of some 700 acres around which he had built a wire fence, he pretended to have no possession, such possession as he thus had being held subject to the pleasure of the owner, and, being so in fact, was in law the possession of the owner. We find nothing, either in the case of *Roe, Wild. Green v. Bundy*, 45 La. Ann. 398, 12 South. 759, or in the matter of the Succession of Zebiriska, 119 La. 1076, 44 South. 893, to sustain the view propounded by defendant's counsel. To the contrary, the opinions in both those cases sustain our conclusion that, in the instant case, the vendor's possession was the possession of his vendee and of the subsequent holders of the title conveyed by him, and may properly be added to his previous actual possession and to their subsequent civil possession for the purposes of the prescription here relied on. The judgment appealed from is, therefore, affirmed.

(123 La. 114)

No. 17,446.

REYNOLDS v. EGAN.

In re REYNOLDS.

(Supreme Court of Louisiana. Feb. 15, 1909.
Rehearing Denied March 15, 1909.)

1. JURY (§ 14*)—RIGHT TO JURY TRIAL—ACTION FOR INJUNCTION.

Plaintiff had a right to a trial by jury.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 77; Dec. Dig. § 14.*]

2. MANDAMUS (§ 31*) — WHEN GRANTED — GROUNDS.

The writ will not issue, as the answer of respondent shows that the issues will be heard and determined at the earliest possible opportunity.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 74; Dec. Dig. § 31.*]

(Syllabus by the Court.)

Action by M. L. Egan against Margaret Reynolds. On the grant of a writ of injunction, Margaret Reynolds applied for writs of certiorari and mandamus. Application denied, and petition dismissed.

See, also, 47 South. 371.

Benjamin Rice Forman, for relatrix. Carleton Hunt and Charles Louque, for respondent judge.

BREAUX, C. J. The relator asks this court to issue an order to the honorable judge of the district court, directing him to rescind the order for a jury trial, to try the case as a summary case according to Act No. 23, p. 39, 1882, or, in the alternative, that a mandamus issue directing him to try the case as a preference case, and not to postpone the trial of the injunction suit and action of nullity by the judgment debtor until after the final determination of the devolutive appeal pending in this court.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

To the end of considering the questions involved, it became necessary to review the facts connected with this litigation.

In June, 1908, relator recovered a judgment in the district court against Marie Louise Egan, from which the latter obtained a suspensive appeal, which was not perfected by furnishing bond.

A rule was taken for execution of the judgment.

In answer to the rule the validity of the judgment was attacked.

Not a jury case:

The relator objected to the court's ruling allowing the case to go to a jury.

The defendant in the district court, Miss M. L. Egan, instituted an action of nullity and sued for a writ of injunction, which was granted on a \$1,500 bond.

Relator's ground is that the case is summary, and not a jury case.

This contention is erroneous. As bond was required, jury trial was properly granted. *Cumming v. Police Jury*, 5 La. Ann. 634.

In the second place, relator complains of the delay to which she had been subjected. Relator claims that, even if this case be a jury case, she is entitled to preference because the execution of her judgment is enjoined.

It is in place to state here that plaintiff in injunction attacked the judgment on the ground of fraud and ill practices; that the defendant in injunction conspired with the witnesses heard on the trial; that she (relator) has no hope of an early trial to which she is entitled.

Preference claimed:

Defendant's injunction urged that, if the case can be tried by jury, then it should be given the right of way over all cases.

We are not prepared to agree with this proposition under all circumstances, although we are of the opinion that the trial of an injunction, arresting the execution of a judgment, should not be postponed in any case, or continued, if reasonably avoidable.

Without reviewing the details of the case, we are attracted by the statement of our learned brother of the district court that he will try the case at an early date as a jury can be drawn for the trial from the general venire drawn to serve in other divisions; that this will be done if the court is of opinion that delays should be brought to a close and the injunction tried at an early date.

Upon this expression of our opinion, we are certain that our brother will try the case this month, or early in the next—as soon as possible, in fact.

This being understood, we take it, we decline to make the mandamus peremptory, as everything needful in the premises will be attained without it. Courts should not

be prone to peremptory orders to go where the utmost faith prevails.

For reasons stated, the order heretofore issued on relator's application is recalled, her application is denied, and her petition dismissed; the costs of these proceedings to be assessed to the losing party in the injunction proceedings.

(123 La. 117)

No. 17,266.

ANTEE et ux. v. D. C. RICHARDSON TAYLOR LUMBER CO., Limited.

(Supreme Court of Louisiana. Feb. 1, 1909.

Rehearing Denied March 15, 1909.)

MASTER AND SERVANT (§ 233*)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

A servant who selects an improper and dangerous route assumes the risk of resulting injury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 702; Dec. Dig. § 233.*]

(Syllabus by the Court.)

Appeal from First Judicial District Court, Parish of Caddo; Thomas Fletcher Bell, Judge.

Action by Pierre and Noeme Antee against the D. C. Richardson Taylor Lumber Company, Limited. From a judgment for plaintiffs in part, they appeal. Affirmed.

Joel Lafayette Fletcher, for appellants. Alexander & Wilkinson and Wise, Randolph & Rendall, for appellee.

LAND, J. Plaintiffs sued to recover damages for the death of their son Louis, who was killed in defendant's sawmill in January, 1908. Plaintiffs allege that their son was inexperienced and uninstructed, and was killed by coming in contact with a large driving belt operated across a narrow passageway.

It is charged that defendant was negligent in not furnishing sufficient lights and in operating the exposed belt.

Plaintiffs also sued for damages for another alleged injury to their son in the same mill a few days prior to his death, resulting from contact with another belt.

Plaintiffs also sued for \$4.50 wages due their son at the time of his death.

Defendant for answer pleaded the general issue, and averred that the death of the plaintiffs' son was caused by his own gross negligence and want of care; that the deceased knew the location of the belt and had been warned against coming in contact with it; that the belt was open and visible, and if it was dangerous he assumed the risks therefrom.

The case was tried before the judge, who rendered judgment for the plaintiffs for the wages claimed, but otherwise rejected their demands. Plaintiffs have appealed.

Louis Antee, a young man 21 years old,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

after working several days at the defendant's sawmill, was killed in the morning before daylight by coming in contact with the main driving belt where it crossed a narrow alley between the engine house and the mill. This belt was running whenever the mill was in operation. It was exposed. The young man was attempting to pass through this unlighted alley, when he was caught by the belt and killed. The evidence shows that this belt was almost invisible when it was dark.

The evidence tends to show that the alley was not intended for, and was seldom used as, a passageway, and that the deceased could have safely passed in other ways to the other side of the buildings. The evidence also tends to show that the deceased knew the location of the belt and that it was in operation at the time. It is hardly possible that he was ignorant of facts obvious to the dullest perception.

A servant, who without inquiry, selects an improper and dangerous route, assumes the risks of resulting injury. *Sauer v. Union Oil Co.*, 43 La. Ann. 699, 9 South. 568.

Where there are two avenues of travel, a person choosing the more dangerous one assumes all of its attendant and incidental risks. *Settoon v. T. & P. Ry. Co.*, 48 La. Ann. 807, 19 South. 759.

In the case at bar the deceased could have passed through the lighted building, but chose to attempt the passage of a dark alley, across which a large belt was operating at the time. The other injury was slight, and the alleged negligence of defendant is not shown.

Judgment affirmed.

(123 La. 119)

No. 17,189.

Succession of STAUB.

(Supreme Court of Louisiana. March 1, 1909.)
WILLS (§ 775*)—BEQUESTS—CONSTRUCTION.

Testatrix bequeathed a specified sum to "the city insane asylum" of a designated city. At the time of the execution of the will the city maintained the insane at such institution. At the death of testatrix the city had ceased to permanently care for the insane at such institution, but temporarily cared for them, until they could be transferred to the state asylum, either at a house of detention, or at a retreat, or the city jail. *Held*, that the bequest was to the city, for the benefit of the insane falling to the charge of the city, and it did not lapse because it ceased to permanently care for the insane.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 775.*]

Appeal from Civil District Court, Parish of Orleans; John St. Paul, Judge.

In the matter of the succession of Anna Staub, deceased, involving the question whether a bequest to the City Insane Asylum of New Orleans had lapsed. From a decree adjudging that the legacy had lapsed, the city appeals. Reversed.

John Fowle Crosby Waldo, Asst. City Atty., for appellant. Félix Jonathan Dreyfous and Alfred David Danziger, for appellee.

PROVOSTY, J. Mrs. Anna Staub made her will in 1881, and died in 1908. She instituted the Little Sisters of the Poor her residuary legatee, and made a bequest of \$1,000 to her sister-in-law, and added that, should her sister-in-law die before her—

"then the legacy of \$1,000 shall accrue to the below-named insane asylum.

"To the City Insane Asylum I give and bequeath two thousand dollars."

This bequest is contested on the ground that the asylum ceased to exist before the death of the testatrix and that the legacy has consequently lapsed.

At the time this will was made the law required, as it has done since and does now, that the insane falling to the charge of the public should be sent to the State Insane Asylum at Jackson, La. But at that time the city, for some reason not explained, sent none of her insane to Jackson, but cared for them herself. She kept them in one of the wings of an old ramshackle iron structure belonging to the United States government, which had been used at one time as a marine hospital, but which for years had been abandoned by the government and left to shift for itself. Whether this use of the building was with the permission of the government, or even by virtue of any city ordinance, the record does not show. The inference would be that the whole arrangement was a mere expedient, or makeshift, resorted to by the city officer to whose department this branch of the public service belonged, on his own initiative. And this is all the more probable, considering that the arrangement was put an end to by one of the district judges of the city, who at the instance of a private citizen went to the place, examined all the inmates, committed to Jackson all those found insane, some 60, and released the rest, some 30. This was in September, 1882. Such as the place was, however, it was popularly known as the "City Insane Asylum." Thereafter, and until the completion of the House of Detention in 1902, those of the indigent insane who were not sent to the Jackson Asylum were kept at the Louisiana Retreat and in the city jail. As many were kept at the Louisiana Retreat as that institution could receive, or the city afford to pay for. The rest were kept at the city jail. In the construction of the House of Detention, the lower story of one of the wings was specially designed for the insane, and is put to that use. But it has proved inadequate, and the Louisiana Retreat continues to be utilized to its limit, and, oftener than not, a surplus have

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to be temporarily harbored at the jail. The testimony shows that the city has always had, and is likely always to have, in her charge a large number of the unfortunates.

The case here presented is assimilated by the learned counsel for the executrix to that of *City v. Hardie*, 43 La. Ann. 251, 9 South. 12, where the legacy was made in these words:

"To the support of asylums, in the faith of the Protestant religion, especially devoted to the care of the aged persons"

—and where the court found that the legacy had lapsed because the intended legatee was some institution which the testator supposed would be in existence at the date of his death, and none such proved to be then in existence. The difference between that case and the one at bar is that a legacy to an asylum conducted by the city as a part of the ordinary administration of her affairs, by whatever name such asylum may be popularly known, cannot possibly be construed into a legacy to a nonexistent institution, since it is necessarily to the city for the benefit of the insane falling to her charge. As was observed in the *Fink and Vance Cases*, 12 La. Ann. 319, and 36 La. Ann. 559, the legacy is not to the building in which the insane are housed. Mrs. Staub did not institute as her legatee the old building, belonging to the United States government, in which, for all we know, the city and her charges were mere squatters, but manifestly intended that her charity should be administered by the city for the benefit of the unfortunate insane in the charge of the city. A legacy to the city jail would not lapse because the old jail had been torn down and a new one constructed. The only change that was brought about by the discontinuance of the old so-called City Asylum was that the insane have since then been kept in a different place. Had Mrs. Staub died immediately after having made her will, the legacy would have been received and administered by the city for the benefit of the indigent insane falling to her charge, and precisely the same thing occurs now. The legacy is received and administered by the city for the benefit of the indigent insane falling to her charge. The place where these intended beneficiaries are taken care of is of no consequence. What difference it would make if the evidence showed that since the discontinuance of the so-called asylum there had not been, and it was not likely there ever would be, any insane to be taken care of by the city, is a question needless to be considered, since the evidence shows that such a contingency is entirely improbable.

A point is sought to be made of the circumstance that the city had permanent charge of the insane while the so-called City

Insane Asylum existed, whereas since then she has had charge of them only temporarily, until she can transfer them to Jackson. But we take it to be plain that, the legacy being for the benefit of the insane in the care of the city, irrespective of individuals, it can make no difference whether the particular patients are to spend one day or their entire lives in the hospital, so long as the supply of them is constant and unfailing, which the evidence shows is the case.

The following note of Jarman on Wills (4th Am. Ed.) p. 452, is quoted in the brief of the learned counsel for the executrix:

"The inclination of the courts is favorable to *cy pres* execution; but this will not be done where the gift is clearly to a charitable institution, by name, which had ceased to exist before the testator's death."

We have not been able to get the decision upon which this note is founded. Doubtless, upon examination, the legatee there in question will be found to have been some autonomous institution, and the case, therefore, to be analogous to that of *Hardie*, supra, in other words, that the legatee was a distinct legal entity, capable of receiving by testament at the time the will was made, but which had gone out of existence by the time the testator died. It will be noted that the text to which said note is appended would justify a construction very much more latitudinarian than any that can be necessary for sustaining the legacy in the instant case, or even for sustaining such a legacy as that in the *Hardie Case*, supra.

It is therefore ordered, adjudged, and decreed that the testamentary executrix of Mrs. Anna Staub, deceased, pay to the city of New Orleans the legacy of \$3,000 contained in the will of the said deceased in favor of the City Insane Asylum of the said city, to be applied to the uses named in the said will; the succession to pay all costs.

(123 La. 123)

No. 17,292.

DIMMICK et al. v. OPELOUSAS, G. & N. E. RY. CO. et al.

(Supreme Court of Louisiana. March 1, 1909.)
COUNTIES (§ 193*)—ACTION TO ANNUAL TAX—
AS ELECTION CONTEST—LIMITATIONS.

A suit to annul a tax levied in favor of a railroad, pursuant to an election held by the police jury for such purpose, which required the court to inquire into the election, and to ascertain whether or not the tax received the vote of the majority of the qualified voters, thereby involving an inquiry into the question who were the qualified voters, and how many votes were cast for the tax, was a suit contesting an election, even though the proclamation made by the police jury of the result of the election itself showed that the majority which the tax received was only of those voting at the election, and not of the total number of those qualified to vote, and, not being brought within

three months after the proclamation, as required by Acts 1892, p. 140, No. 106, was barred.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 308; Dec. Dig. § 196.*]

Appeal from Sixteenth Judicial District Court, Parish of St. Landry; Edward Taylor Lewis, Judge.

Suit by Frank Dimmick and others against the Opelousas, Gulf & Northeastern Railway Company and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Garland & Harry, for appellants. Lewis & Lewis, for appellee railway company. Edward Benjamin Du Buisson, for appellee police jury.

PROVOSTY, J. Under article 270 of the Constitution the police jury of St. Landry parish held an election in the First ward of said parish, in which ward the town of Opelousas is situated, to vote a tax of five mills for ten years in favor of the defendant railroad company. The police jury canvassed the returns, declared the tax carried, made proclamation of said result, and levied the tax. The road was constructed, and for three years the tax was paid without demur. Plaintiffs allege that the said tax did not receive the majority required by said article 270 of the Constitution, and that they have but recently made this discovery; that there were in said ward 480 persons qualified to vote at said election, and said tax received only 181 votes; that consequently the said tax has been levied without authority, and should be annulled. Plaintiffs do not explain whether what they recently discovered was that the vote in favor of the tax had been less than a majority of the qualified voters of the ward, or was that the majority required by article 270 of the Constitution is of the voters in the ward, and not merely of those voting at the election. They further allege that the proclamation made by the police jury of the returns of the election and the ordinance levying the tax show that the said tax received only a majority of those voting at the election, not a majority of those qualified to vote at the election.

The case was tried on exceptions of no cause of action, prescription, and estoppel. The contentions upon these exceptions are that by its own terms act No. 106, p. 140, of 1892, which is the only law conferring upon courts jurisdiction to entertain suits for contesting elections, is limited in application to elections held under article 242 of the Constitution of 1879, and has no application to elections held under article 270 of our present Constitution, and that consequently the court is without jurisdiction to entertain this suit; but that, if said act 106 of 1892 has application, it limits to three months from the date of the proclamation

of the result of the election the time within which to contest the election and that this suit was filed three years after said date, hence entirely too late; that plaintiffs are estopped, they having waited until the railroad had been constructed before filing their suit; and, finally, that the majority required by article 270 of the Constitution is not of those qualified to vote at the election, but only of those actually voting.

Plaintiffs do not deny that this suit has been brought too late, if it contests the election; but they say that it does not contest the election, but merely challenges the authority by which the tax has been levied—merely asserts that authority to levy the tax can only be derived from the favorable vote of a majority of those qualified to vote at the election, and that such favorable vote has never been received.

As we are clear that this suit does contest the election, we deem it unnecessary to examine the other questions raised by defendants. The functionary vested with authority to pronounce upon the result of the election—to decide whether the tax carried or not—has done so; and by this suit plaintiffs are asking the court to review and reverse that decision. For doing so, the court would have to inquire into the election—would have to ascertain whether the tax did or not receive the vote of a majority of the qualified voters of the ward. This would involve an inquiry into who are the qualified voters of the ward, and how many votes were cast for the tax. A suit involving these inquiries is clearly a suit contesting an election.

The learned counsel of plaintiff liken this case to that of *Esteves v. Board of Commissioners*, 121 La. 991, 46 South. 992, where a suit to annul a tax, on the ground that the election at which it had been voted was void, was entertained after the three months fixed by said act 106 of 1892. But in that case the election had been held under the auspices of a body unauthorized to hold it; and, as a consequence, the situation was that no election had been held—precisely as if the sheriff, or the parish priest, or some local bank, had undertaken to hold an election. There was nothing more than the empty form of an election—a mere simulacrum. The tax was not based on an election, because no election had been held. Differently from this, there was an election held in the instant case; and the contention is, not that no election was held, or that the authority which held it and found and proclaimed the result did not have authority to do so, but that a sufficient number of votes was not cast in favor of the tax, and that for that reason the result as found and proclaimed was not the true result.

If, as plaintiffs allege, the proclamation itself made by the police jury of the result of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the election will show that the majority which said tax received was only of those voting at the election, and not of the total number of those qualified to vote at the election, this would not change the case. The suit would still involve the issue whether a majority of those qualified to vote had or had not voted for the tax, and would still be the contest of an election on the ground of the insufficiency of the number of votes cast. Judgment affirmed.

(123 La. 127)

No. 17,259.

THOMPSON v. SOUTHERN SAWMILL CO., Limited.

(Supreme Court of Louisiana. March 1, 1909.)

FRAUDULENT CONVEYANCES (§ 27*)—TRANSFERS AS SECURITY—PIGNORATIVE CONTRACT.

In the absence of fraud in fact or in law, a pignorative contract in the form of a sale made in the usual course of business to secure advances, and perfected by a delivery of the property, will be recognized and enforced as a pledge against the creditors of the owner, and against a receiver appointed to administer his insolvent estate.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 66; Dec. Dig. § 27.*]

(Syllabus by the Court.)

Appeal from Twenty-Third Judicial District Court, Parish of St. Mary; Albert Campbell Allen, Judge.

Action by Albert H. Thompson against the Southern Sawmill Company, Limited. Judgment for defendant, and plaintiff appeals. Affirmed.

Charles Francis Borah, for appellant. Foster, Milling & Godchaux and Scarborough & Carver, for appellee.

LAND, J. Plaintiff, as receiver of the Berwick Shipyard & Manufacturing Company (hereinafter styled the "Shipyard Company"), instituted this suit against the Southern Sawmill Company, Limited (hereinafter styled the "Sawmill Company"), to restrain the defendant from shipping or removing certain lumber from the premises of the shipyard company, and to have the same adjudged to be the property of said company free from any claim of ownership or privilege on the part of the defendant, and also to compel the defendant to account for all lumber shipped and removed by it since the appointment of the receiver, and to recover the value of the same.

The defendant answered that it held possession of said lumber by virtue of certain contracts made with the shipyard company, under which it had the legal right to dispose of said lumber, as owner or as pledgee, to secure the payment of large sums of money paid and advanced under said contracts to the shipyard company.

There was judgment for the defendant, and the plaintiff has appealed.

In the year 1906 the Berwick Shipyard & Manufacturing Company established a large sawmill and manufacturing plant at Berwick, La. In December, 1906, the president of the company went to New Orleans, and in that month entered into two several contracts with the Southern Sawmill Company for the sale or disposition of the entire output of the mill not needed in the manufacturing and ship repairing branch of the business.

The first contract, of date December 10, 1906, was an agreement on the part of the shipyard company to sell the by-products of its mill, in ash and cypress lumber below the grades of shop, and cypress shingles and laths, through the sawmill company on the following basis:

"Said Southern Sawmill Company, Ltd., is to procure orders for the lumber &c. herein referred to, at the best possible market prices and when said prices are acceptable to said Berwick Shipyard and Manufacturing Company, Ltd., to consummate the sales and in consideration of which said Southern Sawmill Company, Ltd., is to be allowed a commission of 10 per cent. net amount of invoice after deducting freight; said Berwick Shipyard & Mfg. Co. shall also have the right to sell said product but in which case said Southern Sawmill Co., Ltd., shall receive the said 10 per cent. commission.

"All sales made by either party are to be invoiced through Southern Sawmill Co., Ltd., who shall be responsible and settle direct with Berwick Shipyard & Mfg. Co., Ltd., for each shipment, provided however that neither party to that agreement shall be privileged to sell to any firm, corporation or individual, who is not a mutually satisfactory financial risk.

"In consideration of the above agreement said Southern Sawmill Co., Ltd., binds and obligates itself to advance to said Berwick Shipyard & Mfg. Co., Ltd., 75 per cent. of the net f. o. b. mill value of the products herein referred to, at the end of each 30 day period, said advance to be made in the following manner, to wit:

"Said Berwick Shipyard & Mfg. Co., Ltd., to make out a bill of sale in the form hereto annexed and attached to same a ninety day sight draft on said Southern Saw Mill Company, Ltd., drawn on them at their domicile, together with insurance policy for at least 80 per cent. of the net f. o. b. mill value of the product or products drawn for.

"Should said product or products not be shipped prior to the maturity of said note or acceptance, then it is mutually agreed by and between the parties hereto that said note or acceptance may be renewed for an additional sixty days, at the option of the buyer.

"Final and full settlement covering each sale and shipment made shall be made by the Southern Sawmill Co., Ltd., on each and every car as shipped or delivered. This contract to remain in force for a period of twelve months, from date."

On December 21, 1906, an absolute bill of sale was executed by the shipyard company in favor of the sawmill company for 243,058 feet of lumber, delivered to Homer Pickett, custodian acting for the latter company, on its leased land, for and in consideration of \$2,400 in hand paid.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes
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Similar bills were executed from time to time for other lumber delivered to the same custodian.

On December 31, 1906, another contract was executed between the same parties, by which the shipyard company, called the "seller," agreed to saw and manufacture for the sawmill company, called the "buyer," 5,000,000 feet of cypress lumber in the grades of first and second clear, called "select" and "shop" grades. It was stipulated that the lumber should be of certain dimensions, and as manufactured should be properly piled and cross-sticked on or before the last day of each month, and that the buyer should pay certain prices for the different grades, 75 per cent. on the delivery of the lumber from month to month on the millyards, and the balance on shipment. This contract gave the "buyer" the right to keep the lumber on the yard for six months after delivery, and the necessary ground for such purpose was leased to the "buyer." The contract provided for the branding of the piles of lumber and the delivery of the same to the "buyer's" representative or agent.

Homer Pickett was selected as custodian to represent the sawmill company in receiving, grading, stacking, and marking the lumber. He also, from time to time, took bills of sale for the lumber as it was delivered.

Operations under these contracts continued without interruption or friction until November, 1907, when Albert H. Thompson was appointed receiver of the shipyard company. At the time of his appointment there was on hand a large amount of lumber on the yards. This lumber had been delivered to Homer Pickett from the mill, and had been stacked under his directions. Practically all of this lumber had been included in bills of sale issued prior to the appointment of the receiver. Pickett testified that when the receiver was appointed there was possibly two or three thousand feet of lumber on the yard which had not been stacked according to the contract.

During the year the sawmill company made advances to the shipyard company from time to time in anticipation of the money coming to the latter company under the contracts. These advances were secured by indorsed notes, received and retained as collateral. The advances thus made were treated as payments on account of all amounts to become due from month to month under the contract. The testimony of defendant's witnesses that notes were held merely as collateral is confirmed by letter from the president of the shipyard company of date August 31, 1907, in which he refers to the notes then outstanding as "collateral over and above the security of the lumber." Plaintiff's witness Brown, former secretary and treasurer of the shipyard company, testified that the notes were to be returned as the lumber was sawed and

bill of sale issued. All of these notes were produced by the defendant company on the trial below and filed in evidence.

After the appointment of the receiver, the sawmill company through Homer Pickett shipped and sold lumber to the amount of \$13,860.91. The receiver gave the sawmill company credit for freight, commissions, discounts, and labor pursuant to the contracts. Later, the receiver claimed all the lumber on the yards as the property of the shipyard company. It is admitted that a large amount is still due to the defendant company, but the receiver contends that the sawmill company had no rights of ownership, pledge, or privilege on the lumber on the yards when the receiver was appointed.

The contract of December 31, 1906, is clearly a sale or agreement to sell lumber of certain grades to the amount of 5,000,000 feet.

The agreement of December 10, 1906, with the bill of sale attached, is a pignorative contract to secure commissions and advances. By this agreement the sawmill company was entitled to receive all the lumber below a certain grade, all the shingles and laths manufactured by the shipyard company during the ensuing 12 months, and was obligated to make advances on the same at the end of each month. By a supplemental agreement, advances were made prior to the end of the month, with the understanding that they were to be reimbursed in the same manner as the advances specified in the original contracts. The contention of plaintiff's counsel that these advances were independent loans represented by the notes given from time is not supported by the evidence.

When the receiver was appointed, all the lumber then on the yards was in possession of the custodian agreed upon by the parties, and by him held as the representative of the defendant company. In *Prude v. Morris*, 38 La. Ann. 767, the court said:

"The contract may not, in truth, have been a sale because the price was not fixed and certain; but there is a reality about it. The effect of it was to place Lucius in possession and control of the property under an apparent title, in consideration of Lucius settling for Morris a certain debt.

"It was one of those innominate contracts closely resembling a pledge. After Lucius settled this debt by paying Johnson \$1,125. Morris certainly could not have demanded the return of the property without reimbursing Lucius this sum, and the plaintiff, as a creditor of Morris, stands in no more favorable position. Lucius is entitled to reimbursement for the amount he has paid."

In *Wang and Cottam v. Finnerty*, 32 La. Ann. 94; a sale made to secure a debt and future loans was held, as against judgment creditors of the vendor, to be "an actual and valid agreement, which, although innominate, it would be against good conscience to disregard."

We consider the contracts and bill of sales

in this case as innominate contracts to secure advances of money to enable the shipyard company to carry on its business, and that, as advances to a large amount have already been made on the lumber in question, it would be against good conscience to permit the receiver to retake the property without reimbursing the money paid out on the faith of the contracts.

The argument that the receiver occupies a different position from that of the shipyard is without merit. The decisions cited supra show that creditors cannot disregard such contracts, and the receiver as their representative can have no greater rights.

These contracts were entered into in good faith nearly a year before the appointment of the receiver, and soon after the shipyard company commenced business. Under such a state of facts the receiver took the property subject to existing equities, liens, and incumbrances.

It is therefore ordered that the judgment appealed from be affirmed, and that the plaintiff and appellant pay the costs of appeal.

PROVOSTY, J., takes no part, not having heard the argument.

(123 La. 133)

No. 17,410.

STATE v. DAVIS.

(Supreme Court of Louisiana. Feb. 1, 1909.
Rehearing Denied March 15, 1909.)

1. CRIMINAL LAW (§ 736*)—TRIAL—RECEPTION OF EVIDENCE—PRELIMINARY PROOF—QUESTIONS FOR COURT.

It is for the trial judge, and not the jury, to determine, on a murder trial, whether an overt act of hostility has been sufficiently proved to open the door for evidence of prior difficulties, previous threats, and dangerous character.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1219; Dec. Dig. § 736.*]

2. HOMICIDE (§ 331*)—APPEAL—REVIEW—DISCRETION OF COURT—EXCLUSION OF EVIDENCE.

In determining this question, the judge may consider the evidence pro and con, and his ruling will not be disturbed except where the evidence to the contrary is clear and convincing. This is the settled jurisprudence of this court.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 698; Dec. Dig. § 331.*]

3. CRIMINAL LAW (§ 670*)—RECEPTION OF EVIDENCE—PRELIMINARY PROOF.

While evidence of prior threats is admissible, in a proper case, for the restricted purpose of showing that the deceased probably brought on the difficulty, such evidence is not admissible under a general offer to prove communicated threats and dangerous character, based on the theory that an overt act has already been proven.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 670.*]

(Syllabus by the Court.)

Appeal from Second Judicial District Court, Parish of Webster; Richard Cleveland Drew, Judge.

Charley Davis was convicted of manslaughter, and he appeals. Affirmed.

Thomas Washington Robertson (William Richards Percy, of counsel), for appellant. Walter Guion, Atty. Gen., and John Nicholls Sandlin, Dist. Atty. (Roberts & Roberts and Ruffin Golson Pleasant, of counsel), for the State.

LAND, J. The defendant, indicted for murder and found guilty of manslaughter, has appealed from the sentence of the court.

On the trial of the case, after introducing evidence tending to prove that the homicide was committed in self-defense, and that the deceased on the night before had chased the defendant with an open knife, and after a deputy sheriff, a witness for the state, had testified that he found a large knife open under the body of the deceased, the defendant offered to prove by several witnesses that the deceased had made threats against the life of the defendant which had been communicated to him, and also that the deceased was a man of a dangerous and turbulent character. This testimony was objected to by the district attorney on the ground that no overt act had been proven, and the objection was sustained by the court and the evidence excluded. Defendant's counsel excepted to the ruling, and reserved the bill of exception which is now before us. The recitals of this bill show that, prior to the offering of evidence to show communicated threats and dangerous character, four witnesses for the defendant had testified before the jury that "deceased was striking at defendant with an open knife when the fatal shot was fired"; that two of these witnesses were the only ones who testified to having seen the beginning of the difficulty; that another witness had testified that the deceased had chased the defendant with an open knife the night before; that a deputy sheriff, a state witness, had testified that he found a large knife open under the body of the deceased, and in or near his hand; that all the witnesses for the state testified that the defendant, a railroad employé, was at his post of duty, and that the deceased had no business there; and that one witness, called by the state, testified that he heard one of the combatants call out four times, "Go away and let me alone," and that a witness for the defense testified that he had heard the same exclamation and that the words were used by the defendant.

The reasons assigned by the trial judge are as follows:

"That, while some testimony had been introduced by the defense to show an overt act, this testimony had been clearly shown to the satisfaction of the court as not being true. This conclusion was arrived at by taking into

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

consideration the testimony of seven disinterested witnesses for the state, who swore that three shots were fired by the accused at the deceased, who was running away from the accused, and also the physical fact shows that the deceased was hit with only one shot, and that one caused his death, and struck deceased in the center of the back of the head.

"Among seven witnesses above mentioned, two were disinterested white boys, of good families and worthy of belief, and the witness H. E. McDow, for the defense, swore that when he noticed the deceased he was standing talking with the accused, and had his hand folded in front of him and kept them in that position, and if the deceased had a knife he never saw it. He did not testify as stated in defendant's bill of exceptions, and this witness, McDow, was the only white witness for the defense on this point.

"The seven witnesses above mentioned swore that when the deceased received the fatal shot he was running from the accused, who was pursuing him at a distance of from 15 to 20 feet behind deceased.

"The testimony of A. H. Phillips showed that it was some 30 minutes after the shooting that he saw deceased, and he didn't know who had been to the body before he got there; and it was shown that after accused had shot deceased down he drew his pistol and drove parties away from the body, and the evidence showed that near the scene of the killing, and before Mr. Phillips got there, friends of Davis, and witnesses for the defense and collaborators of his, were at or near the body.

"Taking into consideration the character of the witnesses, their interest in the case, and the physical fact, the court was firmly convinced that no overt act on the part of the deceased was shown, and for that reason excluded any evidence of threats and of dangerous character. There was no evidence shown that deceased owned the knife found by Phillips, or in any way to connect deceased with the knife."

It is to be noted that the evidence was not offered for the purpose of proving who was the aggressor in the difficulty, but to show that the defendant had good reasons to believe that the alleged hostile demonstration was made by the deceased with the intent to take life or to do great bodily harm.

In *State v. Golden*, 113 La. 801, 37 South. 761, this court said:

"It is for the trial judge, and not the jury, to determine whether an overt act by the deceased immediately preceding the killing has been sufficiently proved on the trial of the person accused of the homicide to open the door to evidence of prior difficulties between such accused and the deceased, and of prior threats, and of the dangerous character of deceased."

In that case, the undisputed evidence showed the commission of an overt act, and the verdict and sentence were set aside and the case remanded. In the case at bar the evidence was conflicting, and the judge, after considering the same, arrived at the conclusion that the overt act had not been sufficiently proven to admit evidence of prior communicated threats and dangerous character. From the judge's point of view the defendant shot the deceased while he was retreating, and after he had abandoned any purpose, which he may have had, of assault-

ing the accused. From the verdict of manslaughter, it may be inferred that the jury found that there was no overt act of hostility as testified by the witnesses for the defense.

In *State v. Perlioux*, 107 La. 606, 31 South. 1018, this court said:

"There being a wide difference between evidence of an overt act and proof of the same, it was for the judge to decide, from the evidence offered in support of the overt act, whether a sufficient foundation had been laid for the admission of the testimony offered to prove previous threats."

In that case the evidence was conflicting, and this court refused to interfere. In *State v. Feazell*, 116 La. 264, 40 South. 698, there was the evidence of one witness tending to prove an overt act, but the judge did not believe the witness, and held that the alleged hostile demonstration had not been proven. This court refused to reverse the ruling of the trial judge, saying that in such a case "the evidence must be clear and convincing to authorize our interference."

In the case at bar we are not prepared to hold that the trial judge has abused the discretion vested in him. As was said in *State v. Golden*, 113 La. 791, 37 South. 757, the jurisprudence of this state on this subject is too firmly established to be open for further controversy in the courts, and that if a remedy is required it should be sought in the legislative department. Of course, the discretion vested in trial judges to rule out evidence of prior difficulties, previous threats, and of dangerous character should be exercised with great caution, and the benefit of the doubt should be given to the accused. The safe practice is to admit such evidence in doubtful cases, and leave questions of credibility to the jury.

As already stated, the recitals of the bill do not bring this case within the exception that prior threats may be proven for the restricted purpose of showing who was the aggressor in the difficulty.

Judgment affirmed.

(123 La. 138)

No. 17,330.

EBY et al. v. McLAIN et al.

(Supreme Court of Louisiana. Feb. 1, 1909.
Rehearing Denied March 15, 1909.)

1. *GUARDIAN AND WARD* (§ 143*)—*ACCOUNTING BY GUARDIAN—EXCLUSIVENESS OF REMEDY.*

Property belonging to a minor and existing in kind at his majority, found in the possession of a third person, can be recovered by him, with fruits and revenues, in a direct action against the person in possession. Neither he nor the tutor can limit the remedy of the minor to an action inside of the tutorship for the value of the property.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 476, 488; Dec. Dig. § 143.*]

2. GUARDIAN AND WARD (§ 12*)—UNDERTUTOR
—AGENT OF TUTOR—LIABILITY.

The court cannot recognize the existence of a conventional agency between a tutor and an undertutor. A tutor cannot appoint the undertutor to act as his agent in the matter of the tutorship, nor can the undertutor accept such a mandate from the tutor. It is the duty of the undertutor to guard the interests of the minor and to call the tutor to account, and he should not place himself in a position which leaves no one to perform that duty but necessitates, on the contrary, that the tutor should call on him to account. If he undertakes to administer the affairs of a succession under a power of attorney from the tutor, he will, as between himself and the minor, be held to the obligations of a "negotiorum gestor," and to a direct liability to the minor. The mere form in which this liability is enforced is not sacramental. That form is more in the interest of the plaintiff than of the defendant. The defendant is as free to set up his defenses and to advance his claim in a direct action as in "an action to account."

[Ed. Note.—For other cases, see Guardian and Ward, Dec. Dig. § 12.*]

(Syllabus by the Court.)

Appeal from Sixth Judicial District Court, Parish of Ouachita; James Pemberton Madison, Judge.

Action by Stella Crosley Eby and her husband against L. D. McLain and Kate L. Crosley, individually and as natural tutrix. Judgment for defendants, and plaintiffs appeal. Reversed and remanded.

Andrew Augustus Gunby, for appellants.
Hudson, Potts & Bernstein, for appellees.

Statement of the Case.

NICHOLLS, J. Plaintiff alleged that C. C. Crosley died in the parish of Ouachita, on the 22d of September, 1888, leaving a widow, Mrs. Kate Crosley, and two minor children, issue of the marriage with the deceased, Stella Crosley (petitioner) and Martha Clayton Crosley. On January 10, 1889, Mrs. Kate Crosley was appointed and confirmed natural tutrix of her children. On the 26th of January, 1889, an inventory of C. C. Crosley's succession was filed in the clerk's office, amounting to \$20,946, a certified copy of which was recorded in the mortgage book. All of the property in the inventory was the separate property of C. C. Crosley, having been inherited by him from his father, J. P. Crosley, but a large amount of property belonging to C. C. Crosley and the minor heirs was not placed on the inventory. On February 23, 1889, Mrs. Kate Crosley qualified as natural tutrix, and L. D. McLain was appointed and qualified as undertutor. That, immediately after qualifying as tutrix, Mrs. Crosley removed to the state of Mississippi, where she resided permanently for many years. That on the 11th of June, 1889, the tutrix executed a comprehensive power of attorney in favor of L. D. McLain, whereby she empowered him to act as tutor in her place and stead, and to ad-

minister the estate of said Crosley minors as fully as if she herself were present. That said McLain proceeded to act in said capacity as the substitute of said tutrix, although he was still undertutor and personally interested in many sales and other transactions he made as tutor. He took charge of the valuable plantation belonging to petitioner and her sister, known as "Cottonport Plantation," which surrounds the town of East Monroe and is very valuable for farming purposes, and he has had exclusive control and possession of said plantation up to the present time, without any order of court or public lease. He conducted and operated said farm in his own name, and shipped all the cotton and other products in his own name for all these years. That on said plantation at the death of C. C. Crosley were 16 head of good mules and horses, 95 head of sheep, wagons, farming utensils, corn, cotton, seed, and a large quantity of other personal property, which said L. D. McLain used in his farming operations or otherwise disposed of in his capacity as substituted tutor, and he is liable for the value of said personal property, to wit, the sum of \$3,000, one-half of which belongs to petitioner, together with 5 per cent. per annum interest thereon from date of said power of attorney June 11, 1889. Avers that Mrs. Crosley never acted as tutrix, and never received any of said personal property, nor any of the crops raised on said plantation, nor any of the rents due for the lease and operation of the same; and that said L. D. McLain, individually and as agent and acting tutor of said minors and as undertutor, is personally bound for the value of the rents of said plantation and all the proceeds of real and personal property received by him. That neither said L. D. McLain, agent, nor Mrs. Kate L. Crosley, tutrix, has filed any annual account, nor did said undertutor call on the judge to order said account; in fact, the tutrix could not file an account nor statement of the affairs and estate of said minors, because she had nothing to do with said estate nor received any of its funds or property, but intrusted the entire administration to her agent, L. D. McLain, who has not only failed but refused to render any statement of the account of the tutorship of the said minors and his administration thereof. That he has received and holds all their property and funds, and owes for same.

Petitioner represents that she married E. S. Eby on the 18th of December, 1906, and was emancipated by marriage. That notwithstanding this fact and the termination of the tutorship, L. D. McLain continues to hold her property and funds to the present time, and refuses to deliver same to her. That she owns in her own right as one of the heirs of C. C. Crosley an undivided half

interest in the Cottonport plantation, lying on the Ouachita river, opposite the city of Monroe, and surrounding the town of West Monroe, containing 784 acres of land, more or less (as shown on the inventory as follows):

32.97 acres in section 47.
185.66 acres in section 51.
182.09 acres in section 52.
32.25 acres in section 53.
17.74 acres in section 45.
31.45 acres in section 44.
165.37 acres in section 43.
784.49 acres in lot one (1).

All in township 18 north, of range 3 east, a detailed and particular description of which land is hereto annexed and made part of this petition. That she also owns an undivided half interest in the Crosley residence, and six acres of land adjoining thereto.

That said L. D. McLain is in actual possession of all said property, and is operating said plantation and collecting rents for petitioner's houses two years after the emancipation of petitioner. That said plantation is fully equipped with valuable ginhouse, barns, overseer's house, and contains between four and five hundred acres of very fertile land, and that same, together with the teams, tools, and other property thereon at the time of said C. C. Crosley's death, was and is well worth \$4,000 per year rent. That L. D. McLain has had possession of and cultivated same for 20 years, and owes \$80,000 rent therefor, one-half of which belongs to petitioner, together with 5 per cent. per annum interest on each year's rent from the end of the year on which it fell due.

That, as well as she can learn from the records, C. C. Crosley owed no debts at the time of his death, except a judgment in favor of Stubbs & Russell for \$2,500, which was paid and canceled July 28, 1890, and a rent in favor of S. W. Sanders for \$440, which fell due March 23, 1889. While tutrix was in Mississippi, L. D. McLain held a family meeting which illegally authorized the mortgage of said plantations to pay the above debts when there was sufficient personal property, note and personal accounts, etc., on hand to pay same. But no mortgage was executed under the advice of said meeting until April 20, 1891, after said debts had been paid by the rents and revenues and proceeds of property sold. That said mortgage was executed more than two years after said family meeting, and when there was no necessity therefor, without the advice of a family meeting, and without an order from court for said particular mortgage. That it was executed by L. D. McLain, who was agent for the mortgagee and at the same time undertutor and agent for the tutrix, and said mortgage was and is in no manner binding on the said Crosley minors and their property. That at the time of his

death C. C. Crosley owned one-sixth interest in certain lots in the town of West Monroe, and this interest was not covered by the inventory of his succession. That the other interests in said lots were owned by Uriah Millsaps, estate of T. F. Millsaps, L. D. McLain and his wife, Mrs. Mattie C. McLain, and that petitioner and her sister inherited that undivided interest of her father, C. C. Crosley. Avers that said L. D. McLain, assuming to act as agent of Mrs. Kate Crosley, tutrix, and for said minors, sold the interest of the minors in many of said lots, which, as near as petitioner has been able to investigate, include the following sales (describing them).

That in most of this property petitioner and her sister had one-sixth interest, but that in some of it they had one-third interest. That by act of exchange Uriah Millsaps and the representatives transferred all of their interest in block F, to the representatives of J. P. Crosley, and petitioner and her sister Clayton had a third interest in the property sold to John P. and Jas. R. Henry and that sold to J. L. Russ and Mrs. H. V. Wheatley, in which Uriah Millsaps does not join. They also owned one-third interest in block N, and blocks B and N. For instance, lot sold to F. Vollman, May 12, 1890, did not belong in any part to Uriah and T. F. Millsaps, and could not be covered by a family meeting called to advise with reference to sale of land owned by Uriah Millsaps et al. This sale was made to Vollman in name, but in reality the sale was made to L. D. McLain, who was both purchaser and seller, and who a few days afterwards bought a half interest from Vollman for \$2,500. All the transactions with reference to this lot were pure simulations, and petitioner avers that this lot still belongs in part to her, and that L. D. McLain owes rent therefor from May, 1890, to the present time at the monthly rental of \$50. So, also, with the sale of 30 feet of Commerce street, block N, to L. D. McLain, on March 17, 1903, was and is an absolute nullity, and petitioner asks that her interest in said lot be decreed to belong to petitioner. Also lot sold to W. R. Moore June 6, 1890, was really sold to McLain, and is null and void.

That one of the lots on Commerce street sold to the Acme Gardwood Company belonged to L. D. McLain and C. C. Crosley's heirs. It brought \$83.33 $\frac{1}{3}$, and could not be sold. It still belongs to the minors. The other lot brought \$83.33 $\frac{1}{3}$, of which \$277.77 was paid in cash. That for the balance of \$555.56 an order of seizure and sale was issued in the name of all the vendors, including the minors, of which L. D. McLain was agent, and said property was bought in at sheriff's sale in the name of Uriah Millsaps and L. D. McLain for the balance of said debt, and was afterwards sold by them to John T. Haynes

for \$100. That the purchase of L. D. McLain inured to the benefit of petitioner and her minor sister, and he owes them one-sixth on said \$1,000.

That she has been unable to obtain complete — of the sales of West Monroe property. That all of said sales were made by L. D. McLain, and he received the purchase price for the share of petitioner, and owes interest at the legal rate of 5 per cent. from the date of each sale. That it is the purpose and desire of petitioner to ratify all of said sales except those made to L. D. McLain individually or through his partner, F. Vollman, or other persons interposed. That said funds were not reinvested nor placed in bank, nor in any manner accounted for, and said L. D. McLain owes interest at the highest legal rate on same.

The same is true of the sale made to C. A. Cannaughton in 1891 of six acres of land off the southeast corner of Cottonport plantation for \$750, which said L. D. McLain received, one-half of which he owes petitioner, with 5 per cent. per annum interest from date of sale. That on August 9, 1904, said L. D. McLain received the sum of \$1,090 in cash from the Monroe & Southwestern Railroad Company for right of way expropriated by a jury across Cottonport plantation, one-half of which he owes petitioner, together with 5 per cent. per annum interest from the date of its receipt by him. That said L. D. McLain sold timber from said Cottonport plantation, including gum logs, pine timber, and cypress poles sold by him to the telephone company, all of which sales amount to \$2,000, one-half of which he owes petitioner, together with 5 per cent. per annum interest from the date of the receipt by him.

That said L. D. McLain caused other sales to be made of the capital of petitioner's real estate while she was a minor, all of which was without warrant in law and absolutely null and void. That, so far as third persons acting in good faith made purchases at said illegal sales, petitioner desires to ratify them and to claim the purchase price, together with interest thereon from the date it was paid to the said L. D. McLain. But as to property acquired at such sales by or for L. D. McLain, petitioner avers that the said sales were absolute nullities. That an order of sale was illegally obtained in March, 1903, based on a pretended family meeting held many years before the sale was made, and when conditions and necessary reasons for sale had totally changed. It was also made at a time when no legal claim or indebtedness whatever existed against said minors. That under this illegal order, issued without the advice of a family meeting, said L. D. McLain on the 22d of April, 1903, made a pretended sale in the absence of the tutrix, at which certain properties were sold (which she described).

That at said sale the said L. D. McLain, who was undertutor and was entirely con-

ducting said sale, knocked off and adjudicated to his clerk and agent, R. Bruce Frizzell, to wit, certain property (which she described). That on the next day after said sale L. D. McLain caused his said clerk and agent, R. B. Frizzell, to make a deed to said property to L. D. McLain for the expressed consideration of \$3,450, whereas nothing was paid by Frizzell or by L. D. McLain, no purchase was made, no sale was made, but the paper title to said minors' property was put in the name of L. D. McLain, who was incapable of buying, in glaring violation and disregard of the law. That said property was well worth more than double the amount for which it was pretended to be sold, as was shown by the sales afterwards made by McLain.

He sold a lot to Mrs. Dora Davis for	\$ 500 00
He sold a lot to O. C. Harris for....	600 00
He sold a lot to Mrs. Emma Griffin	
for	1,500 00
He sold two lots to A. A. Gunby for	1,200 00

Making the sales of less than half of said property amount to..... \$3,800 00

That she desired to ratify said sales, and claims one-half of said amount, together with 5 per cent. per annum interest from date of its receipt by L. D. McLain. She also claims one-half of the \$2,265 and interest for sales to third persons on the 22d of April. On the 25th of May, 1903, the said L. D. McLain caused another sale to be made of the real estate of the said Crosley minors, without any cause or warrant of law to make same, at which illegal and unwarranted sale the following purchases were made: W. M. Parker bought a certain lot in block 2, having a front of 133½ feet on Pine street and 130 feet on Cypress street, for \$500. John R. Frantom bought a certain lot in block 2, having a front of 88½ feet on Clayton street and running back to Cotton street, and having a front of 186 feet on Cotton street, for \$410. At said illegal sale on May 25th L. D. McLain pretended to sell to R. B. Frizzell all the balance of block 2 for \$760. That said sale was really to put the title in McLain, who had no right or capacity to bid at said sale, but to whom said R. B. Frizzell, his clerk and agent, made a sale for a pretended price the day after the said sale. That said L. D. McLain acquired no title whatever to said property, but his pretended purchase left the property still vested in said Crosley minors, and petitioner demands that her half thereof be delivered to her. She ratifies the sales made to W. M. Parker and John R. Frantom, and claims one-half of the purchase price, \$1,000, together with interest at the legal rate thereon from the date of its receipt by McLain.

That said L. D. McLain made another illegal sale of the property of the Crosley minors, in which he assumed, without an order of court or anybody's advice, to exchange with Mrs. Sallie C. Moore a lot of ground on

Pine street with 50 feet front for another lot of 35 feet front; avers that said transaction and sale was absolutely null, and made for the individual interest and convenience of said L. D. McLain. She asks to be decreed to be the owner of the lot which L. D. McLain pretended to transfer to Mrs. Moore, and to be put into possession thereof. That, in addition to the interest in the lots in West Monroe above enumerated, the C. C. Crosley heirs own one-third interest in all the lots in South Cottonport or South West Monroe, and a third interest in all the money received by L. D. McLain for sale of lots to H. L. Gregg, R. W. McClendon, and Miss Josephine McClendon. That said property belonged to Bry Young and J. P. Crosley, and in 1880, while said L. D. McLain was executor of J. P. Crosley's succession and tutor of the minor, C. C. Crosley, he permitted said property to be sold at tax sale in 1880, and bought same in, together with H. M. Bry. That he could not purchase the interest of J. P. Crosley for himself, and his purchase was for the minor, C. C. Crosley, as to one-third interest which was inherited by your petitioner and her sister; and this petitioner demands the possession of her share in all parts of said property that remain unsold, and her share of the proceeds of all lots sold by L. D. McLain, together with 5 per cent. per annum interest from date of receipt of said proceeds, as shown by the notarial records of Ouachita parish. That in addition to the rents of the plantation which have been set forth, L. D. McLain owes for additional rents of houses situated on said property, to wit:

Eighteen cottages situated in block L on Cypress street and block O and beyond block O on Natchitoches road, each worth \$10 per month rent. Two or more houses situated on Natchitoches road beyond Black bayou, each worth \$10 per month. Five dwellings situated on Trenton street, all of which rented for at least \$100 a month, one-half of which belongs to petitioner as the dwellings of C. C. Crosley during his life by act of donation dated January 23, 1888, recorded in Conveyance Book 29, p. 74. That said L. D. McLain, assuming to act as agent for said Crosley minors, both before and after the emancipation of petitioner, has held possession of all the aforesaid property and has collected rents therefor up to the present time. He has also collected rents on a house formerly situated on the Ouachita river in block N in West Monroe, at the rate of \$15 a month for 15 years. Also a house on the river bank between railroad bridge and Wood street, which property and house belong to petitioner and her sister, at the rate of \$10 a month. That said L. D. McLain, without right or law, included in the lumber yard of the sawmill which belongs to him individually a large square of ground belonging to the C. C. Crosley heirs, which he has used and rented for at least \$300 a year for 20 years, together with 5 per cent. per annum interest from date of receipt of

each year's rent by L. D. McLain. He has also rented the cotton yard in West Monroe for between \$300 and \$400 per year for the past 15 years, one-sixth of which belongs to the C. C. Crosley heirs, together with 5 per cent. per annum interest from the date of each payment. That said L. D. McLain received other rent from houses on said property which petitioner is unable at present to itemize. That said L. D. McLain up to the present time has received at least \$65,000 in rent from houses and other property other than the plantation belonging to the C. C. Crosley heirs, and that one-half of said rent, together with 5 per cent. per annum interest from the date of each receipt, is due to petitioner by said L. D. McLain.

That said L. D. McLain had said plantation assessed to himself as agent, and paid the taxes on same, but that the taxes and repairs paid for by him did not equal the interest due petitioner on money collected by him for rent. That it was the plain duty of L. D. McLain to file or have filed an annual account of the administration of said minor's estate, and that it was his duty to lease said plantation at public auction to the highest bidder for cash, and that it was his duty to place in bank at interest all funds collected for rents and from sales of said minor's property as fast as received by him, and that it was his duty as soon as the tutorship of petitioner terminated to turn over to her her estate and pay over all funds in his hands, and not force her to employ an attorney to recover her estate and a settlement of her rights.

She prayed that L. D. McLain and Mrs. Kate L. Crosley, individually and as natural tutrix, be cited. That on final trial she be decreed to be one of the heirs of C. C. Crosley, deceased, and as such the owner of an undivided half interest in Cottonport plantation hereinabove particularly described, and all the improvements thereon situated, including all the lots in blocks O, W, and 4, purchased by L. D. McLain on April 22 and May 25, 1903, through his representative, R. B. Frizzell. That she be declared the owner of all of said property, and be put in possession thereof by decree of the court.

That there be judgment decreeing petitioner the owner of one-half interest in the Crosley residence and six acres adjoining thereto, and a one-sixth interest in and to all lots in block F and L and N bought by L. D. McLain during the tutorship of the C. C. Crosley minors, and a third interest in lot in block B of West Monroe sold May 12, 1890, to F. Vollman, representative of L. D. McLain. That all said sales made to L. D. McLain or to some person interposed for him be decreed absolute nullities, and that the sales made to R. B. Frizzell, the representative of L. D. McLain, of said minors' property, on April 22, 1903, and May 25, 1903, be decreed absolute nullities. That she have judgment against said L. D. McLain for \$40,000 for one-half the value of the rents

and revenues of said plantation for 20 years, together with 5 per cent. per annum interest from the date when said rents fell due. That she have further judgment for \$32,500 as her one-half of rents collected from said Crosley houses, cottages, and yards. That she have judgment for one-half of \$1,690.50 and \$1,500 and \$750 for property sold as above set forth; also judgment for \$2,715 for petitioner's share in proceeds of lots sold in West Monroe to effect a partition, with 5 per cent. per annum interest on the proceeds from date of sales as above set forth; also judgment for \$1,000, and further judgment on \$300 for petitioner's share in rents of cotton yard and lumber yard as above set forth; also judgment for one-half of \$7,079.60, being proceeds for sales of property made April 22 and May 25, 1903, to other persons than L. D. McLain or R. B. Frizzell, with interest from day of sale.

That she have judgment for \$2,000 for petitioner's interest in timber sold by L. D. McLain from Crosley property, and the further sum of \$1,000 for personal property disposed of on said plantation. Making a total of \$87,724.80, for which petitioner asks and prays for judgment against said L. D. McLain, together with 5 per cent. per annum interest from the date the various amounts came into his hands. She further prays that her interest in the lots in South Cottonport still held by L. D. McLain, and her interest in proceeds of sales made by L. D. McLain south of the railroad, be recognized, and her interest in all lots in West Monroe owned in indivision with Uriah Millsaps et al. be decreed, and she be put in possession of the same. Petitioner reserves the right to amend and make additions to above statement of her property, and claims and prays for equitable and general relief.

On September 21, 1908, plaintiff, with leave of court, filed an amended petition in which she alleged that the said L. D. McLain caused the said tutrix to execute a \$4,460 mortgage on Cottonport plantation, belonging to the minor heirs of C. C. Crosley as aforesaid, in favor of Sam Wolf, which is alleged to be given for money "loaned and advanced" and owing by said minors to Sam Wolf, as will more fully appear by reference to said mortgage recorded in Mortgage Book 28, p. 558, of the records of Ouachita parish. That said mortgage was executed without authority in law, and that it was unnecessary and injurious to said minors and their estate. That no money was loaned by them, and no indebtedness was due to said Wolf by said estate. That said money was borrowed by L. D. McLain for his own individual use, interest, and advantage, and the mortgage given therefor on petitioner's property was illegal, null, and void. That the pretended family meeting of January 29, 1897, was irregular and illegal in every particular, held in the interest and at the instance of said McLain, and in no

manner binding on petitioner or her property. That the revenues of petitioner's property were sufficient and ample to extinguish and discharge all indebtedness whatever against her estate, and the attempt to mortgage and burden her property was wrongful and void, and the tutrix had forfeited the tutorship long prior thereto. That J. W. Hill retransferred the lot in block A of West Monroe sold by him to L. D. McLain et al. to Uriah Millsaps and L. D. McLain as alleged in the original petition, and that said vendees hold said lot for the respective minors who were interested with them in the ownership thereof. That said J. W. Hill has paid rent on the said lot at the rate of \$250 a year, one-third of which is due to petitioner by L. D. McLain, who has received said rent and converted same to his own use without any right whatsoever.

That in 1901 the ginhouse on said Cottonport plantation was consumed by fire, and L. D. McLain collected and received the insurance thereon, amounting to \$4,000 or more, and he was never authorized, so far as petitioners can discover, to reinvest same. He therefore owes for said insurance, together with 5 per cent. per annum interest thereon from the date of its collection.

That the claim for \$4,000 in the original petition per year rent for the use and cultivation and lease of said Cottonport plantation by said L. D. McLain in his own name and for his own interest, without any authority or law, is a just and fair claim, and the yearly lease of said plantation and its equipments has been and is well worth said sum and amount, and petitioner reiterates said claim and demand. But in the event the court should hold that L. D. McLain is not bound for that amount of rent, then in the alternative petitioners aver that said L. D. McLain received large crops from said plantation, which were principally worked on the share system, and averred that the share of the crop received by L. D. McLain and sold by him for his own account each year largely exceeded \$4,000, one-half of which belongs to petitioner.

That he made large profits out of running and furnishing said plantation, both before and after petitioner was emancipated by marriage, and by judgment of the court, and by her majority, which she obtained in 1907. That said L. D. McLain had no right or authority whatever in law, and no authority from any one, to occupy and cultivate said plantation as he has done. That he has occupied and occupies the status of an intermeddler or negotiorum, and justly owes petitioner one-half of all the crops raised or which could have been raised on said Cottonport plantation. That the said lands were rentable and customarily rented for one-fourth of the cotton and cotton seed and one-third of the corn produced. That on these

terms the value of the rent of the plantation would average more than \$4,000 yearly up to and including the present year. That petitioner is entitled to receive in full one-half of all crops of all sorts raised and now growing on said plantation during the present year of 1908, and she is entitled to have same delivered to her, together with her interest in said land and all other property inherited by petitioner which is illegally detained from her by said L. D. McLain.

In view of the premises, plaintiffs pray to be allowed to file this amended petition; that same be served on defendants; that on final trial petitioner Mrs. Stella Crosley Eby have judgment as prayed for in her original petition, and also that the pretended act of mortgage of March 9, 1897, and in favor of Sam Wolf, be decreed to be absolutely null and void and in no manner binding on petitioner; that the retransfer of the lot to McLain by J. W. Hill be decreed to be for petitioner's benefit, and that she be decreed to own an interest in said lot, and have judgment against L. D. McLain for her share of the rents of said lots, with interest thereon from the date of the receipt of said rents by McLain; that petitioner have judgment for one-half of the insurance money received by L. D. McLain in 1901 for the ginhouse burned on said plantation, together with legal interest thereon.

Petitioners further pray in the alternative, and in the event that it be decided that defendant, McLain, is not liable for \$4,000 per year rent for the Cottonport plantation from January 1, 1889, until the present time, that petitioner be decreed to be entitled to one-half of the value of all the crops raised on said plantation, including the crops of all sorts now on said plantation; that she have judgment against said L. D. McLain for one-half of the crops raised on said Cottonport plantation and sold by him, together with 5 per cent. per annum interest from date of sale by him, and judgment against L. D. McLain decreeing petitioner to be the owner and entitled to possession of one-half the crops now on said place, and ordering him to deliver same to petitioner, and in the event he disposes of or parts with any part of said crops during the pendency of this suit that he be condemned on final judgment to pay to petitioner the highest market price of said crops of cotton, cotton seed, corn, peas, potatoes, hay, and all other crops that may be now produced or may be hereafter produced on Cottonport. She finally prays for all equitable and general relief.

The defendant, L. D. McLain, excepted to plaintiff's original petition on the ground that the same was premature, for the reason that no account had been filed by the tutrix of the minors Crosley, and no proceedings had by the plaintiff looking to or requiring the filing of such account and settlement with her tutrix, Mrs. Kate Crosley, which accounting must be had before it can be legally ascer-

tained that any injury has resulted to plaintiff or any loss has been sustained by her or any action lie against any person other than for accounting against said tutrix. Mrs. Kate Crosley also excepted that plaintiff's suit as against her was premature, as no liquidation of plaintiff's account against her as tutrix had been sought or had.

The district court rendered judgment sustaining the exceptions of prematurity filed by defendants, and dismissed plaintiff's suit as premature. She appeals from that judgment. The exception was tried on the face of the papers.

Opinion.

Mrs. Kate Crosley was made party to the suit individually and as natural tutrix, but no judgment is prayed for against her. She was evidently made a party so that notice be brought home to her of the issues raised between plaintiff and L. D. McLain, and she might have an opportunity of taking such action in the premises as she might deem herself entitled to. Plaintiff refers to the action she has brought as a petitory action, one involving "property rights," not derived, originating, or growing out of the mother's tutorship, which she is entitled to reconveyance by direct action.

Plaintiff's counsel urges that this suit is not one for liability growing out of a legal tutorship, but for causes and acts entirely outside of the law, and for property that belongs to her before any tutorship began; that the right to sue a "negotiorum gestor" who takes charge of and holds and sells the property of minors without the legal capacity or authority to do so, has been repeatedly recognized and enforced by this court.

Counsel says that his client has no occasion to call upon the tutrix to account, as she has received nothing to account for, having turned over everything to the undertutor, who has received everything and holds everything; that, if defendant has any claims against the plaintiff, he can set them up as fully in this proceeding as in any other.

Counsel cites, in support of his various contentions: *Cambre v. Grabert*, 31 La. Ann. 538; *Tugwell v. Tugwell*, 32 La. Ann. 548; *Glascok v. Clark*, 33 La. Ann. 585; *Heirs of Self v. Taylor*, 33 La. Ann. 769; *Heirs of Wood v. Nicholls*, 33 La. Ann. 745; *Succession of Richmond*, 35 La. Ann. 838; *Heirs of Burney v. Ludeling et al.*, 41 La. Ann. 627, 632, 6 South. 248; *Code Prac. art. 988*; *Civil Code, arts. 273, 275, 276, 279, 358*; *Otterl v. Parker*, 42 La. Ann. 381, 7 South. 570; *Rist v. Hartner*, 44 La. Ann. 378, 10 South. 760; *Railroad v. Fairrex*, 46 La. Ann. 1022, 15 South. 421; *Le Bleu v. North American Co.*, 46 La. Ann. 1465, 16 South. 501; *Aronstein v. Irvine*, 48 La. Ann. 302, 19 South. 131; *People's Bank v. David*, 49 La. Ann. 136, 21 South. 174; *Aronstein v. Irvine*, 49 La. Ann. 1482, 22 South. 405; *Parker v.*

Ricks, 114 La. 942, 38 South. 687; Thompson v. Vance, 110 La. 36, 34 South. 112, and authorities therein cited; Succession of Kidd, 61 La. Ann. 1157, 26 South. 74.

Defendant's counsel submit in the syllabus to their brief the following propositions, with authorities in support of the same:

(1) An emancipated minor can only sue her tutor for an accounting. *Ludowig v. Webber*, 35 La. Ann. 579; *Gilbert v. Meriam*, 2 La. Ann. 160; *Succession of Edwards & Wilson*, 32 La. Ann. 458; *Gibbs v. Lum & Co.*, 29 La. Ann. 526; *Succession of Lalmont*, 110 La. 119, 34 South. 298; *McHugh v. Stewart*, 12 La. Ann. 361.

(2) It is the duty of the tutor to take into his possession all the estate of the minor, to administer it "as a prudent administrator," and he is responsible for all damages resulting from a bad administration. *Civil Code*, art. 337; *Tutorship of Scarborough*, 43 La. Ann. 319, 8 South. 940; *In re Hollingsworth's Heirs*, 45 La. Ann. 135, 12 South. 12.

(3) Should the tutor administer through, or intrust property of the minors to, others, he is responsible to the minors for all damages and losses caused to the minors by the acts of such third persons, agents, or lessees. *Arseneaux v. Michel*, 6 Mart. (N. S.) 695.

(4) The tutor is alone responsible to the minor for the revenues of her property, whether it be leased or cultivated for the minor's interest. *In re Hollingsworth's Heirs*, 45 La. Ann. 134, 12 South. 12; *Succession of Lalmont*, 110 La. 119, 34 South. 298.

(5) If the tutor cultivate the plantation of the minor, either himself or through agents or managers, the minor may either accept the net revenues, or may demand of the tutor an amount equal to the customary rents of such property. *Vance v. Vance*, 32 La. Ann. 190; *In re Hollingsworth's Heirs*, 45 La. Ann. 134, 12 South. 12; *Civil Code*, art. 346.

(6) If the minor accept the fruits or revenues produced by a cultivation of the property, she must pay the costs of such cultivation, and is entitled to collect from the tutor only the net revenue after paying all costs of production.

(7) If the property of the minor is leased to other parties, the tutor is liable to the minor for all rents collected or that should have been collected by a "prudent administrator." *Succession of Trosclair*, 34 La. Ann. 327; *Vance v. Vance*, 32 La. Ann. 188.

(8) If the tutor lease the property of the minor, the lessee owes his yearly rents only to his lessor, the tutor, and he in turn owes them to, and must account for them to, his ward, the minor. *Ludowig v. Webber*, 35 La. Ann. 579.

(9) If the tutor, on the other hand, attempts to cultivate or manage the property of the minor through an agent or manager or other representative, such agent or manager is accountable to the tutor, who alone, with his surety, is responsible to the minor. *Barnard v. Coffin*, 141 Mass. 37, 6 N. E. 364, 55 Am. Rep. 443; *Bradstreet v. Everson*, 72 Pa. 124, 13 Am. Rep. 666; *Baillie v. Augusta Savings Bank*, 95 Ga. 277, 21 S. E. 717, 51 Am. St. Rep. 75; *Davis v. King*, 66 Conn. 463, 34 Atl. 107, 50 Am. St. Rep. 122.

(10) The minor cannot collect from other persons on account of the tutorship more than is due to him by the tutor. *Succession of Lalmont*, 110 La. 119, 34 South. 298; *Gibbs v. Lum & Co.*, 29 La. Ann. 526; *McHugh v. Stewart*, 12 La. Ann. 361.

(11) "The tutor administers by himself alone." "He can on his own responsibility act by an attorney in fact," etc. *Civil Code*, art. 351.

(12) The tutor must support, maintain, and educate the minor "according to his condition

and his fortune" out of his revenues, and the minor can collect from his tutor only the excess of his revenues over the amount expended therefrom for his maintenance and education. This balance can only be ascertained by an accounting. *Civil Code*, art. 350; *McHugh v. Stewart*, 12 La. Ann. 361; *Gibbs v. Lum & Co.*, 29 La. Ann. 526; *Succession of Lalmont*, 110 La. 119, 34 South. 298.

(13) The agent or manager of the tutor, while so acting, represents the tutor. For his acts the tutor is responsible to the minor, and the agent could in no event be held liable to the minor beyond the indebtedness of his principal, the tutor.

(14) A subagent employed by the agent without the consent of the principal is not privy to the agency, and owes no account to the principal, the agent, who is alone responsible to his principal. *Barnard v. Coffin*, 141 Mass. 37, 6 N. E. 364, 55 Am. St. Rep. 443; *Baillie v. Augusta Savings Bank*, 95 Ga. 277, 21 S. E. 717, 51 Am. St. Rep. 75; *Bradstreet v. Everson*, 72 Pa. 124, 13 Am. Rep. 666.

(15) In contemplation of law the tutor does not owe the minor anything until settlement of tutor's account. *Major v. Her Creditors*, 46 La. Ann. 307, 15 South. 8.

(16) A petitory action is a contest for ownership or title. It is one brought for the establishment of the plaintiff's title to property in the adverse possession of the defendant, in order to have the plaintiff decreed the owner, and incidentally to be placed in possession.

(17) The tutor may administer a succession falling to his wards if creditors do not object. In that case his first duty is to liquidate the succession and pay off its debts. He then holds the residue of the property, as tutor, for the benefit of his wards. *Molinari v. Fernandez*, 2 La. Ann. 553; *Succession of Guillbert*, 117 La. 374, 41 South. 653.

The usual course pursued by a minor upon reaching his majority to obtain a settlement from his tutor is upon his petition to have issued by the court an order to the tutor to file an account. It is the duty of the tutor in compliance with this order to file his account, in which he charges himself with everything which has come under his administration or for which he might have been responsible, and, on the other hand, charge the minor himself with all expenditures made for his benefit, and setting out all the claims he has against him. If the minor accepts the account, it is after due proceedings approved and homologated; if, on the contrary, he has reason to complain of any part of it, he files an opposition to it, and on the issues so made the rights of parties are fixed by judgment of the court.

This method of proceeding does not cut off from the minor (now of age) the right to bring at once direct action against persons in possession of property which he claims to belong to himself to have his ownership of the same recognized and decreed, together with the fruits and revenues thereof as incidental to said demand. Neither those in possession of the property nor the tutor can limit the remedy of the minor to recourse against the tutor for its value through the action of account. We do not understand defendant to deny the correctness of this proposition. This being the case, the judg-

ment of the court dismissing the entire suit was to that extent erroneous.

We do not mean to say that had the court overruled the exception as to claims of that character, and sustained it only to the other claims set out, that that portion of the judgment would have been correct. We hold, on the contrary, that the judgment cannot be sustained at all. The rule invoked by defendant that a subagent employed by an agent is responsible alone to the person who employed him, and that the principal must look to his own agent (whether a forced legal agent or a conventional agent) for any losses he may have sustained in the administration of his property, has no application to this case. We cannot recognize legally the existence of a conventional agency between the tutor and an undertutor. The tutor cannot appoint an undertutor to act as his agent in the matter of the tutorship, nor can an undertutor legally accept such a position from the tutor. It is the duty of the undertutor to guard the interest of the minors and to call the tutor to account, and he should not place himself in a position which leaves no one to perform that duty, but necessitates, on the contrary that the tutor should have to call him to account.

If he undertakes to administer the affairs of a succession under a power of attorney from the tutor, he will, as between himself and the minors, be held to the obligation of a "negotiorum gestor" and a direct liability for his acts. The mere form in which this liability is enforced is not sacramental; that form is more in the interest of the plaintiff than of the defendant. The defendant is as free to set up his defenses and to advance his claims in a direct action as in an action to account. We may mention incidentally that, in response to some inquiry from the court as to where the tutrix was at the present time, it was stated that she had recently married the undertutor.

For the reasons herein assigned, it is hereby ordered, adjudged, and decreed that the judgment appealed from is annulled, avoided, and reversed, the exception of prematurity is overruled and case reinstated, and this cause is remanded to the district court to be proceeded with according to law.

(123 La. 160)

No. 17,235.

JEANERETTE RICE & MILLING CO. v.
DUROCHER.

(Supreme Court of Louisiana. March 1, 1909.)

1. CORPORATIONS (§ 298*)—BOARD OF DIRECTORS—MEETINGS—NECESSITY.

Where a suit was brought in the name of a corporation through its president, alleged to have been duly authorized in the premises, and the defendant excepted that the president had never been authorized by the board of directors

to file the suit, and on the trial it was shown that the president had no authority beyond the verbal assent of a majority of the individual directors given separately, *held*, that such an assent cannot be recognized as having the force and effect of a resolution adopted by the board of directors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1292; Dec. Dig. § 298.*]

2. CORPORATIONS (§ 399*)—PRESIDENT—POWER—IMPLIED DELEGATION.

The president of a corporation has not by virtue of his office any power to bind the corporation or control its property. His powers as an agent must be delegated directly in the organic law of the corporation, or through the board of directors. An implied delegation of authority to the president from the board of directors may result in some cases from a habit or custom of doing business, where the board has left the entire management of affairs to that officer. But this doctrine has no application where all the property of the corporation has been sold, and its affairs are being liquidated by the board of directors, instead of commissioners as contemplated by the charter.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 399.*]

(Syllabus by the Court.)

Appeal from Nineteenth Judicial District Court, Parish of Iberia; James Simon, Judge.

Suit by the Jeanerette Rice & Milling Company against John M. Durocher. Judgment for defendant, and plaintiff appeals. Affirmed.

Burke & Burke and Ventress Jones Smith, for appellant. Cammack & Broussard, for appellee.

LAND, J. This is a suit for balance due on account, instituted in the name of the plaintiff corporation, appearing through its president, J. C. Ackers, alleged to have been duly authorized in the premises.

The defendant excepted as follows:

"That the Jeanerette Rice & Milling Company, Ltd., is a defunct corporation now in the hands of liquidators; and that there has been no meeting of the board of directors for two years, and at no meeting was the ex-president of this corporation, J. C. Ackers, ever authorized to file this suit."

This exception was tried, and there was judgment in favor of the defendant sustaining the exception and dismissing the suit. Plaintiff has appealed.

The evidence shows affirmatively that J. C. Ackers, as president of the corporation, was never authorized by the board of directors to bring this suit. It appears that no meeting of the board of directors has been held since the sale of the mill property in the year 1906. It further appears that the president consulted the members of the board as to bringing suits against all the debtors of the corporation, and that a majority of them approved of such action. The charter of the corporation gave the president no authority to institute suits in the name of the company.

In *German Evangelical Congregation v. Pressler*, 14 La. Ann. 811, it was held that courts of justice cannot regard the wishes of a majority of the members of a corporation unless expressed in a valid form in conformity with the by-laws and charter; citing the case of *St. Mary's Church*, In re, 7 Serg. & R. (Pa.) 530. In *Ross v. Crockett*, 14 La. Ann. 823, it was held that a majority of a board of trustees could not undertake to act in their individual names for the board itself.

In *Peirce v. N. O. Building Co.*, 9 La. 404, 29 Am. Dec. 448, it was held that where the assent of a majority of the stockholders was not expressed in a meeting of stockholders, but by each one separately, at different times, and evidenced not by the corporate minutes, but by a separate paper, the assent is without force.

Directors can bind the corporation only by acting together as a board. A majority of them cannot undertake to act in their individual names for the board itself. 10 Cyc. 774, 775.

It follows that the president instituted this suit without any authority from the board of directors of the corporation. Under the provisions of the charter, it is provided that all citations or legal process shall be served upon the president, or, in case of his absence or inability to act, upon the vice president, but no power to sue is vested in either officer.

The board of directors, in which all the corporate powers were vested by the charter, was the only representative of the corporation competent to authorize suits in its name.

Corporations act judicially through their proper representatives, who, however, need not be named in the petition. Code Prac., art. 112; *N. O. Terminal Co. v. Teller*, 113 La. 736-738, 37 South. 624. When a suit is brought in the name of a corporation through its president, special authorization from the board of directors must be proven. *Hoffman v. Wise*, 38 La. Ann. 704.

Where a suit is brought in the name of the corporation alone, it suffices to prove that it was brought by authority of the board of directors. *Insurance Oil Tank v. Scott*, 33 La. Ann. 946, 39 Am. Rep. 286. In such a case the affidavit of the vice president annexed to the petition is sufficient proof that the suit was authorized. *Lacaze & Reine v. Creditors*, 46 La. Ann. 239, 14 South. 601. In the *N. O. Terminal Case*, supra, it was held that whether a suit be brought in the name of the corporation, or in its name through a representative, the question is one of authority to bring the suit, a matter of substance and not of form. In the case at bar the authority of the president is alleged, but has not been proved.

The office of president in itself confers no power to bind the corporation or control its

property. The president's power as an agent must be sought in the organic law of the corporation, in a delegation of authority from it, directly or through the board of directors, formally expressed, or implied from a habit or custom of doing business. 10 Cyc. 903. In the case at bar, the charter after providing that "the business and affairs and corporate powers shall be transacted by a board of directors," declares that "three members of said board, including the president, shall constitute a quorum for transaction and management of all business of said corporation." No powers were expressly delegated by the board to the president, and it has not been shown that the entire management of the business of the corporation was left in his hands. The case here presented is one where the president, long after the corporation had sold all of its property and gone out of business, undertook, with the verbal assent of a majority of the directors, to sue and collect the debts of the corporation for the purpose of liquidating its affairs. The charter provides for the liquidation of the corporation by commissioners elected by the stockholders. It may be conceded for the purposes of the argument that a president intrusted by a board of directors, meeting at long intervals, with the entire management of a large business corporation, has the implied power to "prosecute and defend ordinary litigation of the corporation and appoint attorneys to that end" (10 Cyc. 904), but we have no such case before us. Whether such a doctrine is consonant with our Code and jurisprudence need not now be decided.

It is therefore ordered that the judgment appealed from be affirmed, and that plaintiff pay the costs of appeal.

(123 La. 164)

No. 17,047.

DARSAM et ux. v. KOHLMANN.

(Supreme Court of Louisiana. Feb. 15, 1909.

Rehearing Denied March 15, 1909.)

1. MASTER AND SERVANT (§ 228*)—INJURIES TO SERVANT—VIOLATION OF STATUTE BY MASTER—CONTRIBUTORY NEGLIGENCE.

Whilst the violation by the master of the provisions of a statute regulating the employment of his servants is negligence per se, and actionable, if injuries are sustained by the servants in consequence thereof, such provisions are not to be so construed as to abrogate the ordinary rules relating to contributory negligence, which is available as a defense, notwithstanding the statute, unless the latter is so worded as to leave no doubt that such defense is to be excluded.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 671; Dec. Dig. § 228.*]

2. MASTER AND SERVANT (§ 204*)—INJURIES TO SERVANT—EMPLOYMENT OF CHILDREN—VIOLATION OF STATUTE BY MASTER—CONTRIBUTORY NEGLIGENCE.

Where the foreman of a factory employs a boy, in his twelfth year, and assigns him to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

work in a perfectly safe position, instructing him to stay there, and not to go near or meddle with any of the machinery, the owner of the factory will not be liable in damages, notwithstanding that the employment of boys of that age in factories is prohibited under penalty of fine and imprisonment, for injuries received by the boy whilst unnecessarily, and in violation of his instructions, subjecting himself to an obvious risk, the danger of which he was capable of appreciating. And, a fortiori, is this true where the boy was employed in the belief, superinduced by his own representations and his appearance, and by the acquiescence of his family, that he was over the age prescribed by the statute.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 204.*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Walter Byers Sommerville, Judge.

Action by Frank Darsam and wife against Louis Kohlmann. Judgment for defendant, and plaintiffs appeal. Affirmed.

Armand Romain (George Montgomery, of counsel), for appellants. Charles Rosen, for appellee.

Statement of the Case.

MONROE, J. Plaintiffs seek to recover damages for the use of their minor son, and on their own account, resulting from an injury sustained by the minor whilst in the defendant's employ, and, as they allege, through defendant's negligence and disregard of the law. Defendant, after excepting on several grounds, denies the averments of the petition, and alleges that the injury sustained by the minor was due to his own negligent act. It appears from the evidence that at the time of the accident that caused the injury complained of (August 15, 1907) the minor was about 11 years and 1 month old, but large for his age, wearing the clothing usually worn by boys of 15, and fairly intelligent. He lives, with his parents, on Clouet street, between Chartres and Royal, and on the opposite side of the street defendant operated, and for a number of years has operated, a moss factory, in which the minor's two elder brothers (one of them a major) were, or had been, employed. The minor, Clarence, was enjoying a vacation from school during the month of August, and being, as we infer from the testimony, an active lad, made repeated requests of the foreman of the moss factory to give him work, stating on one occasion, in the presence of his brother George, that he was 15 years of age, and, on being corrected by George, asserting, without further correction, that he was 14, which latter statement he made on another occasion in the presence of a number of the employés of the factory. Defendant appears to have known the law upon the subject of the employment of minors, and had a further interest in the matter, in that he was insured against accidents to his em-

ployés by a policy which did not cover an accident to a minor under 12 years of age, and he had specifically instructed his foreman to employ no small boys. He had another business, however, and spent very little time at the moss factory, the operatives in which were employed and discharged by the foreman, and he knew nothing of the employment or age of Clarence Darsam. The foreman apparently thought that the age limit with regard to the employment of minors in factories was 14 years, and the evidence satisfies us that, if he had not believed that plaintiff's son had attained that age, he would not have employed him. As it was, the boy was persistent and seemed anxious to earn something, and on two successive Saturdays the foreman employed him in moving dust in the yard with a wheelbarrow. On one of these occasions the father, in passing, inquired what he was doing, and, being told, said he did not think he could stand the dust. He says that he told the foreman that he did not want the boy to work about the factory, but the foreman denies it, and testifies, without contradiction, that the boy's lunch was sent to him from home—referring as we understand, to the subsequent period of employment, between August 10th and August 15th—and we hardly think that would have happened without the knowledge of his parents, nor do we find any sufficient reason for believing that the foreman would have employed him against his father's expressed wish. When he applied, on August 10th, he was assigned to about as light and as safe work as is done in the factory. The moss, it appears, is brought into the upper story of the building upon an automatic carrier, consisting of what may be called a belt of slats, which passes up an inclined plane, over and around a wheel raised some five feet above the floor, and, in so doing, deposits the moss on the floor in front of the wheel. The incline up which the carrier moves is built alongside of and about 16 inches from the wall of the building, and the power which drives the apparatus is communicated to the carrier wheel through a driving wheel and two cogwheels, geared together in the space between the end of the carrier wheel and the wall, the driving wheel getting its power from a steam engine, through a rope, and having a grooved or hollowed periphery in which the rope works. The driving wheel, which is nearest the wall, is 26 inches in diameter, and on the same axle is a cogwheel, 4½ inches in diameter, on which is geared (on the further side from the front of the carrier wheel) the other cogwheel, 30 inches in diameter. In order to prevent the moss and dirt brought up on the carrier from falling into the cogs, and possibly by way of precaution against accidents, defendant caused to be built a wooden partition separating the driving wheel and cogwheels from the car-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

rier and from the end of the carrier wheel, and projecting to the front edgewise, so that a person standing immediately before the carrier wheel would be safe from contact with the others. And it was to that position that Clarence Darsam was assigned; it being his duty to take up with a pitchfork the moss as the carrier brought it over the wheel and dropped it on the floor, and to distribute it among a number of girls and women who were standing within a few feet of him, and whose function it was to take the moss in their hands and shake it apart.

Being asked by plaintiff's counsel:

"Clarence, how did you get hurt on that day? How did you come to get hurt?" he replied: "Well, I was standing this way, and when I wanted to throw the moss, it all happened so quick that I didn't know what had hold of me, and when I hollered, Mr. Monroe [the foreman] came there with a crowbar and stopped the machine, and took my hand out and threw the wheel up. * * * Q. What was it that caught your hand? A. Well, I don't know exactly what it was, whether it was the flywheel or the cogwheel. Q. And when Mr. Monroe came and took your hand out, where was your hand? A. It was in the cogwheels. * * * Q. Clarence, what made your hand get caught between the cogwheels? A. It was my sleeve. Q. Did you have your coat on at the time? A. No, sir, no coat. Q. Well, what did you have on? A. I had on a red shirt, and the sleeve was a big sleeve, and it caught."

On his cross-examination, his attention was called to the fact that the cogs lie back some $15\frac{1}{4}$ inches, in the narrow space between the driving wheel and the end of the carrier wheel, and that the rope on the driving wheel lies imbedded in its grooved periphery, and he could give no explanation further than to say that he had a button on his shirt sleeve, and that it might have been caught between the driving wheel and the rope, as the latter was loose. Being asked whether he knew that the button was caught, he replied that he did not; the sum and substance of his testimony being that he knew nothing about the accident, save that he found his hand between the cogwheels, where (it may be here stated) it was very badly mangled, necessitating the loss of the thumb, with the first and second fingers and part of the palm. He was taken to the hospital, and two of the young women who were working with him at the time called on him, about a week later, and they testify as follows:

Miss Louise Macke:

"I asked him how did he get his hand hurt, and he said he put his hand there, and he never thought he was going to get his hand hurt."

Mrs. Louise Schlusser:

"I asked him how he did that, and he said he put his hand behind there. Q. That he put his hand in where? A. In the cogwheels. Q. That is what Clarence told you? A. Yes, sir."

Being questioned in regard to the statements thus attributed to him, the minor ad-

mitted that the witnesses called on him and that he had a conversation with them, but, being asked, "Did you have any conversation at all with those young ladies as to how this accident happened?" he replied, "No, sir."

That the accident could not have happened as the boy says it did, or in any other way save by his deliberately meddling with the driving wheel or cogwheels, if the partition to which we have referred was in position, is made manifest by all the testimony, and the story told by the boy rests upon the premise that the partition was not in position. The carpenter who built the partition (in 1904) testified that, whilst he could not absolutely identify the boards, they appeared to be the same that he had used. Fourteen other witnesses testified, positively, that the partition was there on the day of the accident, and had been there, just as it was on that day, from the time it was built, or for a year or two years, as they happened to know the fact.

Plaintiff seems to have conceived the idea that three new planks of white pine were put in after the accident, and the photographer employed by him was probably impressed with his view of the matter, as he testified that, when he took his photographs (shortly after those for defendant had been taken), the three planks looked to him like pieces of dry goods cases. Defendant, however, called several witnesses who testified that the planks are of yellow pine, and, as it would have been easy matter to have shown that they were wrong, if such had been the case, we assume that plaintiffs, who made no attempt to disprove their statements, concluded that they were right. Apart from that, the testimony adduced on behalf of plaintiffs to show that the partition was not in its place at the time of the accident is conflicting, and withal insufficient, both in volume and character, to overcome that adduced by defendant. We therefore conclude, as a matter of fact, that the partition was in its place when the accident occurred.

There was a verdict and judgment in favor of defendant, and plaintiffs have appealed.

Opinion.

Having found, as facts, that the minor, whilst engaged in the discharge of the duty to which he was assigned, could not have come in contact with the driving wheel or cogwheels, and hence could not have been injured by them, if the partition, represented in the photographs offered in evidence, was in position, and that the partition was in position at the time of and prior to the accident, we are now to inquire whether defendant should be held liable upon any other basis than that of its alleged negligence in failing to provide one of its employes with a safe place in which to do his work.

Counsel for plaintiffs refers the court to the provisions of Act No. 34, p. 50, of 1906, which,

so far as they are pertinent to the issue to be determined, read:

"Section 1. * * * That no boy, under the age of twelve years, and no girl, under the age of fourteen years, shall be employed in any factory, mill," etc.

"Sec. 7. * * * That any person who shall violate any of the provisions of this act shall be deemed guilty of an offense for each violation thereof, and, upon conviction of the same, shall be punished by a fine, * * * or by an imprisonment," etc.

From this law he argues that, by the mere fact of his employing the minor, Clarence Darsam, in his factory, defendant was guilty of negligence which renders him civilly liable for any injury which the minor may have sustained whilst so employed, and this whether there was any proximate causal connection between the employment and the injury or not, and he cites, among others, the following authority, to wit:

"Status of Children Employed in Violation of Statute.—Upon this subject, one idea is that the hiring of a boy under twelve years of age, in violation of a statute declaring it to be a misdemeanor, constitutes negligence per se, such as will render the employer liable for all injuries suffered in consequence of and in course of the employment. Another view is that to employ a child, in violation of such statute, to operate a dangerous machine, is evidence of negligence, in case the child is injured in so working, because the statute indicates that such children are unfit, by reason of their immaturity and indiscretion, to be so employed."

The remaining portion of the section thus quoted (as supplied by defendant's counsel) reads:

"But the view which more nearly comports with judicial analogies is that such unlawful employment of a child does not, per se, constitute negligence which will render the employer liable for injuries to the child, where such employment is not the direct or proximate cause of the injury." Thompson on Negligence (2d. Ed.) vol. 4, § 3827.

And the view of the learned author, as thus expressed, is sustained by a consensus of opinion. Thus:

"When it appears that the violation of a statute, ordinance, or municipal regulation was a contributing cause to produce the injury complained of, then such statute * * * is competent evidence to charge the defendant with negligence. But such evidence is incompetent, as being immaterial, if the violation of the statute did not contribute to produce the injury." Buswell on Personal Injuries (2d Ed.) 185, citing Wakefield v. Conn. & P. R., 37 Vt. 330, 86 Am. Dec. 711; Steves v. Oswego & Syracuse R. R., 18 N. Y. 422; Brooks v. Buffalo & N. F. R. R., 25 Barb. (N. Y.) 600; Dascamb v. Buffalo & State Line R. R., 27 Barb. (N. Y.) 221; Evans v. Am. Iron Tube Co. (C. C.) 43 Fed. 519.

"The fact that defendant's violation of duty consists in the violation of a statute will not relieve the plaintiff of the obligation of showing that he was in the exercise of due care"—citing Taylor v. Carew Mfg. Co., 143 Mass. 470, 10 N. E. 308; Nosler v. Chicago, B. & Q. R. R., 73 Iowa, 268, 34 N. W. 850; Ryall v. Cent. Pac. R. R., 76 Cal. 474, 18 Pac. 430; Hudson v. Wabash R. R., 101 Mo. 13, 14 S. W. 15.

"Thus the violation, by the employer, of a

statute requiring cogs in factories to be properly guarded, does not render the employer liable for an injury to an employé by coming in contact with unguarded cogs, when the danger was obvious and the employé assumed the risk of it"—citing E. S. Higgins Carpet Co. v. O'Keefe, 79 Fed. 900, 25 C. C. A. 220, 51 U. S. App. 74; Buswell on Personal Injuries (2d Ed.) pp. 187, 188.

"In many jurisdictions statutes have been enacted which impose upon masters certain duties in relation to their servants. While it is well settled that the violation of these provisions is negligence per se, and actionable, if injuries are sustained by the servants in consequence thereof, they are nevertheless not so construed as to abrogate the ordinary rules relating to contributory negligence, which is available as a defense, notwithstanding the statutes, unless they are so worded as to leave no doubt that this defense is to be excluded." A. & E. Enc. of Law (2d Ed.) vol. 20, p. 151. See, also, 26 Cyc. p. 1091.

The doctrine thus stated has been recognized by this court in Clements v. La. Electric Light Co., 44 La. Ann. 692, 11 South. 51, 16 L. R. A. 43, 32 Am. St. Rep. 348, Hailey v. Texas & P. R. Co., 113 La. 533, 37 South. 131, and Lopes v. Sahuque, 114 La. 1004, 38 South. 810. In McCloughry v. Finney, 37 La. Ann. 31 (relied on by plaintiff), defendant, a dealer in Western produce, had piled a lot of grain in sacks on the banquette, in violation of a city ordinance, and this court having, in the original opinion, used some language which suggested the idea that he thereby became liable for an injury sustained by a boy by reason of the falling of the sacks, and without reference to any contributory negligence of which the boy might have been guilty, a rehearing was applied for, in refusing which, Manning, C. J., said:

"A re-examination of the record confirms us in the opinion, expressed before, that there is no proof of contributory negligence, and, therefore, there is no need to say what effect proof of contributory negligence would have."

In the cases of Queen v. Dayton Coal & Iron Co., 95 Tenn. 458, 32 S. W. 460, 30 L. R. A. 82, 49 Am. St. Rep. 935, and Marino v. Lehmaier, 173 N. Y. 530, 66 N. E. 572, 61 L. R. A. 811, the boys, on whose account the damages were claimed, were both injured whilst in the actual discharge of the duties for which they were employed in violation of prohibitory statutes, and hence sustained their injuries by reason of such employment. In the instant case, considered without reference to his status as a minor, the employment of Clarence Darsam had no more causal connection with the injury sustained by him than it would have had if, employed to devote an hour a day to the copying or addressing of letters in the office, he had of his own motion undertaken to investigate some curious machine in a remote part of the building, and had been injured in so doing.

Moreover, it will be noted that we have found as a fact that defendant's foreman employed the boy in the belief, superinduced by the boy's own representations, his appear-

ance, and the apparent acquiescence of his family, that he was at least 14 years of age, a circumstance which will be borne in mind in the consideration of the remaining question: Was the danger that, being in the factory, he might curiously put his fingers between cogwheels which were not connected with his employment and with which he had no concern, a danger unsuitable to or beyond his apparent capacity? The generally accepted view in regard to the relations between minors and their employers is, as we think, correctly stated as follows:

"Persons who employ children to work with or about dangerous machinery, or in dangerous places, should anticipate that they will exercise only such judgment, discretion, and care as is usual among children of the same age under similar circumstances, and are bound to use due care, having regard to their age and experience, to protect them from dangers incident to the situation in which they are placed; and as a reasonable precaution, in the exercise of such care in that behalf, it is the duty of the employer to so instruct such employees concerning the dangers connected with their employment which, from their youth and inexperience, they may not or are presumed not to appreciate or comprehend, that they may, by the exercise of such care as ought reasonably to be expected of them, guard against and avoid injuries therefrom. Yet the mere fact that the servant is a minor does not of itself affect the liability of the principal or master as to obvious defects and dangers, unless the minor was a child of unsuitable age to be exposed to unsuitable risks in a hazardous business. If a minor engages to work, the risks of the business are incident to the work, so far as he is competent to comprehend and appreciate them. And it can make no difference in the application of the rule whether such employment was with or without the consent of the parent." *Master's Liability for Injury to Servants*: Bailey, pp. 114, 115. See, also, *Kinkead, Torts*, vol. 1, p. 325; *Labatt, Master & Servant*, vol. 1, § 348 (p. 890); *A. & E. Enc. of Law* (2d Ed.) pp. 406, 407, 409.

Defendant's foreman says, in his testimony, that he told the minor, Clarence—

"to stay there" (in a perfectly safe place) "and to throw that moss over there" (a safe occupation) "and keep away from the end, from the machine, from everything else. * * * I ran him away when he came around the gin, one time, not only once or twice, but I told him to go and stand behind the carrier wheel. In his own position, * * * at the place where he was working."

It is true that the boy denies that he received such instructions, but we think the foreman is corroborated, in that the other employees who were working about the carrier girls and women unite in testifying that they all received such instructions, and it is improbable that the foreman would have made an exception in the case of the boy. Beyond that, it seems to us that an intelligent boy, in his twelfth year, who has attended school sufficiently to have acquired the rudiments of a common-school education, who has lived across the street from a factory in which his older brothers were employed, and about which he has played and

worked, may be assumed to have sufficient capacity to appreciate a danger so obvious as that involved in coming in contact with plainly exposed revolving cogwheels. In fact, he himself admits that he knew the danger. Upon the whole, we find no error in the verdict and judgment appealed from, and they are, accordingly, affirmed, at the cost of the appellant.

(159 Ala. 453)

THEO. POUILL & CO. v. FOY-HAYS CONST. CO.

(Supreme Court of Alabama. Feb. 4, 1909.)

1. STATUTES (§ 167*)—REPEAL—CODIFICATION—FAILURE TO INCORPORATE ACT.

The general rule is that, if no contrary intention is expressed in the act adopting a code of laws, all general statutes of a public nature in force when the Code is adopted and promulgated, and not embraced therein, are repealed by virtue of such omission, and by the laws providing for the preparation, revision, adoption, and promulgation of the Code; and hence Code 1896, § 436, allowing one year from the rendition of a judgment within which an appeal may be taken, was repealed by Code 1907, § 2868, providing that appeals under the chapter, except where a different time is prescribed, must be taken within six months.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 243; Dec. Dig. § 167.*]

2. LIMITATION OF ACTIONS (§ 9*)—CHANGE OF LIMITATION—EXISTING ACTIONS.

An appeal being part of a remedy, and not a vested right, Code 1907, § 10, providing that the Code shall not affect any existing right, remedy, etc., but that as to such cases the laws in force at the adoption of the Code shall continue in force, continues, as to a judgment rendered before the adoption of the Code, the right to take an appeal within a year from rendition of the judgment, expressly given by Code 1896, § 436, though Code 1907, § 2868, lowers the limitation to six months.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 27, 30; Dec. Dig. § 9.*]

3. CONTRACTS (§ 337*)—ACTION FOR BREACH—PLEADING—ALLEGATION OF AMOUNT CLAIMED DUE AND UNPAID.

A count of a complaint in an action for breach of an agreement, alleging that plaintiff complied with all the provisions of the agreement, but that defendant breached it by not paying the consideration, \$1,000, stipulated in the agreement, sufficiently alleges the amount due and unpaid.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1683; Dec. Dig. § 337.*]

4. APPEAL AND ERROR (§ 1040*)—REVIEW—HARMLESS ERROR—OVERRULING DEMURREER.

Where the evidence without conflict shows that there was no breach of a contract which a plea set up and alleged to have been breached, the overruling of a demurrer to the plea, if erroneous, was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4101; Dec. Dig. § 1040.*]

5. PLEADING (§ 143*)—RECOURPMENT—NATURE OF REMEDY.

If a defendant has been damaged by plaintiff's breach of a contract in suit, a plea of recoupment is the procedure by which defendant may bring the matter before the court and have his damages considered.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 292; Dec. Dig. § 143.*]

6. TRIAL (§ 194*)—INSTRUCTIONS—INVADING PROVINCE OF JURY.

In an action for breach of contract, where defendant set off plaintiff's breach of another contract, a charge that, to constitute proof of plaintiff's breach of that contract, it must be shown that the terms of the contract, including plans and specifications, or some one provision or term thereof, has been broken, was not invasive of the province of the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 450, 460; Dec. Dig. § 194.*]

7. CONTRACTS (§ 348*)—ACTIONS FOR BREACH—SET-OFF—BURDEN OF PROOF.

In an action for breach of contract, where defendant set off plaintiff's alleged breach of another contract, the burden was on defendant to prove to the jury's reasonable satisfaction the material allegations of his pleas of set-off, or one of them.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1754; Dec. Dig. § 348.*]

8. APPEAL AND ERROR (§ 215*)—OBJECTIONS BELOW—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

In an action for breach of contract, where defendant set off plaintiff's alleged breach of another contract, a charge that the burden is on defendant to prove to the jury's reasonable satisfaction the material allegations of his pleas, or one of them, of set-off, including the fact (if it be a fact) that plaintiff breached the contract alleged therein, and that defendant was damaged thereby, was misleading in its tendencies, so that it might properly have been refused; but defendant, not having taken available measures at the trial to protect himself against it, cannot complain of it on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1311; Dec. Dig. § 215.*]

9. SET-OFF AND COUNTERCLAIM (§ 1*)—"SET-OFF"—NATURE.

A "set-off" is a final demand growing out of an independent transaction, liquidated or unliquidated, not sounding in damages merely, subsisting between the parties at the commencement of the suit.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6439-6444; vol. 8, pp. 7798, 7799.]

10. APPEAL AND ERROR (§ 1064*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

In an action for breach of contract, where defendant set off plaintiff's alleged breach of another contract, and defendant's evidence showed that there was no material difference between the parties as to the work done under the contract sued on, thus proving plaintiff's demand, the giving of a charge that a plea of set-off confesses the debt sued on, but says that plaintiff ought not to have judgment therefor, because he owes defendant a debt which defendant elects and offers to set off against the claim in suit, was not reversible error; the first postulate, if erroneous, being harmless to defendant, and the remainder being merely misleading.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219; Dec. Dig. § 1064.*]

Appeal from Circuit Court, Jefferson County; A. A. Coleman, Judge.

Action by the Foy-Hays Construction Company against Theo. Poull, doing business as Theo. Poull & Co. Judgment for plaintiff, and defendant appeals. Affirmed.

The first count in the complaint is for breach of a contract entered into between the

parties on the 17th day of July, 1905, for the building by the Foy-Hays Construction Company of certain work upon a high school at a fixed price of \$1,000, and an acceptance thereof by the Theo. Poull Company, who had the contract for constructing the entire building, and the breach alleged is the failure to make the payment on the completion of the work. The other counts are for work and labor done and materials furnished, etc. The third plea sets up a failure of plaintiff to comply with the contract of July 17, 1905, in that the plaintiff failed to do such work as per plans and specifications and to the satisfaction of the architect and superintendent in charge of said work, in that the engine room in the basement was never completed, and the floor in the passage was two inches too high, and that said work was not done within the time of the contract, to the damage of the defendant in the sum of \$5,000, which sum is offered to be set off and claim judgment for the excess. The second replication to the third plea is that the plaintiff did not put in the cement floor in the basement room designated in the contract for the reason that when he was on the ground and ready to begin filling in same the foundation for machinery in said room was not in and the room was not ready for the floor, and defendant asked plaintiff to leave that alone, and that he would put it in himself, or have it put in.

The following charges were given for the plaintiff: "(3) I charge you that a plea of set-off confesses the debt sued on, but says that plaintiff ought not to have judgment therefor, because he owes the defendant a debt, which the defendant elects and offers to set off against the claim in suit. (4) I charge you that a set-off is a final demand, growing out of an independent transaction, liquidated or unliquidated, not sounding in damages merely, subsisting between the parties at the commencement of the suit." Charge 5 is set out in the opinion. "(6) I charge you, gentlemen of the jury, that the burden is on the defendant to prove to your reasonable satisfaction the material allegations of his pleas, or one of them, of set-off, including the fact (if it be a fact) that plaintiff breached the contract alleged therein, and that defendant was damaged thereby."

Tomlinson & McCullough, for appellant. Francis M. Lowe, for appellee.

DENSON, J. This cause is submitted on a motion to dismiss the appeal, as well as on the merits. The motion rests upon the ground that the appeal was not taken within the time prescribed by the statute; that the right of appeal was barred by the statute of limitations. The judgment is a final judgment, and was rendered by the circuit court of Jefferson county on the 19th day of June, 1907. The appeal was taken on the 18th day

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of June, 1908, more than 6 months after the rendition of the judgment, and 48 days after the Code of 1907 went into effect.

The statute in force at the time the judgment was rendered allowed one year from the rendition of the judgment within which an appeal might be taken (Code 1896, § 436); but section 2868 of the Code of 1907, which became effective on May 1, 1908, provides that "appeals under this chapter, except in such cases as a different time is prescribed, must be taken within six months." It will be observed that there is no saving clause expressed in this section of the Code in respect to judgments in existence at the time the Code took effect. The general rule is that, no contrary intention being expressed in the act adopting a code of laws, all general statutes of a public nature in force when the Code is adopted and promulgated, and not embraced therein, are repealed by virtue of such omission, and by the laws providing for the preparation, revision, adoption, and promulgation of the Code. *Hatchett v. Billingslea*, 65 Ala. 16; *Carmichael v. Hays*, 66 Ala. 543; *Sawyers v. Baker*, 72 Ala. 49; *Werborn v. Austin*, 77 Ala. 381; *Benness' Case*, 124 Ala. 97, 26 South. 942. Under this rule there can be no doubt that section 436 of the Code of 1896 (referred to above) was repealed by the adoption and promulgation of the Code of 1907, leaving in lieu thereof, and as a substitute therefor, section 2868 of the Code of 1907.

But we agree with appellee's counsel that an appeal is a part of the remedy, and is not a vested right. *Elliott's App. Proc.* § 76; *B. & P. R. R. Co. v. Grant*, 98 U. S. 398, 25 L. Ed. 231; *Dennison v. Alexander*, 103 U. S. 522, 26 L. Ed. 313; *McClain v. Williams*, 10 S. D. 332, 73 N. W. 72, 43 L. R. A. 287, 289; *Smith v. Packard*, 12 Wis. 371. This being true, it is our opinion that section 10 of the present Code continues in force the statute of limitations of one year as to all judgments rendered before the adoption of the Code (such as the one here appealed from), and saves to the appellant the appeal which appellee seeks to have dismissed. The case of *Mazange v. Slocum*, 23 Ala. 668, cited by appellee, is not in conflict with the theory that section 10 saves the appeal, as above indicated. In that case a very different proposition was before the court from the one now before us. Section 12 of the Code of 1852 was under consideration. It will be remembered that the Code of 1852 abolished the writ of error as the method of bringing civil cases to this court for review, and for the first time in Alabama established appeal as the remedy. Section 3040 of that Code fixed two years as the limitation for the suing out of appeals, and provided that it should not apply to then existing judgments and appeals. The Code took effect on the 17th day of January, 1853. After that date a writ of error (that in the *Mazange-Slocum Case*, *supra*) was issued on

a judgment rendered prior to the specified date. The court held that appeal was the only remedy, and dismissed the writ. So it was the form of the remedy, instead of the question of limitations, that was involved.

But it was sought in that case to save the writ of error under section 12 of the Code, which read as follows: "No action or proceeding commenced before the adoption of this Code shall be affected by its provisions." The court answered that contention—*Chilton, C. J.*, delivering the opinion—as follows: "The meaning of this twelfth section is that actions and proceedings commenced before the Code took effect are governed by the old law as to all continuous proceedings had in the court in which they are pending; but proceedings in the nature of a new action, although predicated upon the determination of the court had under the old law, if commenced after the Code went into operation, must conform to its provisions." It was also held that an appeal, like the writ of error for which it was substituted, was a new proceeding, and was the commencement of proceedings in this court to revise the action of the court below, and therefore could not be regarded as the continuation of proceedings in the lower court. In other words, the effect of the decision was that section 12 did not apply to the remedy by appeal, nor to the writ of error.

Section 10 of the present Code provides that: "This Code shall not affect any existing right, remedy, or defense, nor shall it affect any prosecution now commenced, or which shall be hereafter commenced, for any offense already committed. As to all such cases the laws in force at the adoption of this Code shall continue in force." We think it cannot be doubted that to abridge the time within which an appeal may be taken would affect the right of or remedy by appeal. In this case, for instance, if the six-months statute be held to apply to the judgment here appealed from, the appeal was lost when the Code became effective. We are clear in our conclusion that section 10 of the Code continues in force the limitations of one year for appeals from judgments rendered prior to the 1st day of May, 1908. Therefore the motion to dismiss the appeal is overruled.

The action is one for breach of a contract or agreement, alleged to have been made between the parties, whereby plaintiff agreed to do certain work for the defendant on the Birmingham high school building; the defendant having contracted with that city to construct such building. It is alleged in the first count of the complaint, which is a special count for breach of the agreement, that plaintiff complied with all the provisions of the contract, but that defendant breached it by not paying the consideration (\$1,000) stipulated in the agreement. It is shown in the count that the consideration was to be paid on the completion of the work. The aver-

ments of this count are an answer to the ground of demurrer insisted upon, that the count does not allege the amount claimed as due and unpaid.

Whether the demurrer to the second replication to plea 3 was or was not improperly overruled is immaterial, as the evidence without conflict showed that there was no breach of the contract of July 17, 1905, set up in said plea. The defendant himself testified that there was no material difference between him and the plaintiff "as to the work under that contract." Consequently defendant was entitled to nothing, so far as that plea was concerned, even if the replication had not been in the case.

If a defendant has suffered damages on account of a breach by the plaintiff of the contract upon which the plaintiff bases his cause of action, a plea of recoupment is the procedure by which defendant may bring the matter before the court and have his damages considered. *Behrman v. Newton*, 103 Ala. 525, 529, 15 South. 838. For this reason we see no reversible error in the action of the court in giving charge 2, requested by the plaintiff.

The defendant's defense is that plaintiff had breached, to the defendant's damage, a contract made April 1, 1905; and there is testimony in the record which tends to support the defense. The plaintiff requested, and the court gave, the following charge: "(5) I charge you, gentlemen of the jury, that to constitute proof of a breach of contract executed by plaintiff and defendant April 1, 1905, upon the part of the plaintiff, it must be shown that the terms of the contract, including plans and specifications, or some one provision or term thereof, has been broken." This charge is criticised, in brief of appellant's counsel, as being invasive of the province of the jury. The criticism is inapt.

The proposition of law involved in charge 6, given for the plaintiff, is correct; and while the charge is misleading in its tendencies, and the court could well have refused it on this account, yet the defendant could have protected himself against its misleading tendencies, and the court will not be put in error for giving it. *Woodward Iron Co. v. Curl*, 44 South. 969.

Charge 4, as copied in the transcript, correctly defines set-off, and was properly given. The charge is not the same as charge 4 set out in appellant's brief, and we have found in the record no charge corresponding with that so quoted by the appellant. But, waiving this point, and taking the brief of counsel as referring to charge 3, which he sets out, and which is covered by the sixth ground in the assignment of errors, the court cannot be put in error for giving charge 3, because the evidence of the defendant, Theo. Poull, showed without dispute that there

was no material difference between plaintiff and defendant as to the work done under the contract of July 17, 1905, the one sued upon. Therefore plaintiff's demand was proved, and the first postulate of the charge, if erroneous, could not possibly have worked injury to defendant, and the remainder of the charge was misleading merely.

The court did not err in overruling the motion for a new trial.

We have treated all the grounds of error insisted upon in the briefs, but can sustain none, and the judgment appealed from is affirmed.

Affirmed.

TYSON, C. J., and SIMPSON and MAY-FIELD, JJ., concur.

(160 Ala. 155)

GARDINA v. BOARD OF REGISTRARS OF JEFFERSON COUNTY.

(Supreme Court of Alabama. Feb. 2, 1909.)

1. ELECTIONS (§ 1*)—SUFFRAGE—NATURE OF RIGHT.

While theoretically sovereignty is in the people, practically it resides only in those who exercise the right of suffrage.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. ELECTIONS (§ 5*)—RIGHT OF SUFFRAGE—POWER TO REGULATE—STATES.

Power to determine who are entitled to exercise the right of suffrage is in the several states, except as restricted by the fifteenth amendment of the federal Constitution, and that provision thereof requiring congressional electors to have the qualifications of electors of the most numerous branch of the state legislature.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 4; Dec. Dig. § 5.*]

3. ELECTIONS (§ 10½*)—RIGHT OF SUFFRAGE—REGULATIONS—VALIDITY.

Regulations of the elective franchise must be reasonable, uniform, and impartial, and should not abridge the constitutional right of the citizen or unnecessarily prevent its exercise.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 10½.*]

4. ELECTIONS (§ 1*)—FRANCHISE—NATURE OF RIGHT.

The exercise of the elective franchise is a privilege, and not a right.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 1; Dec. Dig. § 1.*]

5. ELECTIONS (§ 19*)—REGISTRATION—VALIDITY OF REGULATIONS.

A state may require citizens to conform to registration laws in order to vote, and the validity of such laws is not affected by the fact that the registering officer may, by neglecting to perform his duty, disfranchise the electors; an elector's remedy being to compel performance of the duty.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 14; Dec. Dig. § 19.*]

6. ELECTIONS (§ 24*)—REGULATIONS—MANNER OF HOLDING.

The Legislature may prescribe the time and place of holding elections, and require notice thereof.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 16; Dec. Dig. § 24.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

7. ELECTIONS (§ 69*)—QUALIFICATION OF VOTERS—CITIZENSHIP—DECLARATION OF INTENTION.

Const. 1875, art. 1, § 2, provides that all residents, born in the United States, or naturalized, or who have declared their intention to become citizens of the United States, are citizens of the state, with equal civil and political rights. Const. 1901, § 177, provides that every male citizen of the United States, and every male resident of foreign birth who, before the ratification of this Constitution, has declared his intention to become a citizen of the United States, shall be an elector, provided all foreigners who have declared their intention to become citizens of the United States shall, if they fail to become citizens thereof, when entitled to become such, cease to have a right to vote until they become citizens. Code 1907, § 290, requires practically the same qualifications for voting, and states the necessary period of residence in the state, county, etc.; section 291 provides that foreigners who have legally declared their intention to become citizens, if they fail to do so when they are entitled to be such, shall cease to have the right to vote until they become citizens; and section 312 provides that those persons, and no others, who will have qualifications as to residence prescribed by section 290, shall be qualified to register as electors, if not otherwise disqualified. *Held*, that foreigners who have merely declared an intention to become citizens of the United States since the ratification of the Constitution of 1901, but have not perfected their naturalization, cannot register or vote, nor are they citizens of this state, within Const. U. S. Amend. 14, defining federal and state citizenship, so as to entitle them to register and vote.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 65; Dec. Dig. § 69.*]

8. ALIENS (§ 60*)—NATURALIZATION—POWER TO NATURALIZE.

Naturalization is a national right and privilege, rather than a state right; Congress having exclusive power to provide for naturalization.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 117, 118; Dec. Dig. § 60.*]

9. CITIZENS (§ 11*)—CLASSES OF CITIZENSHIP.

There are two classes of citizens under our form of government, citizens of the United States and of the state; and one may be a citizen of the former without being a citizen of the latter.

[Ed. Note.—For other cases, see Citizens, Cent. Dig. § 18; Dec. Dig. § 11.*]

Appeal from City Court of Birmingham; H. A. Sharpe, Judge.

Proceeding by Frank Gardina against the Board of Registrars of Jefferson County. From a judgment for defendant, petitioner appeals. Affirmed.

William Conniff, for appellant. Alexander M. Garber, Atty. Gen., for appellee.

MAYFIELD, J. We agree with counsel for appellant that there is but one question to be decided on this appeal, namely, can a man of foreign birth be registered as an elector of this state, on his mere declaration of intention to become a citizen of the state and the United States? The law regulating this subject is as follows:

Const. Ala. 1901, § 177:

"Every male citizen of this state who is a citizen of the United States, and every male resident of foreign birth, who, before the ratification of this Constitution, shall have legally declared his intention to become a citizen of the United States, twenty-one years old or upwards, not laboring under any of the disabilities named in this article, and possessing the qualifications required by it, shall be an elector, and shall be entitled to vote at any election by the people: Provided, that all foreigners who have legally declared their intention to become citizens of the United States, shall, if they fail to become citizens thereof at the time they are entitled to become such, cease to have the right to vote until they become such citizens."

Const. Ala. 1875, § 2, art. 1:

"That all persons resident in this state, born in the United States, or naturalized, or who shall have legally declared their intention to become citizens of the United States, are hereby declared citizens of the state of Alabama, possessing equal civil and political rights."

Code Ala. 1907, §§ 290, 291:

"290. Qualification of Elector to Vote.—Every male citizen of this state who is a citizen of the United States, and every male resident of foreign birth, who, before the ratification of the present Constitution of the state, shall have legally declared his intention to become a citizen of the United States, twenty-one years old or upwards, not laboring under any of the disabilities named in section 293 (1557) of this Code, and who shall have resided in this state at least two years, in the county one year, and in the precinct or ward three months, immediately preceding the election at which he offers to vote, and who shall have been duly registered as an elector, and shall have paid, on or before the first day of February next preceding the date of the election at which he offers to vote, all poll taxes due from him for the year 1901, and for each subsequent year, shall be an elector, and shall be entitled to vote at any election by the people.

"291. Foreigners, Right to Vote.—All foreigners, who shall have legally declared their intention to become citizens of the United States shall, if they fail to become citizens thereof at the time they are entitled to become such, cease to have the right to vote until they become such citizens."

Code of Alabama, 1907, § 312:

"Persons Qualified to Register.—The following persons, and no others, who, if their place of residence shall remain unchanged, will have, at the date of the next general election the qualifications as to residence prescribed by section 290 (1556) of this Code,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

shall be qualified to register as electors, provided they shall not be disqualified under section 293 (1557) of this Code," etc.

Elections are the machines through which the voice of the people acting in their sovereign capacity is transformed into law. These elections must be exercised at the time, place, and in the manner prescribed by the Constitution and statutes which the people, through their agents, have constituted. By means of elections the people choose these officers, and choose those who shall exercise the legislative, executive, and judicial functions of the government. The Constitutions of the various states contain provisions that certain specific propositions, such as amendments of Constitutions, removal of county seats, election of officers, etc., shall be determined by the vote of the electors, either by a majority or sometimes by two-thirds majority of the electors. While the sovereignty is in the people, theoretically speaking, practically considered it resides in those persons only who are permitted to exercise the right of elective franchise. Cooley, Const. Lim. 752.

The power to determine who are qualified electors and who are entitled to exercise the elective franchise is left to the several states. The federal Constitution does not prescribe the regulations as to this matter, except that the electors for Representatives in Congress shall have the qualifications requisite for electors of the most numerous branch of the state Legislature, and also the fifteenth amendment, which forbids the state from denying any citizen the right to vote on account of race, color, or previous condition of servitude. The exercise of elective franchise is a privilege, and not a right. The state may grant or deny the right. Aliens are denied the right. The fifteenth amendment does not deny the state the right to forbid any person from voting, but only provides that he shall not be excluded on account of his race, color, or previous condition of servitude. Minors and women may be and are usually excluded from the right to vote, and also those who have been convicted of infamous crimes, also idiots and lunatics, also nonresidents of the state, county or municipality, etc., in which the election is to be held; but these are not the only qualifications that the states may require. They may require any qualifications, or exclude any person or class of persons, unless the federal Constitution or the state Constitution forbids it. The state may provide registration laws, and require that citizens conform thereto before they are entitled to vote. It is no excuse to the validity of such law that the registering officer may neglect to perform every duty and thereby disfranchise the electors. The remedy would be for the elector to compel the performance of the duty. But regulations as to the elective franchise must be reasonable and uniform

and impartial, and they should not deny or abridge the constitutional right of the citizen, nor unnecessarily impede its exercise. Statutes may prescribe the time and place of elections, and they may also prescribe the notice to be given of the election. Cooley, Const. Lim. 757, 758.

It will be observed that the Constitution of 1901, and the election laws thereafter, wrought a complete change in the qualifications of electors and mode of registration as prerequisites to vote. It is also clear that only those foreigners who had declared their intention before the adoption of the Constitution of 1901 could register or vote thereafter, and they must have become citizens at the time they were entitled to become such, else they lost their right to vote or register until they did become citizens. The Code provisions on this subject were evidently intended to make these constitutional provisions perpetual, so as to apply to future cases.

The election laws, statute or Code, do not authorize these foreigners who have merely declared their intention to become citizens of the United States since the Constitution of 1901 was ratified, but who have not perfected their naturalization as required, to register or vote in this state, and it is doubtful if the Legislature could so authorize. It appearing that the appellant in this case had declared his intention of becoming a citizen since the ratification of the Constitution, and that he had not perfected his naturalization and was not a citizen at the time he applied for registration it follows that he cannot register until he perfects his naturalization, unless he is a "citizen of this state" within the meaning of the election laws of this state.

It will be observed that section 2, art. 1, of the Constitution of 1875, defined or prescribed who were citizens of this state, and that appellant would be a citizen under that section; but it also appears that that section was not embraced in, or adopted as a part of, the Constitution of 1901, and there is no substitute for it in the new Constitution. We must, therefore, resort to other sources for a definition of "citizen of this state." The word "citizen" has come to us from the Roman law. In Roman law it designated a person who had the freedom of the city of Rome and could exercise the political and civil privileges of the Roman government. 2 Kent, Com. p. 76, note. It was both an honor and a sacred privilege to be a Roman citizen. Paul, the great Apostle of the Gentiles, claimed and asserted the right of a Roman citizen when apprehended in Jerusalem. The chief captain answered him: "With a great sum obtained I this freedom; but Paul said, 'I was free born.'" Again this great Apostle is heard to say: "I am a man which am a Jew, of Tarsus, a city in Cilicia, a citizen of no mean city." Citizen-

ship has always been regarded as the most sacred right or privilege that the sovereign can confer. Mr. Webster defines "citizen" as "a person, native or naturalized, who has the privilege of voting for public officers and who is qualified to fill public offices in the gift of the people; also either native-born or naturalized persons who are entitled to full participation in the exercise and enjoyment of so-called private rights." Bouvier says a citizen, in American law, is one who, under the Constitution and law of the United States, has a right to vote for Representatives in Congress and other public officers and who is qualified to fill offices in the gift of the people; that all persons, born or naturalized, in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.

The Supreme Court of Nebraska has held that "citizen," as used in that Constitution, relative to the right to hold office, means a person who is an American citizen by birth or a person of foreign birth who has been naturalized. *State v. Boyd*, 31 Neb. 682, 48 N. W. 739, 51 N. W. 602. The Constitution of the United States provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Const. Amend. 14. Congress of the United States has exclusive power to provide for naturalization, and is required to establish a uniform rule for all states, though it may provide for naturalization to be acquired by and through state courts. Const. U. S. art. 1, § 8, subd. 4. Naturalization is therefore a national right and privilege, rather than a matter of state concern. *Scott v. Strobach*, 49 Ala. 490.

There are, then, under our republican form of government, two classes of citizens, one of the United States and one of the state. One class of citizenship may exist in a person, without the other, as in the case of a resident of the District of Columbia; but both classes usually exist in the same person. The federal Constitution, by this amendment, has undertaken to say who shall be citizens both of the states and United States. Prior to this amendment, the states could probably have determined, respectively, who were citizens of each, though naturalization has been exclusively a national subject, rather than a state, since the federal Constitution was first adopted. Consequently we find no authority, state or national, for registering appellant as an elector of this state.

The judgment of the lower court is affirmed.

Affirmed.

TYSON, C. J., and SIMPSON and DENSON, JJ., concur.

(159 Ala. 4)

BAILEY v. STATE.

(Supreme Court of Alabama. Feb. 11, 1909.)

FALSE PRETENSES (§ 28*)—INDICTMENT—DESCRIPTION OF "PERSON" TO WHOM PRETENSE WAS MADE—CORPORATION.

An indictment for obtaining money under false pretenses, which alleged that the false pretense was made to a certain corporation, sufficiently alleged the "person" to whom the false pretense was made; Code 1907, § 1, providing that the word "person" includes a corporation, as well as a natural person.

[Ed. Note.—For other cases, see False Pretenses, Dec. Dig. § 28.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5327-5330; vol. 8, p. 7752.]

Appeal from City Court of Montgomery; W. H. Thomas, Judge.

Ed. Bailey was convicted of obtaining money under false pretenses, and he appeals. Affirmed.

John W. A. Sanford, Jr., for appellant. Alexander M. Garber, Atty. Gen., and Thomas W. Martin, Asst. Atty. Gen., for the State.

DOWDELL, J. The appellant was tried and convicted on an indictment for obtaining money under false pretenses. The indictment is in Code form. Cr. Code 1907, p. 670, form No. 58. There is no bill of exceptions in the record, and the only question presented for our consideration is the one raised by the demurrer to the indictment. The demurrer takes the point that the indictment fails to allege the name of any person to whom any false representation was made, but instead thereof alleges that the false pretense was made to the Louisville & Nashville Railroad Company, a corporation.

So far as we are advised, this is the first time this precise question has ever been presented to this court. The case of *White v. State*, 86 Ala. 69, 5 South. 674, is somewhat analogous; appellant there having been convicted of attempting to defraud by false pretenses "the Louisville & Nashville Railroad Company, a corporation duly incorporated under the laws of Kentucky." The indictment in that case was not assailed on the point here raised. In 19 Cyc. p. 425 (D), it is said: "An indictment for obtaining property by false pretense must allege specifically that defendant made the pretense in question, and state to whom the pretense was made, and who was defrauded thereby, unless his name is unknown. It is sufficient to allege that the pretense was made to, or that the person defrauded was, a corporation, either private or municipal, a firm, or, where the pretense was by advertisement, the public generally." In the case of *State v. Turley*, 142 Mo. 403, 44 S. W. 267, the precise question was considered and decided, and it was there held that the indictment was sufficient. In the opinion in that case it is said arguendo: "No one would contend that if

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

representations of the character which defendant is charged with making, were made in writing and addressed to a corporation, it would be necessary to allege that they were relied upon by some particular director or agent of the corporation; and the same rule applies when such statements and representations are verbal." And we may here add to what was there said, if the false pretenses were made in a letter addressed to the corporation eo nomine, to aver in the indictment that they were made to some particular individual might involve a still more serious question of a variance between the allegata and probata. The same question was ruled on by the Supreme Court of Minnesota in the case of *State v. Hulder*, 78 Minn. 524, 81 N. W. 532, and the indictment was held sufficient. Our own statute (section 1, Code 1907) provides that "the word 'person' includes a corporation as well as a natural person."

Our conclusion is that the indictment was not subject to the demurrer, and was properly overruled. Finding no error in the record, the judgment appealed from is affirmed.

Affirmed.

ANDERSON, McCLELLAN, and MAYFIELD, JJ., concur.

(159 Ala. 113)

JOHNSON v. STATE.

(Supreme Court of Alabama. Feb. 11, 1909.)

1. CRIMINAL LAW (§ 304*)—JUDICIAL NOTICE—VALUES—CLEARING HOUSE CERTIFICATES.

The Supreme Court will not take judicial notice of a particular clearing house, or of the nature of the clearing house certificates issued by it.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 700, 715; Dec. Dig. § 304.*]

2. LARCENY (§ 30*)—INDICTMENT—NATURE OF PROPERTY—"PERSONAL PROPERTY."

Under Code 1907, § 7324, making the felonious taking, etc., of any personal property of a certain value grand larceny, an indictment alleging the taking of clearing house certificates, the personal property of another, sufficiently alleges the taking of property subject to larceny, in the absence of evidence of the nature of such certificate; section 2 providing that the words "personal property" shall include money, evidences of debt, etc.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 65; Dec. Dig. § 30.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5346-5358; vol. 8, p. 7753.]

3. LARCENY (§ 30*)—INDICTMENT—DESCRIPTION OF PROPERTY.

An indictment for taking and carrying away one bill, of the denomination of \$20, lawful money of the United States of America, and four clearing house certificates of the denomination of \$5 each, issued by the clearing house association named, of the value of \$20, sufficiently described the property taken.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 72-75; Dec. Dig. § 30.*]

Appeal from City Court of Montgomery; W. H. Thomas, Judge.

John Johnson was convicted of grand larceny, and appeals. Affirmed.

John W. A. Sanford, Jr., for appellant. Alexander M. Garber, Atty. Gen., and Thomas W. Martin, Asst. Atty. Gen., for the State.

McCLELLAN, J. The indictment charged that the appellant "feloniously took and carried away one bill, of the denomination of twenty dollars, lawful currency of the United States of America, and four clearing house certificates, of the denomination of five dollars each, issued by the Clearing House Association of Montgomery, Alabama, of the value of twenty dollars, the personal property" of one Garner. The demurrer takes the objection, in substance: First, that the certificates mentioned cannot be the subject of larceny under our statutes; second, that, no authority for their issuance being averred, they were without legal existence and without intrinsic value; and, third, these alleged subjects of the alleged larceny are not sufficiently described. The appeal is on the record proper, without bill of exceptions.

While it may be that judicial knowledge of the general nature and purpose of a clearing house could, upon proper occasion, be indulged, we know of no reason, and have been unable to find any authority, to justify the assumption of judicial knowledge of the particular institution, and the certificates mentioned in the indictment. 16 Cyc. pp. 878-880, and notes. Since the indictment avers that such certificates were personal property, and were of the value of \$20, the issues were, of course, of fact, and in the absence of judicial knowledge, as stated, neither the court below, nor this, could pronounce the result asserted by some grounds of the demurrer. Our statute (Code 1907, § 7324) condemns as grand larceny the felonious taking, etc., of any personal property of the value of \$25. The words "personal property" include "money, goods, chattels, things in action and evidences of debt, deeds and conveyances." Code 1907, § 2. It may very well have been assumed by the court below, for the purpose of ruling on the demurrer, that the certificates described, in number, denomination, and source of issue, were evidences of debt, promises to pay. The description was sufficient. *Dubois v. State*, 50 Ala. 139; 25 Cyc. pp. 77, 78, and authorities in notes.

There is no error in the record, and the judgment must be affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and MAYFIELD, JJ., concur.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(139 Ala. 555)

ROY v. ROY et al.

(Supreme Court of Alabama. Feb. 4, 1909.)

**EXECUTORS AND ADMINISTRATORS (§ 332*)—
SALE OF DECEDENT'S LAND FOR DISTRIBUTION—
PROCEDURE IN CHANCERY.**

The only authority for any court ordering the sale of a decedent's lands for distribution being in Code 1896, § 157 et seq., the requirements of these sections must be complied with in the chancery court, when administering an estate, as well as in the probate court.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1369; Dec. Dig. § 332*]

McClellan, J., dissenting.

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Bill by Louis A. Roy against Cecelia N. Roy and others. From the decree, complainant appeals. Reversed and remanded.

Sterling A. Wood and George L. Smith, for appellant. Henry Upsom Sims, for appellees.

MCCLELLAN, J. The administration of the estate of James A. Roy, deceased, was properly removed from the probate into the chancery court of Jefferson county upon appropriate bill filed by Louis A. Roy, who was an heir at law of said intestate. Consequent upon this bill the usual processes and practices of the chancery court were employed to bring in parties respondent, resident and nonresident, adult and infant, and a guardian ad litem, consenting in writing to so serve, constituted to represent the infant parties in interest in the cause. The jurisdiction, therefore, attached for all purposes of administration, unless infirmities to be considered intervened to thwart the effective exercise, in respect of the sale of the real estate for division, of the powers of the court.

Pending the administration, after removal, the administratrix, Cecelia N. Roy, a party respondent, filed her petition therein, praying a private sale of the real estate belonging to the estate for the purpose of division among those entitled thereto, upon the ground that the realty could not be equitably divided. The petition was favorably considered, and a decree entered ordering the private sale as prayed. In the course of the procedure, from the filing of the petition to the decree of (private) sale, the following steps, required in like proceedings in the probate court, conveniently thus enumerated by one of the solicitors in the cause, were not observed: (1) The day for the hearing was not 40 days after filing the petition. (2) There was no publication for non-residents. (3) There was no appointment of guardian ad litem for that special proceeding. (4) There was no express denial of the averments of the petition. (5) Testimony was not taken by deposition. (6)

The sale was authorized to be privately made, though subject to confirmation by the court.

The errors assigned propound these questions for decision: First. Is the chancery court, in administering an estate of which it has jurisdiction, bound, in order to effect a valid sale, for division, of real estate thereof, to observe the statutory requirements provided for such sales in the probate court? Second. May the chancery court validly order a private sale of real estate, subject to confirmation thereby? Third. Is the decree erroneous in requiring, as a condition precedent to the execution thereof, a bond as provided by Code 1896, § 759?

The majority of the court hold that, as the only authority for any court ordering the sale of a decedent's lands, for distribution, is found in section 157 et seq., of the Code of 1896, it necessarily follows that the requirements of those sections must be complied with, in the chancery as well as in the probate court. The day for the hearing should have been appointed, as required by statute. Publication should have been made as to nonresidents. There should have been a guardian ad litem for this proceeding, and the sale should have been in accordance with the statute. The importance of the questions presented afford my reason for a statement of my views in dissent from the majority.

The first inquiry is more a matter of interpretation of our previous decisions bearing thereupon than the ascertainment and announcement of substantive law in the premises. For this reason, as well as because best promotive of the effort to declare a sound conclusion, I quote several of these adjudications, from the pens of our learned elders:

Bragg v. Beers, 71 Ala. 151: "It is true that a court of equity, in the absence of statute conferring the jurisdiction, will not decree a sale of lands of an adult, to make partition, without his consent. * * * Before the jurisdiction of the court of probate to settle an administration, and to make division and distribution, has been put in exercise, without the assignment of any special cause, devisees or heirs, legatees or distributees, may resort to a court of equity for a settlement of the administration. * * * The court (equity), proceeding according to its own practices, is governed by and applies the law controlling the settlement of administrations, the distribution of assets, or the partition or division of property, which prevails in the court of probate. The parties lose neither right nor remedy by resorting to a court of equity, instead of invoking the jurisdiction of the probate court. If, to effect a final settlement, distribution, and partition, a sale of lands is necessary, the court will order the

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sale in all cases in which, under like circumstances, the court of probate would have had jurisdiction to order it."

Sharp v. Sharp, 76 Ala. 312: "When a court of equity takes jurisdiction of the administration of an estate of a decedent, the court takes the estate in its condition at the time of taking jurisdiction, and is governed by the laws regulating and controlling the sales of property, the payment of debts, and settlement of administrations which are applicable to the administration of estates in the probate court. Following its own practice, the court will decree a sale of lands, when necessary, and when, in similar cases, a court of probate would have had jurisdiction to order a sale. * * * The probate court has jurisdiction to order a sale of the lands of an intestate, in only two cases—for the payment of debts and for distribution. * * *"

Ex parte Lunsford, 117 Ala. 224, 23 South. 529: "And when the court (equity) takes jurisdiction, following its own rules of practice, it is often said that it will apply the law relating to administrations as it prevails in the court of probate. An examination of the cases in which this expression has been employed will show that by it no more was intended than that the court takes jurisdiction of the administration in the plight and condition in which it was in the court of probate, and will exercise whatever of statutory jurisdiction or authority that court could have exercised in drawing the administration to a final settlement." After referring to the two cases above quoted, with others, the opinion denominates the statutory jurisdiction of the probate court in the premises, and its exercise in the equity courts, as incidental to the general jurisdiction of the equity courts over the trust of administrations. In other words, the original jurisdiction of equity to administer estates, not being inclusive of jurisdiction to sell lands for division, is supplemented in jurisdiction to effect such sale by force of statute only. The conferring of that incidental statutory jurisdiction is expressed in Code 1896, § 3187, and its construction, as indicated, by this court, affords the authority by which equity proceeds to a sale for division.

I interpret the cited statute, in the light of previous decisions of this court, to impose on the equity courts, in the exercise of the statutory, incidental power to sell lands for division, pending administration of the estate, none of the conditions to its exercise by the probate courts, other than the substantive prerequisite to effecting such a sale, viz., that the lands cannot be equitably partitioned among those entitled thereto, must exist and be so judicially ascertained. Otherwise stated: That the practices of courts of equity were not supplanted, by assimilation or otherwise, by the bestowal on courts of

equity of the incidental power to effect such a sale.

The foundation for this conclusion, which exonerates courts of equity from the statutorily prescribed steps to call into play the power of courts of probate to make such sales, is the distinguishing, between the two courts, characteristic, viz., that equity, once assuming jurisdiction of an estate, will proceed to its final and complete settlement, adjudicating all questions and enforcing the rights of all concerned—a power unknown, of course, to courts of probate. The latter court, in sales of real estate for division, is therefore bound to the procedure defined in the statutory system to that end, and cannot exert the power independent of this procedure. The law is necessarily the same, in such matters, in both courts, and the law, as distinguished from the practices of each, is that the sale, passing title, when confirmed, may be effected when the court has judicially ascertained the fact that the real estate cannot be equitably partitioned. The basis stated for the view of the writer is thus aptly announced in Tygh v. Dolan, 95 Ala., at page 271, 10 South., at page 838 among others: "And when an administration is removed into the chancery court for any purpose or in any part, it is there in whole and for all purposes. There can be no splitting up of an administration, any more than any other cause of action. It is one proceeding throughout, in a sense, and the court having paramount jurisdiction of it must proceed to a final and complete settlement." Upon the bill for removal into the chancery court, jurisdiction, entire, was invoked and assumed, not only of the subject-matter—the administration of the estate—but by regular processes the parties were brought into the court. The guardian ad litem was formally so constituted in the entire cause. The sale of lands for division, because they could not be equitably partitioned, was within, of course, the purview of the broad jurisdiction of the court to administer the estate—an element of jurisdiction conferred by statute. It is true, but none the less, if full disposal of the whole cause was to be effected, as, indeed, equity assumes to do, an element of that comprehensive jurisdiction.

The argument that, since the power possessed by courts of equity to sell lands for division is derived solely from statute, and must, therefore, result, in valid exercise, from the employment of all statutory steps thereto, is not applicable, for the reason, stated before, that the procedure for such sales in courts of probate was not imposed upon courts of equity exercising the jurisdiction to effect such sale in course of the administration of an estate. Independent of the pertinent decisions by this court, as the writer interprets them, there never was any occasion to cumber the equity court with the procedure required to be pursued by

courts of probate. For instance, if the requirement, in the probate court, that the inability to effect equitable partition must be proven by deposition taken as in chancery cases before the sale for division could be validly had, is applicable to courts of equity, these courts would be denied their prerogative to refer to the register the ascertainment of the essential fact—would be compelled, without reference to the register, to determine the issue upon the proof taken. Nothing would be gained by such a limitation on practices of the equity courts, for the report of the register on issues of fact submitted for ascertainment is always accompanied with a statement of the testimony upon which the conclusion is based. The majority yield this statutory requirement, and yet its command is as imperative as any of the others held to be applicable. Like reason obviates any necessity to require 40 days to lapse between the interposition of the application to sell and the hearing thereon. Under equity practices no reference to a register is ever held without notice thereof to parties in interest. This the court's practices demand, not only out of a purpose to afford such parties an opportunity to be present and to be heard in the premises, but also in order that the court, on its own account, may be fully advised as to its duty in the premises. Likewise the denial of the existence of the necessity to sell for division, or of any other material fact in such proceeding, in the chancery court, by the guardian ad litem, is not essential. The obligation to sustain the necessity to sell, rather than that partition be effected, is just as affirmative without such denial as with it. The court itself, or through confirmation of its register's report, must ascertain the existence of the necessity and propriety to so sell the real estate.

Authority to effect the sale in question by private contract was sought and granted. The writer was at first inclined to the view that no such power could be exercised by the court, and this independent of the statute requiring, in sales by the probate court, that such sales be at public outcry. Fuller consideration has led me to the contrary conclusion. The practice of courts of equity to direct such sales by private contract seems to be well established, and so upon the idea that the manner of sale is a matter reposed in the sound discretion of that court. *Dan. Ch. Prac.* p. 1293, and authorities there noted; *Cox v. Price* (Va.) 22 S. E. 512. The court is the vendor, and its primary object is to obtain for the property, in the interest of those entitled to the proceeds, full value. This may be best accomplished by private contract, though such occasions must needs be rare. But, whether the sale be at public outcry, after due publicity, or by private contract, title thereunder does not pass until

confirmation thereof by the court, and the action of the court in that important particular would not be taken until fair opportunity is given parties in interest to resist, if so desired, the confirmation upon the ground, among others, of inadequacy of price, or, it may be, by such showing as would reasonably induce the court to conclude that a better and fairer price would be obtained by a sale at public outcry.

The decree of sale required, as a condition precedent to the sale thereunder, the execution of the bond stipulated in Code 1896, § 759. I think the theory upon which such sales for division rests denies the application of this statute to them. In other words, my opinion is that that statute has reference only to strictly adversary proceedings, by which property is subjected to obligations, aside from mere community of ownership. The theory underlying the sale for division, in preference to partition which cannot be equitably accomplished, is that each joint owner or tenant in common is entitled to have his interest segregated and delivered to him, and to do so the character of the common property is changed into money; but the interest of no one of such owners, save in the cost of the proceeding, which is generally distributed, is diminished or enhanced. No title or right, in the sense of diminution in estate, is affected, favorably or adversely. Under these circumstances it could not have been contemplated that the burden of a bond, conditioned as defined in the statute, should be borne in order to effect the division of the common property desired; and to so apply the statute would necessarily lay the condition of a guaranty, in a sense, upon one seeking such a sale, when his co-owners would thereby be deprived of naught save the cost of division by sale, a process resulting presumably to the best interest of all concerned.

From the conclusions of the majority, as before stated, the decree of sale must be reversed, and the cause remanded.

Reversed and remanded.

TYSON, C. J., and DOWDELL, SIMPSON, ANDERSON, DENSON, and MAYFIELD, JJ., concur. McCLELLAN, J., dissents.

(159 Ala. 115)

ADAMS v. STATE.

(Supreme Court of Alabama. Feb. 11, 1909.)

1. LANDLORD AND TENANT (§ 323*)—RENTING ON SHARES—NATURE OF RELATION.

Where a person engaged with a landowner to make a crop on the land, the owner to furnish the land, team, feed for the team, and farming implements, and the other person to furnish the labor, the crop to be divided, the relation of employer and employe, and not that of tenants in common in the crop cultivated and raised, was created, under Code 1907, § 4743, providing that such an agreement constitutes a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

contract of hire, the laborer to have a lien on the crop for the value of the portion to which he is entitled.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1350, 1355; Dec. Dig. § 323.*]

2. LARCENY (§ 5*)—OFFENSES—PROPERTY SUBJECT TO LARCENY—CROPS AFTER REMOVAL FROM LAND.

While corn standing on the land is part of the realty, and not subject to larceny, if a person, subsequent to its severance from the realty and by a separate act, takes it with intent to steal it, his act constitutes larceny.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 15; Dec. Dig. § 5.*]

3. LARCENY (§ 70*)—PROSECUTION—INSTRUCTIONS.

In a prosecution for larceny of a crop of corn, where there was evidence that accused carried away the corn by a separate act after its severance from the realty, a requested charge that before the jury could convict they must believe beyond a reasonable doubt that the corn was severed from the freehold, and if they believed that accused severed the corn and then carried it off they should acquit, was properly refused, as pretermittin in hypothesis the fact that larceny could have been committed by a separate act of accused after he had severed the corn from the realty.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 182; Dec. Dig. § 70.*]

Appeal from Law Court, Pike County; A. H. Owens, Judge.

Hill Adams was convicted of petit larceny, and he appeals. Affirmed.

In his oral charge to the jury the court said that if the defendant gathered the corn, or had it gathered, out of the fields of one E. J. Pilley, as testified about, and put it in the Babcock house, where he then lived, and afterwards had it moved to the place where he moved to from there, with the intent to steal it, and that this was in Pike county and within 12 months before the commencement of this prosecution, and they believed all this beyond a reasonable doubt, the defendant would be guilty, and it would be their duty to so find. Charge 4 is as follows: "Before the jury can convict the defendant, they must believe beyond a reasonable doubt that the corn was severed from the freehold, before they can convict the defendant. If the jury believe that the defendant severed the corn, and then carried it off, then the defendant cannot be convicted of larceny."

Boykin Owens, for appellant. Alexander M. Garber, Atty. Gen., for the State.

McCLELLAN, J. The indictment charged petit larceny of seven bushels of corn. The defendant engaged, with one Pilley, to make a crop on the latter's land; he to furnish the land, team, feed for the team, and the farming implements, and the defendant to furnish the labor—the crop to be divided. This arrangement created the relation of employer and employe, and not that of ten-

ants in common in the crop cultivated and raised. Code 1907, § 4743.

There was proof tending to show that the defendant gathered the corn, then in growth, and carried it to the Babcock house, to which he had previously removed from the place whereon the crop was growing, and that, later, this corn was hauled to another place, to which defendant moved from the Babcock place. Notwithstanding originally the corn was of the realty, and not subject to larceny, as distinguished from the felonious taking of a part of an outstanding crop, it was open to the jury to conclude, from all the evidence, that subsequent to the severance of the corn from the realty, by a separate act, the defendant took it with the intent to steal. *Johnson v. State*, 100 Ala. 35, 14 South. 98. Accordingly the oral charge of the court was not erroneous.

The defendant requested special charges 1, 2, 3, and 4, which the court refused. The first was the general charge, and the second and third predicated an acquittal upon the idea that the defendant and the owner of the land were tenants in common in the crop. As before indicated, this relation did not exist in the premises. The affirmative charge, of course, could not be given. The fourth charge was properly refused, because it pretermits, in hypothesis, the fact, suggested by some tendencies of the evidence, that by a separate act, after severance from the realty, larceny may be committed.

There is no error in the record, and the judgment is affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and MAYFIELD, JJ., concur.

(159 Ala. 45)

HUCKABEE v. STATE.

(Supreme Court of Alabama. Feb. 9, 1909.)

1. HOMICIDE (§ 290*)—TRIAL—INSTRUCTIONS.

The indictment charged the killing of deceased "by cutting him with a knife." There was evidence that on deceased's body there was a pistol shot wound and several cuts, which may have been inflicted by a knife, or by a barbed wire with which deceased came into contact during the altercation; that deceased was a person who bled so freely that any wound was dangerous; and that he died from loss of blood, and probably from erysipulous inflammation. Held, that it was error to refuse an instruction to acquit defendant unless deceased "died from the effects of a wound inflicted by defendant with a knife."

[Ed. Note.—For other cases, see *Homicide*, Dec. Dig. § 290.*]

2. HOMICIDE (§ 142*) — INDICTMENT — VARIANCE.

Under an indictment charging defendant with having killed deceased "by cutting him with a knife," he cannot be convicted by proof that he shot deceased with a pistol, or threw him against a barbed wire fence, cutting him.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 256; Dec. Dig. § 142.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

8. HOMICIDE (§ 5*)—CAUSE OF DEATH.

To render defendant guilty of homicide, it is not necessary that the blow given by him, or his wrongful act, was the sole cause of the death; but if the blow, or his wrongful act, contributed to the death, he may be responsible, according to the circumstances of the particular case.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 7, 9; Dec. Dig. § 5.*]

Appeal from Circuit Court, Dallas County; S. L. Brewer, Judge.

Sam Huckabee was convicted of murder, and appeals. Reversed.

Arthur M. Pitts, for appellant. Alexander M. Garber, Atty. Gen., for the State.

MAYFIELD, J. The indictment in this case was as follows: "The State of Alabama, Dallas County. Circuit Court, Fall Term, 1908. The grand jury of said county charges that, before the finding of this indictment, Sam Huckabee unlawfully and with malice aforethought killed Arthur Coleman by cutting him with a knife, against the peace and dignity of the state of Alabama. [Signed] J. F. Thompson, Solicitor for 4th Circuit."

The evidence was in conflict as to whether the deceased was cut with a knife or by a barbed wire. He had several wounds inflicted upon him during the altercation with the defendant. One was a pistol shot wound on his right leg; and he had an incised wound on the back of his neck, and a slight contusion on his right cheek, which closed his eye, and was bloody and spitting blood after the fight and before his death. It was shown that a running fight had occurred between defendant and deceased, which lasted several minutes; each retreating at times and pursuing the other at times. The deceased had a pistol, and defendant a knife. Deceased shot at defendant several times during the fight. The defendant finally closed in on deceased, grappled with him, and wrested the pistol from him. The pistol was fired one or more times during this struggle, and deceased fell or was thrown by defendant against a wire fence—some witnesses saying it was of barbed wire; others, that it was not.

The deceased was shown to be a bleeder; that is, a person that bleeds freely from a slight wound, or upon whom such a wound produces hemorrhages difficult to check. It was shown that deceased bled much and for a long time from these wounds, and for a long while freely spat up blood. One of the surgeons examined by the state testified that he could not say that the wound on deceased's neck caused his death; that deceased died about two weeks after he examined him; that, deceased being a bleeder, his blood would not coagulate as it would naturally, and that to such a person any wound, no matter how slight, is dangerous; that a slight operation on such a person often

causes death; that the wound on deceased's neck, which was alleged to be a knife wound, was doing well while he attended him; that the wound on his cheek was not a knife wound, but that it became swollen and gave him much trouble; that deceased died from loss of blood, and probably from erysipelous inflammation. The other surgeon examined by the state testified that he saw deceased the night of the injury, in March; that deceased had a wound on the back of his neck, about three inches long and one-fourth of an inch deep, clean cut; that deceased was a bleeder; that all wounds on a bleeder are considered dangerous; that such a wound as described would accelerate death; that he saw deceased no more after that night.

The defendant requested the court to give the following charge, which was in writing: "The court charges the jury that unless you are convinced beyond a reasonable doubt, from the evidence in this case, that the deceased, Arthur Coleman, died from the effects of a wound inflicted by a knife upon him by defendant, you must acquit the defendant." The court refused this charge, and in this we think there was error. The charge was a proper one, when applied to the facts in this case. There are cases in which it might be refused, because abstract, or where the cause of the death or the deodands are not disputed, or are admitted; but here the cause of the death and the deodands were disputed questions. The indictment charged singly and specifically that defendant killed deceased by cutting him with a knife. He could not be convicted under that indictment, if he killed deceased by any other means, and could not be convicted unless he inflicted the wound which caused, contributed to, or accelerated his death, and he must have inflicted that wound with a knife; and the jury must believe these facts beyond a reasonable doubt before the defendant could be properly convicted under said indictment.

The means by which an offense is committed, if unknown, and they do not enter into the essence of the offense, may be alleged to be unknown (Code 1907, § 7144); and if an offense may be committed by different means or intent, such means or intent may be alleged in the same count in the alternative (Code, § 7149). If an indictment alleges the means by which an offense is committed, it must be substantially, though not literally, proven as alleged. If it alleges that the defendant killed the deceased with a knife, it is sufficient if the substance of the allegation be proven; i. e., proof that he killed him with a razor, or an instrument of like kind and character, would be sufficient. Or, if the allegation be that he killed him with a gun, proof that he killed him with a pistol would support it. But the allegation that he killed him by cutting him with a knife would not be supported by proof that he

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

shot him with a pistol or threw him against a barbed wire fence. *Phillip's Case*, 68 Ala. 471; *Hull v. State*, 79 Ala. 32; *Jones v. State*, 137 Ala. 12, 34 South. 681; *Walker v. State*, 73 Ala. 17.

It will appear from an examination of the authorities that a charge like the one in question should be given in some cases, and refused in others. The case at bar is one peculiarly circumstanced to render the charge not only proper, but to render its refusal revisable error. Not attempting here to pass upon the weight of the evidence, it is, however, proper to say there was evidence to show that deceased came to his death independently of any wounds inflicted by a knife or instrument of like kind or character, and the defendant had the right to have the jury instructed upon this theory of the law; and this charge was a correct and fair exposition of the law as to this feature of the evidence. There was no evidence to show that any wound was inflicted with an instrument similar in kind or character to a knife. They were caused by a pistol, a knife itself, a wire fence, or some blunt instrument.

To render a defendant guilty of homicide, it is not necessary that the blow given by him, or that the agency or means used by him, or that his wrongful act, should be the sole or necessary cause of the death complained of. If his wrongful act, agency, means, blow, or the like, accelerates or contributes to the death, he may be responsible, according to the circumstances of the particular case. It is said: "It is not permitted to the offender to apportion his wrong" in such cases. "Ordinarily, if a wound is inflicted, not dangerous in itself, and death was evidently occasioned by grossly erroneous treatment, the original author will not be accountable; but, if the wound be mortal or dangerous, the person who inflicted it cannot shelter himself under the plea of erroneous treatment." *Parsons' Case*, 21 Ala. 301; *McAllister's Case*, 17 Ala. 434, 52 Am. Dec. 180; *Bowles' Case*, 58 Ala. 335; *Daughdrill's Case*, 113 Ala. 34, 21 South. 378; *Winter's Case*, 123 Ala. 1, 26 South. 949; *Russell on Crimes* (Int. Ed.) pp. 35, 36; *Hale's P. C.* 428; 1 East, C. L. 344, § 113.

The facts in this case are peculiar, in that the deceased was a bleeder. A slight wound upon such is shown to be dangerous, and frequently mortal; whereas, a similar injury inflicted upon a normal person would not be dangerous or even serious. Applying these rules of law to the particular case, we find no error as to other charges refused or given, nor as to rulings upon the evidence relating to the severity of the wounds, or to the mode of treatment thereof, when applied to the killing of a person whose natural physiology is abnormal. We have treated this phase of the case, because it will of

necessity arise upon another trial. The other questions may not arise on another trial, and what we have said will probably be a sufficient guide.

For the error in refusing the charge above treated, the judgment must be reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and ANDERSON and McCLELLAN, JJ., concur.

(159 Ala. 195)

ANNISTON ELECTRIC & GAS CO. v. ROSEN.

(Supreme Court of Alabama. Feb. 4, 1909.)

1. STREET RAILROADS (§ 85*) — USE OF STREETS.

The relative rights of travelers in public streets and street cars operated therein are equal, and the exercise of the common right by each must be such as not to unreasonably hinder or endanger either in the use of the streets.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 193, 195; Dec. Dig. § 85.*]

2. STREET RAILROADS (§ 93*)—CARE REQUIRED OF OPERATORS.

Operators of street cars must keep a lookout for persons on the track, and must so operate the cars that when persons or property are on the track the car may be stopped and thereby avert injury, subject to the right of the operators to assume that apparently adult persons, or property under their control, will leave the track in time to avoid injury; but the operators cannot rely on such assumption beyond the point where prudence should suggest the stopping of the car on reasonable appearance of inability of the traveler to get out of danger.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 195, 197; Dec. Dig. § 93.*]

3. STREET RAILROADS (§ 98*)—CARE REQUIRED OF TRAVELERS.

A traveler on a street on which cars are operated must look for them, and where the street is obstructed he must listen, and in some instances stop.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 208; Dec. Dig. § 98.*]

4. STREET RAILROADS (§ 114*)—INJURIES TO TRAVELERS—EVIDENCE.

Where the liability of a street railway company for injuries to a traveler in a collision with a car is founded on the breach of duty to employ proper means to avert injury after the discovery of the traveler's peril, knowledge of the peril before the injury must be shown; and, in the absence of wantonness or willfulness, this is not done by mere proof of a breach of duty to look for persons in peril, regardless of the place where the injury occurred.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 244; Dec. Dig. § 114.*]

5. STREET RAILROADS (§ 102*)—INJURIES TO TRAVELERS—LIABILITY.

Where a motorman failed to keep a lookout for travelers on a street, and a traveler whose peril and inability to extricate himself therefrom would have been discovered by the motorman, had he kept a lookout, the proximate cause of the injury, aside from wantonness or willful misconduct, was the motorman's failure to keep a lookout.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 203; Dec. Dig. § 102.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

6. STREET RAILROADS (§ 101*)—INJURIES TO TRAVELERS—LIABILITY.

Where the injury to a traveler in a collision with a street car is occasioned by mere failure of the motorman to keep a proper lookout for travelers, contributory negligence of the traveler defeats a recovery.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 101.*]

7. STREET RAILROADS (§ 102*)—INJURIES TO TRAVELERS—LIABILITY.

Where the motorman of a car colliding with a traveler failed to exercise proper care after the discovery of the traveler's peril, the initial negligence of the traveler became only a condition on which the duty arose to avert the injury, and a breach thereof became the proximate cause of the injury, authorizing a recovery, unless the traveler, concurrently with or subsequently to the negligence of the motorman, was guilty of contributory negligence.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 203; Dec. Dig. § 102.*]

8. NEGLIGENCE (§ 83*)—DISCOVERED PERIL.

The principle of negligent breach of duty after the discovery of the peril of the person injured is the same, whether the latter is a trespasser or not, and in each case knowledge of the peril requires the use of all known means to avert injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 113; Dec. Dig. § 83.*]

9. NEGLIGENCE (§ 11*) — "WILLFULNESS" — "WANTONNESS."

"Willfulness" or "wantonness," as applied in cases of injury to a person by a breach of duty, where the peril of the person injured is known, means a direct intent to inflict injury, or an act done or omitted, with the consciousness that the act or omission will probably eventuate in injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 13; Dec. Dig. § 11.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7386-7387, 7485-7486.]

10. NEGLIGENCE (§ 80*)—CONTRIBUTORY NEGLIGENCE—EFFECT.

Where the proximate cause of an injury to one known to have been in peril is due to a willful or wanton wrong, the contributory negligence of the person injured, such as a negligent failure to conserve his own safety after the discovery of his peril, is as a general rule no defense.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 85; Dec. Dig. § 80.*]

11. NEGLIGENCE (§ 80*)—CONTRIBUTORY NEGLIGENCE—EFFECT.

Where the proximate cause of an injury to one known to have been in peril was simply negligence because of the breach of duty to keep a proper lookout, without conscious indifference to probable consequences, contributory negligence of the person injured, concurrent with or subsequent to that of the party charged, after discovery of the peril, such as a negligent failure to conserve his own safety after becoming aware of his peril, defeats a recovery.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 84; Dec. Dig. § 80.*]

12. STREET RAILROADS (§ 110*)—INJURIES TO TRAVELERS—COMPLAINT.

A complaint in an action for injuries to a traveler in a collision with a street car, which alleges that plaintiff's position of peril was known to the motorman, "or by the exercise of reasonable care" could have been known to him, and that by the use of means at hand the motorman could have stopped the car in time to have

prevented the collision, etc., does not state a cause of action founded on the failure of the motorman to exercise proper care after the discovery of the traveler's peril; the alternative form of allegation not amounting to a charge of actual knowledge of plaintiff's peril, necessary to defendant's liability.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 224; Dec. Dig. § 110.*]

13. STREET RAILROADS (§ 110*)—INJURIES TO TRAVELERS—COMPLAINT.

A complaint in an action for injuries to a traveler in a collision with a street car, which alleges that the motorman knew of the traveler's peril and failed to exercise due care to avoid injuring him, and which, after describing the injuries received, avers that the motorman knew of the traveler's peril, but nevertheless wantonly and recklessly ran the car against him, and that he did not use the means at hand to prevent the collision, when the use thereof would have prevented the same, is inconsistent, since it avers a negligent failure to take means to avert the injury after discovery of the peril, and charges wantonness, and also simple negligence.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 224; Dec. Dig. § 110.*]

14. STREET RAILROADS (§ 110*)—INJURIES TO TRAVELERS—COMPLAINT.

A complaint in an action for injuries to a traveler in a collision with a street car at a crossing, which alleges that plaintiff was rightfully at the crossing, where a great many people were accustomed to pass, and which avers that it was the duty of the motorman to so operate the car that it might be under such control that it might be stopped before striking one on the track, that the car was negligently operated at a reckless speed, so that the motorman was unable to bring the car to a stop before the collision, etc., charges simple negligence anterior to a breach of duty, raised by the discovery of peril.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 224; Dec. Dig. § 110.*]

15. STREET RAILROADS (§ 110*)—INJURIES TO TRAVELERS—DEFENSES.

A plea in an action for injuries in a collision with a street car, which alleges that defendant negligently drove on the track ahead of the car, that the street was wide enough for plaintiff to have driven on either side of the track without injury, that the car was in plain view, and plaintiff could have stopped until the car passed, etc., charges contributory negligence, and is available as a defense to a complaint charging simple negligence of the motorman anterior to a breach of duty, raised by the discovery of plaintiff's peril, but does not state a defense to a complaint based on the failure of the motorman to exercise proper care after the discovery of plaintiff's peril.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 110.*]

16. STREET RAILROADS (§ 110*)—INJURIES TO TRAVELERS—COMPLAINT—SUFFICIENCY.

A complaint in an action for injuries to a traveler in a collision with a street car, which avers negligence of the company in general terms, is sufficient, without averring the name of the alleged negligent servant.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 224; Dec. Dig. § 110.*]

17. DAMAGES (§ 141*)—INJURIES—COMPLAINT—SUFFICIENCY.

A complaint in an action for injuries to person and property negligently inflicted, which definitely enumerates the elements of damages alleged to have been suffered by plaintiff and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

his property, is good, without designating the amount claimed for each element of damage.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 422, 423; Dec. Dig. § 141.*]

18. TRIAL (§ 259*)—INSTRUCTIONS—REQUESTS.

Special charges, if intended to be separate requests, must be presented to the court on separate pieces of paper, and where counsel requests several charges, written on one sheet of paper, the court may treat the requests as a single request.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 648; Dec. Dig. § 259.*]

Denson and Mayfield, JJ., dissenting in part.

Appeal from Circuit Court, Calhoun County; John Pelham, Judge.

Action by Harry Rosen against the Anniston Electric & Gas Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Plaintiff's complaint was substantially as follows:

(1) The plaintiff claims of the defendant, a corporation, the sum of \$1,500 damages, for that, to wit, on the 14th day of May, 1906, while the plaintiff was attending to some private business, riding in a buggy drawn by a horse along Pine avenue, which is a public street in the city of Anniston, Ala., and just as he was turning out of Pine avenue into and for the purpose of going westward along Fifteenth street, which is another public street in said city, one of the electric cars of the defendant, in charge of and being operated by an agent or servant of defendant, ran violently against plaintiff's horse and buggy, said buggy was demolished, and said horse thrown violently to the ground and his leg broken, and the plaintiff was thrown from the buggy to the ground. The plaintiff avers that the place of said collision was a street crossing, and a populous district in said city, and that he was turning from Pine avenue into Fifteenth street for the purpose of going westward along Fifteenth street on business as aforesaid, and defendant's car was approaching from a westerly direction along Fifteenth street, and was then, to wit, 70 yards distant from the point of collision and in plain view of plaintiff's horse and buggy, and said motorman then and there in charge of said car saw, or by the exercise of reasonable care could have seen, plaintiff's buggy and horse in a position of peril on the track of the defendant, and he was then sufficiently far from the same, had he used due care and the means at hand, to have stopped said car before the collision, and thereby have prevented the injury, but he did not do so; and the plaintiff avers, further, that just before or about the time the front wheel of his buggy had reached the north rail of the tracks, said car was, to wit, 60 feet distant, and the plaintiff averred that even then said agent or servant of defendant in charge of said car saw, or by the exercise of reason-

able care could have seen his peril, and by the use of means at hand could have stopped said car in time to have prevented said collision and injury, but he failed to do so, and in consequence plaintiff suffered injury in this: Here follows a catalogue of his injuries and special damages. It is alleged that the horse was so injured that he was rendered worthless, and that the buggy and harness were totally destroyed, and that they were the property of plaintiff.

(2) Plaintiff claims of the defendant, a corporation, the sum of \$1,500 damages, for that heretofore, to wit, on the 14th day of May, 1906, the defendant was engaged in the operation of electric street cars in the city of Anniston, Ala. On said date the defendant's said agents and servants, in charge of and operating one of its cars, after discovering that the plaintiff and his horse and buggy were on defendant's track in a position of peril, and in danger of being injured, failed to exercise due care and diligence to avoid injuring plaintiff, when the exercise of such care and diligence would have avoided injuring him, whereby said car struck said horse and buggy, and he was injured thus: Here follows a catalogue of the injuries and special damages. And plaintiff avers that the defendant's agent or servant, in charge of or operating said car, saw and knew of his peril; but, notwithstanding this, he wantonly and recklessly or intentionally ran said car against him, and that he did not use the means at hand to prevent said collision and injury, when the use of such means would have prevented same, with same allegation as to horse and buggy as made in count 1.

(3) Same as 1, except that it is alleged that, just about the time the front wheel of the buggy reached the north rail of the track, plaintiff's horse balked or stopped, while plaintiff was trying to pull him off the track, and that said car was about 60 feet distant, and that even then the agent or servant of defendant, in charge of said car, saw, or by the exercise of due care and diligence could have seen, his peril, etc.

(4) Formal charging part same as 1. It is then alleged that the intersection of Pine avenue and Fifteenth street, where plaintiff turned out of Pine avenue into Fifteenth street, is a public street crossing, where a great many people, horses, and vehicles are accustomed to pass and repass, and was such on said date; and plaintiff avers that it was the duty of said agent or servant, in charge of and operating said car, to have run and to have kept said car under such control as to have been able to bring the same to a full stop before striking a person or thing on the track; but plaintiff avers that on such occasion the agent or servant of defendant, in charge of and operating said car, ran the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

same at such a reckless and rapid rate of speed that he was unable to bring the same to a full stop before striking the plaintiff's horse and buggy, after he had discovered the said horse and buggy were on the track in a place of peril at or near the intersection of Pine avenue and Fifteenth street, whereby said car struck plaintiff's horse and buggy, and he was injured thus: Here follows a catalogue of the injuries to the person, horse, and buggy.

The grounds of demurrers are sufficiently stated in the opinion. The second, third, fourth, fifth, sixth, and seventh pleas were pleas of contributory negligence. The fifth, sixth, and seventh are failure to stop, look, and listen; the fourth, that plaintiff negligently drove his horse and buggy on said car track, and turned it up said car track towards the car, and that it was negligence on the part of plaintiff not to have driven across said track, and it was negligence to have driven on said track ahead of said car. The third plea avers the efforts to stop the car, and the failure to do so after using all means, and that before driving over defendant's driveway plaintiff failed to look for defendant's approaching car, and drove his said horse on the track ahead of said car. The second plea alleges that the street was wide enough where the collision occurred for plaintiff to have driven on either side of said track without injury, that the car was in plain view of plaintiff, that plaintiff could have stopped his horse and buggy until the car passed on, or that he could have turned the said horse and buggy up or down said street, with ample room to have avoided the collision, but that he did neither of these things, but negligently drove or allowed his horse to start across said track in front of defendant's car, and turned said horse and buggy towards said approaching car, which negligence proximately contributed to his injury.

Blackwell & Agee, for appellant. Tate & Walker, for appellee.

MCLELLAN, J. The injury complained of was suffered by the plaintiff, in person and property, in consequence of the collision therewith of a street car then in operation on a public thoroughfare in the city of Anniston. The original complaint contained two counts, to which defendant's (appellant's) demurrers were sustained. After amendment, the complaint consisted of counts 1 to 4, inclusive. All, save the fourth, would found the liability of the defendant upon the breach of duty by the servant of the defendant, arising out of plaintiff's imperiled condition. The principle is familiar, and the sixteenth ground of the demurrer, addressed to these counts, takes the point that it is not averred that the servant in question knew of plaintiff's peril in time to have prevented the injury.

The relative rights of travelers in public

streets and street cars operated therein have been defined as being equal, not exclusive, in favor of or against either. *Schneider v. Mobile L. & R. R.*, 146 Ala. 344, 40 South. 761. The exercise of the common right, by each, must be such as not to unreasonably hinder or endanger either in the use of the street; and upon the operative of the street car rests, as of course, the duty to be diligent in keeping a lookout for persons using the street and to bring to the operation of the car, under such circumstances, such measure of care and prudence as the common right enjoyed by the traveler and the street car suggest. This necessarily imposes upon the carrier the duty to operate its cars, in public streets, under such control, at such speed, as that, if persons or property be upon or dangerously near the track of the street railway, the car may be, with skilled application of stopping appliances, stopped, and injury thereto averted. But this duty is qualified to the extent that the operative of the car may assume that apparently adult persons, or property, such as horses and vehicles in the control of persons apparently adult, will leave, in time to avert injury, the track or dangerous proximity to it; but the stated qualification is also qualified by the requirement that the operative is forbidden to rely upon the stated assumption beyond the point where prudence and care would suggest the stopping of the car, such prudence and care being suggested, to a reasonably prudent man, by the reasonable appearance of inability upon the part of the party imperiled to remove himself or property from danger, or from such circumstances as would indicate, to the reasonably prudent operative, that the party imperiled, or likely to become so, is unconscious thereof. *Schneider v. Mobile L. & R. R.*, supra. On the traveler upon the street the duty rests to "always * * * look for an approaching car, and, if the street is obstructed, to listen, and in some instances to stop. * * *" *Birmingham R. L. & P. Co. v. Oldham*, 141 Ala. 195, 199, 37 South. 452.

As stated before, all of the counts except the fourth would ascribe the negligent misconduct, resulting in the injury here involved, to a breach of duty after discovery of peril. The statement of the doctrine declaring the duty relied upon, in breach, for a recovery by this plaintiff, announces in terms the condition to the creation of the duty, viz., knowledge of the peril with which the party injured is circumstanced before his injury. This knowledge has been otherwise referred to in the descriptive term "aware," meaning "informed." The requisite knowledge is of the fact that the party injured was in peril. Manifestly this condition (knowledge) to the duty (premitting wanton or willful misconduct, to be later considered) cannot arise out of a breach of duty to look out for persons, etc., in peril, whatever the place of injury. If the duty be to keep a diligent lookout, and the duty be merely negligently

breached, the consequence is the opposite of knowledge, namely, want of knowledge, and that, on this phase of the subject, attributable only to the failure to observe that course of conduct which would have probably led to knowledge. *Sou. Ry. v. Bush*, 122 Ala. 470, 26 South. 168. If a motorman, whose duty it is to keep a diligent lookout for travelers, etc., on public streets traversed by his car, forsake his duty and engage in a diverting conversation with a passenger on his car, and a traveler, whose peril and inability to extricate himself therefrom would have been discovered by the operative, had he kept the lookout required, is injured, the proximate cause, aside from wanton or willful misconduct therefor must be ascribed, not to the stated condition of peril in which the traveler was placed, but to the operative's dereliction in not keeping the lookout prescribed. He did not know the peril stated, because he violated his duty to look. Such a breach of a duty, unless raised by the circumstances to the character of wrong commonly called "willfulness" or "wantonness," may be defended and defeated as ground for a recovery by the contributory negligence of the traveler, if attending his conduct, in failing to observe the care due from him (traveler) in placing himself in a position wherein injury to him might result from a breach by the operative of the duty to keep a diligent lookout. This must be true, because the order of causation, put in motion by the negligence counted on, viz., failure to keep a diligent lookout, was not broken by the creation, by discovery of the peril by the operative, of a subsequent duty to employ all means to avert injury to one whose peril is known to the derelict operative. *L. & N. R. Co. v. Young* (Ala.) 45 South. 238, 16 L. R. A. (N. S.) 301. When the subsequent duty is raised, as stated, then the initial negligence of the injured party becomes a condition only, upon which the thereupon arising duty to avert the injury operated to afford the proximate cause of the injury, unless the imperiled party is, on his part, concurrently with or subsequently to the negligence of the operative of the car, after discovering the perilous situation of the injured party, contributorily negligent, which, if found, exempts the defendant from the consequences of the subsequent negligence of its employé. *L. & N. R. Co. v. Young*, supra.

The relative rights of travelers and street cars, in public streets, as we have restated them, necessarily negative any relation of either to the streets or to the other as trespassers. The right to be thereon exists in each, and the duty each owes to the other, in the premises, is, in keeping with the common right of each, to avoid, by the exercise of due care and prudence, injury and embarrassment in the use of the street. But the fact that a traveler is not a trespasser in using the street cannot affect to alter the duty, for or against either the car operative

or the traveler, where one's condition of peril is known to the operative. Whether one is or is not a trespasser, the condition to the application of the principle of the negligent breach of duty after peril is discovered is the same. The duty to avert injury to one imperiled is the same, whether his relation to the dangerous agency theretofore was wrongful or not, whether his situation of peril was the result of right or wrong conduct; provided, of course, the operative knew of the peril to which the injured party was subjected. Whenever the knowledge stated is brought to the operative, his duty is to employ all means, known to one skilled in his place, to avert injury.

Coming to the more aggravated misconduct—willfulness or wantonness, as these terms are applied in cases of injury to person or property—with reference to the performance of the duty arising where the before-stated peril is known to the operative, our decisions establish these conditions precedent to the ascription of the more aggravated wrong to the alleged derelict party: That the injury was the result of a direct intention to inflict it, or that the injury was the result of an act or omission to act as duty required; the action or failure to act being then taken or omitted with the consciousness that such act or omission would probably eventuate in injury. The standard for determination of the inquiry whether the act or omission to act was wanton or intentional must necessarily be the same, regardless of the reason for the creation of the duty in the premises. Given the duty to avert injury, the character of the act or omission to act, coloring it as merely negligent, or as wanton or willful in negation of mere negligence, depends upon the presence, at the time the duty should have been performed, of the conditions we have restated for wantonness or willfulness *vel non*. In natural consequence, the proximate cause of an injury to one known to have been in peril may be the product of simple negligence or of willful or wanton wrong. If characterized by the elements essential to make a case of willful or wanton wrong, then contributory negligence of the imperiled party, such as negligent failure to conserve his own safety after he has become aware of his peril, is, as in cases generally, no defense. But if the duty to avert injury to one known to be in peril is unobserved, from inadvertence or mistake, and without the conscious indifference to probable consequences stated before, then contributory negligence of the injured party—concurrent with or subsequent to that of the party charged, after discovery of peril—such as the negligent failure to conserve his own safety after he has become aware of his peril, is a defense, and will defeat a recovery for such breach of duty predicated upon discovery of the injured party's peril. In *L. & N. R. Co. v. Young*, supra, we noted many of our decisions declarative of the

principles stated in respect of initial, subsequent, and contributory negligence, and hence do not recite them.

Applying these principles to the complaint as amended, the sixteenth ground of demurrer should have been sustained to counts 1 and 3. Both of these counts allege that plaintiff's position of peril was known to the motorman, "or by the exercise of reasonable care" could have been known to him. The alternative averment is, of course, not the equivalent of an averment of the requisite knowledge. The pleader had for this alternative averment high authority in *B. R. L. & P. Co. v. Brantley*, 141 Ala. 614, 37 South. 698. In that cause this court approved charge 3, requested for the plaintiff therein, which charge declared, in effect, among other things, that, since the duty to keep a diligent lookout was on the motorman, the "law charges the motorman with seeing the exposed condition of the wagon or of the plaintiff. * * *" Evidently these counts were drawn in the light of the *Brantley* Case. We feel compelled, upon principle and authority, to condemn the proposition quoted from the approved charge. If the proposition be sound, then actual knowledge is not an essential condition to the creation of the duty to avert injury after discovery of peril. On the contrary, the condition is suppliable as a matter of presumptions arising from the mere existence of the duty to keep a lookout. This court, in *Osborne v. Ala. S. & W. Co.*, 135 Ala. 571, 577, 33 South. 687, ruled that, in pleading, notice is not the equivalent of knowledge, thus in consequence, we think, refuting the proposition, less strong than that treated in the *Osborne* Case, that from the mere existence of a duty the law will, in such cases as this presume such actual knowledge of peril as the performance of the duty would have afforded. To attain such a result as the *Brantley* Case approves, it must be presumed that the motorman performed his duty to keep a diligent lookout, and still further, and additionally, to presume that such lookout would have resulted and did result in his actual knowledge of the peril. Of course, to conclude actual knowledge from such bases is assumption not supported by fact.

Count 2 avers that the motorman knew of plaintiff's peril and that of his property, and "failed to exercise due care and diligence to avoid injuring plaintiff, when the exercise of such care and diligence would have avoided injuring him." After describing the injuries received, both to person and property, it is further averred in this count that "defendant's agent or servant in charge of and operating said car saw and knew of his peril, but notwithstanding this he wantonly and recklessly or intentionally ran said car against him, and that they did not use the means at hand to prevent said collision and injury when the use of said means would have pre-

vented same." It is evident from a reading of the count that it is inconsistent and repugnant, as objected in the twenty-seventh ground of demurrer. In one phase it avers a negligent failure to take means to avert injury after discovery of peril, and latterly therein ascribes the injury to wanton and reckless or intentional driving of the car against plaintiff, and still later therein avers simply that means at hand were not used to avert injury, as could have been done by such use. The lines between wanton and willful wrong and such wrong as results from simple negligence, of course, compel, in pleading, the observance of the distinctions between the two. The primary pleading should leave no doubt of the character of the wrong imputed—whether wanton or willful, or merely negligent. Duplicity in this respect is not tolerable. *L. & N. R. R. Co. v. Markee*, 103 Ala. 160, 15 South. 511, 49 Am. St. Rep. 21. The question whether a given count is in simple negligence, or for wantonness or willfulness, oftenest arises on the propriety of the plea of contributory negligence, permissible as a defense to the former, but not to the latter. So many of our cases have taken the course consequent upon a determination of the question stated, and accordingly allowed or disallowed that species of plea. But, where the count assumes to charge both, and the demurrer takes the point, the court cannot aid the inaccuracy of pleading by choosing when the pleader has not chosen.

Count 4, after setting forth the rightfulness of plaintiff's presence in and use of the public street, and which was a place—street crossing—where a great many people and turnouts were accustomed to pass and repass, and were so doing where the injury occurred, avers, in substance, that it was the duty of defendant's servant or agent to so operate the car as that it might be under such control as that it might be brought to a full stop before striking a person or thing on the track; that this car was so negligently operated, in that it was run under such rapid and reckless rate of speed that the operative was unable to bring the car to a full stop before striking plaintiff and his property, after the operative had discovered the peril of plaintiff and his property on the track. This count cannot be held to charge willful or wanton injury, for the reason that it is not averred therein that the operative of the car knew of the conditions of accustomed frequent use of the street crossing in question, so as to impute to him knowledge of the probability of the presence there on that occasion, on the track or in dangerous proximity to it, of persons or property liable to injury by his car. *M. & C. R. R. Co. v. Martin*, 117 Ala. 367, 385, 23 South. 231, and its many successors in ruling on this point. The count, then, is in simple negligence; and we must determine whether the negligence imputed is initial or subse-

quent, as related to the presence of plaintiff on or dangerously near the track—whether, to be more concrete, the negligence ascribed was a breach of duty predicated upon the peril alleged to have been discovered, or, on the other hand, was anterior in order of committal to such discovery of peril. If the averments refer to initial negligence, as indicated, then, of course, negligence of the plaintiff, if present on the occasion in putting himself or his property in a position of peril, would be a pleadable defense. If, on the other hand, the negligence averred refers to a duty breached after discovery of peril, then such negligence of the plaintiff, if present, would not be pleadable for the reasons we have before stated.

The court below, in overruling the demurrer to the several pleas of contributory negligence to the fourth count, evidently construed the count as charging negligence anterior to a breach of duty raised by discovery of peril. We affirm the correctness of this construction of the count. Since a willful or wanton wrong is not therein imputed, to construe the count as charging subsequent negligence after peril discovered would be to ignore the unequivocal averment of duty, and its breach, in respect of the operation of the car prior to and independent of the discovery of plaintiff's peril. The idea sought to be stated in the count is, in short, that the operative was so negligent in the operation of the car, at or about the street crossing mentioned, that when he discovered plaintiff's peril he was powerless to avert the impact by the use of all means at hand to stop the car. So interpreted, the count was not subject to the demurrer assailing it, though we are not prepared to affirm, and do not consider the question, that the broad statement of the duty set forth in the count is sound—a matter not tested or raised by any ground of the demurrer interposed. Our recent cases of *B. R., L. & P. Co. v. Brown*, 44 South. 572, and *B. R., L. & P. Co. v. Jones*, 45 South. 177, are noted as bearing on these questions. The first of these decisions involved an injury not occurring on a track in a public highway; and the second dealt with an injury to an infant, not chargeable with contributory negligence, and hence the holding therein, in one phase of the case, that the negligent failure of the operative to keep a diligent lookout, if proximately causing the injury, rendered the defendant liable, regardless of whether the peril of the child had been discovered or not. These cases are, therefore, not in point in the determination of this appeal.

Turning to the pleas of contributory negligence, and applying the principles announced before, none of these pleas set up matter in defense of the subsequent negligence charged in counts 1 and 3. The eighth ground of plaintiff's demurrer took the objection indicated. However, such pleas were, as the court below ruled, answers to the fourth

count of the complaint. These pleas, as matter of defense to the fourth count, were not, we think, subject to any of the objections to substance, suggested by the demurrer.

The court erred in overruling defendant's demurrer to counts 1, 2, and 3, for the reasons stated, though we should add that those grounds of defendant's demurrer assailing the counts for failure to aver the name of the alleged derelict servant and to designate the amount claimed for each element of damage were not well taken. Our system of averring, in such cases as this, negligence in general terms, has become fixed beyond hope of change, even if it were thought desirable. The elements of damage alleged to have been suffered by plaintiff and his property were definitely enumerated in the complaint; and we know of no ruling by this court, nor good reason, justifying a departure from the universal practice, in this state, of stating in the complaint, without apportioning, the total damage claimed for the injuries averred.

None of the assignments rest on the giving or refusal of special instructions for either litigant. There are assignments complaining of portions of the court's oral charge. Specific treatment of these assignments is unnecessary, in view of the conclusions stated before.

The last assignment is as follows: "In refusing the request of defendant's counsel to write 'Given' or 'Refused' on each of the several charges from 1 to 8, inclusive, and sign his name thereto separately." From the bill it appears these special charges were written on one sheet of paper. The court made one indorsement of "Refused" on this sheet; but counsel for defendant requested the court to enter the indorsement, stated in the quoted assignment, on or opposite each of said charges 1 to 8, inclusive. The court declined to do so, treating the request as single of all of said charges. This action was proper. Counsel not having separated these charges, the court was under no duty to do so. Special charges should, if intended, by counsel requesting them, to be separate requests, and not in bulk, always present them to the court on separate sheets or pieces of paper.

The errors indicated require the reversal of the judgment and the remandment of the cause.

Reversed and remanded.

TYSON, C. J., and DOWDELL, SIMPSON, and ANDERSON, JJ., concur.

DENSON, J. I concur in the reversal of the judgment; but in respect to count 2 I am of the opinion that the injury complained of is ascribed solely to negligence on the part of the motorman; that the count cannot be construed as ascribing the injury to wantonness, recklessness, or intentional misconduct; and that these averments might well be stricken from the count as surplusage.

MAYFIELD, J., concurs in the reversal, but is of the opinion that the Brantley Case is not susceptible of the construction given it in the opinion. He is of the opinion that there is no conflict between the Brantley Case and the opinion in this case.

(159 Ala. 59)

LETCHER v. STATE.

(Supreme Court of Alabama. Feb. 4, 1909.)

1. COURTS (§ 62*)—TIME FOR OPENING—STATUTES.

Acts 1890, p. 68, entitled "An act to amend" Code 1886, § 750, so far as applying to the counties of L., Fa., M., and Fr., though attempting in its body to re-enact the section, as applied to the entire state, except as to said four counties, and so providing that the courts of the several circuits shall not be opened before noon, except that in those counties they may be opened any time after 10 o'clock a. m., only repeals said section so far as it applies to said counties, and does not revise and extend the section, so as to make it extend to counties previously removed from its influence, and so does not repeal Acts 1888-89, p. 64, authorizing the opening of courts in the Third and Fifth circuits at 10 a. m.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 207; Dec. Dig. § 62.*]

2. STATUTES (§ 16*)—AMENDMENT OF BILL IN PASSAGE—CHANGING ORIGINAL PURPOSE—"OPENING"—"HOLDING."

Acts 1888-89, p. 64, is not violative of Const. 1875, art. 4, § 19, providing that no bill shall be so altered or amended on its passage through either house as to change its original purpose; the change having been only from a bill to regulate and fix the time of "opening" courts to one to regulate and fix the time of "holding" courts, the terms as used in the connection being synonymous.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 14; Dec. Dig. § 16.*]

3. INDICTMENT AND INFORMATION (§ 11*)—RETURN—PRESENCE OF GRAND JURORS.

The record reciting that the indictment was returned into open court by the foreman in the presence of "all the other grand jurors," and showing that there were more than 11 other grand jurors, shows a compliance with Code 1896, § 4914, requiring indictments to be presented to the court by the foreman in the presence of at least 11 other grand jurors.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 62; Dec. Dig. § 11.*]

4. CRIMINAL LAW (§ 789*) — REASONABLE DOUBT—INSTRUCTIONS.

A requested charge, "After considering all the evidence, if the jury have a reasonable doubt of the guilt of the defendant, they will give the benefit of the doubt to the defendant, and return a verdict of not guilty," properly states the law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1906; Dec. Dig. § 789.*]

5. CRIMINAL LAW (§ 829*) — REASONABLE DOUBT—INSTRUCTIONS.

The requested instruction, "After considering all the evidence, if the jury have a reasonable doubt of the guilt of defendant, they will give the benefit of the doubt to the defendant, and return a verdict of not guilty," was not covered by the one given, "If any member of the jury have a reasonable doubt of the guilt

of defendant, the jury will not return a verdict of guilty."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

6. CRIMINAL LAW (§ 753*)—GENERAL CHARGE—REQUESTS.

Though, on a prosecution under an indictment charging assault with intent to murder, there was no evidence to avoid the bar of the statute of limitations against a prosecution for assault and battery with a weapon, the misdemeanor of which defendant was convicted, yet, the point having been raised only by request for the general charge, which did not separate the misdemeanor from the felony, and the evidence authorizing a conviction of the felony, the general charge was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1727; Dec. Dig. § 753.*]

7. INDICTMENT AND INFORMATION (§ 189*)—CONVICTION OF LESSER OFFENSE—LIMITATIONS.

A conviction, on a prosecution under an indictment for a felony, of a lesser offense included in the felony, cannot be sustained if such offense is barred by limitations, though the felony is not so barred.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 582; Dec. Dig. § 189.*]

McClellan, J., dissenting.

Appeal from Circuit Court, Macon County; S. L. Brewer, Judge.

Metcalfe Letcher was indicted and tried for assault with intent to murder, and convicted of an assault and battery with a weapon, from which he appeals. Reversed and remanded.

The facts on which the opinion was rested sufficiently appear therein. Charge 3, referred to in the opinion, is as follows: "After considering all the evidence in this case, if the jury have a reasonable doubt of the guilt of the defendant, they will give the benefit of the doubt to the defendant, and return a verdict of not guilty." Charge 2, given and referred to as not being a duplicate of charge 3, is as follows: "If any member of the jury have a reasonable doubt of the guilt of defendant, the jury will not return a verdict of guilty."

T. L. Bulger, H. P. Merritt, and J. T. Letcher, for appellant. Alexander M. Garber, Atty. Gen., for the State.

ANDERSON, J. The term of court at which this indictment was found was opened at 11 o'clock, and Acts 1888-89, p. 64, authorizes the opening of courts in the Fifth judicial circuit at 10 a. m. Indeed, it is conceded in brief of counsel that the court was legally opened, and that the grand jury finding the indictment was legally organized, unless this act be unconstitutional, or unless it was repealed by Acts 1890, p. 68. This act only repeals the Code of 1886 in so far as it applies to the counties of Lamar, Franklin, Fayette, and Marion, and did not have the effect of revising and ex-

tending said section, so as to make it extend to counties which had been previously removed from its influence by subsequent acts. The subject as expressed in the title of the act was to amend said section 750 of the Code, so far as the same applies to the counties of Lamar, Fayette, Franklin, and Marion; in other words, to provide for the holding or opening of courts in these counties. The body of the act does attempt to re-enact the said section, as applied to the entire state, except as to these four counties; but to hold that said act regulated the opening of courts in all the counties of the state would render it much broader than its title indicates, and make it apply to a subject not clearly expressed in said title, and probably repugnant to section 45 of the Constitution of 1901.

It is also insisted that Acts 1888-89, p. 64, is violative of section 19, art. 4, of the Constitution of 1875, because it was so altered or amended as to change its original purpose; the change complained of being from a bill "to regulate and fix the time of opening courts in the Third and Fifth circuits" to one "to regulate and fix the time of holding courts" in said counties. We do not think that this was a change of the original purpose of the act. "Opening" and "holding," as used in this connection, are synonymous. Opening is essential to holding, and holding court includes opening the court. The indictment, having been returned by a legally organized grand jury, was valid, and the trial court committed no reversible errors in the rulings upon the motions, pleas, and charges attacking the indictment, because not returned by a legal grand jury.

This case is treated upon the assumption that the statute with reference to the hour of opening court is mandatory; and, as the statute was complied with, it is unnecessary for us to determine whether it was mandatory or directory.

While section 4914 of the Code of 1896 requires that indictments must be presented to the court by the foreman in the presence of at least 11 other jurors, we think that the record shows a compliance with this statute. It recites that it was returned into open court by the foreman in the presence of "all the other grand jurors." The record also shows that there were more than 11 other grand jurors. *Russell v. State*, 33 Ala. 370.

Charge 3, requested by the defendant, asserted the law, and should have been given. Nor was it covered by given charge 2.

It is insisted that, while the offense for which the defendant was indicted was not barred by the statute of limitations, the one for which he was convicted, being a misdemeanor, was barred by section 4914 of the Code of 1896. It is true the only proof as to the commencement of the prosecution is the indictment, which was returned more than a year after the assault; but the point

was raised only by the general charge, which did not separate the misdemeanor from the felony, and, as there was proof authorizing the jury to convict for the felony, the trial court properly refused the general charge.

As this case must be reversed, however, for other reasons, we may as well lay down the rule on this subject as a guide upon the next trial, notwithstanding it may be dictum upon this appeal. The defendant having been acquitted of the felony, the state will have to rely upon the misdemeanor, in the event the former acquittal of felony is pleaded by the defendant. Then, unless the proof shows that the prosecution was commenced within a year after the commission of the said assault, the defendant will be entitled to an acquittal. The law is well settled on the subject: "If, on an indictment for a felony, the accused is found guilty of some less crime included in the felony and which constitutes a part of it, the conviction cannot be sustained where the crime of which he is convicted is barred by the statute of limitations, although the crime for which he was indicted is not thus barred." 12 Cyc. 257. This rule is sanctioned in the cases of *Turley v. State*, 3 Helsk. (Tenn.) 11; *Fulcher v. State*, 33 Tex. Cr. R. 22, 24 S. W. 292; *Nelson v. State*, 17 Fla. 195; *State v. Morrison*, 31 La. Ann. 211; *Heward v. State*, 13 Smedes & M. (Miss.) 261; *People v. Miller*, 12 Cal. 291; *People v. Burt*, 51 Mich. 199, 16 N. W. 378. The only authority to the contrary seems to be the case of *Clark v. State*, 12 Ga. 350.

The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

TYSON, C. J., and DOWDELL, SIMPSON, DENSON, and MAYFIELD, JJ., concur.

MCCLELLAN, J. (dissenting). The defendant was put to trial on an indictment charging an assault with intent to murder. This indictment was returned more than 12 months after the act for which the judgment of conviction now complained of by the defendant was committed. Accordingly, upon the sound holding made in the last paragraph of the opinion of the majority, the misdemeanor of which defendant was convicted was not embraced in the major charge of assault with intent to murder, unless taken out of the effect of that bar by proof that the offense charged was a continuance of a prosecution instituted against this defendant before the 12 months' bar stated operated to conclude a prosecution for the misdemeanor of which the defendant was attempted to be convicted. The bill of exceptions purports to contain substantially all of the evidence adduced on the trial. No evidence, the effect of which was to avoid the bar stated, was offered.

In this state of the case I am of the opinion that the court was wholly without

jurisdiction to render the judgment, under this indictment, for an assault with a weapon, a misdemeanor, as was here undertaken. The point has been, in my opinion, expressly decided in *McDowell v. State*, 61 Ala. 174, where it was said: "Although, however as was held in the first of these cases, the time when an offense was committed need not be alleged in the indictment, it must be proved on the trial that it was committed within the period which is prescribed as a bar against the prosecution for it. If this is not done, the prosecution fails. Why? Because, when the period of limitation elapsed, the act ceased to be a punishable offense. No court was then authorized to pronounce sentence against the person who committed it." The obvious result, in this case, was that no such offense as that of which the judgment condemns the defendant was embraced in the major charge. The defendant was not charged with the misdemeanor, and the judgment assuming to so condemn him is a nullity, because the record shows that the court was without jurisdiction of the misdemeanor of which the court below attempted to adjudge the defendant guilty. Being so void for want of jurisdiction, it could not, of course, support an appeal. 2 Ency. Pl. & Pr. p. 103, and note citing our decisions. There cannot be, it seems to me, such a thing as a reversal of a judgment shown to have been rendered without jurisdiction, because a reversal presupposes an appeal, and from a void (for want of jurisdiction) judgment an appeal will not lie.

Nor is there any merit in the suggestion that the defendant, if his appeal should be dismissed on the ground that it was void, as is my opinion should be done, would be left with the judgment below against him, for the reason that, if such dismissal was entered, it would be a final adjudication of the invalidity of the judgment, and the court below would not attempt its enforcement; but, if it did undertake to enforce it, prohibition and other remedies, it maybe, would be subject to defendant's employment. To reverse this case on the presumption that evidence may be introduced to avoid the bar before stated is, in my opinion, to presume jurisdiction in the face of the record before us, which denies it.

creating concurrent, dependent conditions on each to do that which each had engaged to do.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 119; Dec. Dig. § 76.*]

2. VENDOR AND PURCHASER (§ 349*)—BREACH OF CONTRACT—COMPLAINT.

A complaint in an action for breach of contract whereby plaintiff agreed to buy and defendant agreed to sell property described, which alleged that plaintiff was ready, able, and willing, and offered, to comply with his part of the contract, and that defendant refused to convey the property, sufficiently averred performance by plaintiff of the acts necessary to put defendant in default.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 1039-1042; Dec. Dig. § 349.*]

3. VENDOR AND PURCHASER (§ 344*)—CONTRACTS—PERFORMANCE.

Where a vendor in a contract for the sale of real estate refused to convey, the purchaser, to maintain an action for breach of contract, need not tender to the vendor a proper conveyance.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 1031-1033; Dec. Dig. § 344.*]

4. VENDOR AND PURCHASER (§ 75*)—CONTRACTS—PAYMENT OF PRICE.

A contract for the sale of real estate for a stated consideration, which contains no stipulation for credit, imports that the payment shall be cash.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 116; Dec. Dig. § 75.*]

Appeal from Circuit Court, Mobile County; S. B. Browne, Judge.

Action by Ignatius Green against P. F. Brady for breach of contract. From a judgment for plaintiff, defendant appeals. Affirmed.

The complaint as amended is as follows:

"(4) The plaintiff claims of the defendant \$500 damages for the breach of an agreement entered into by him on the 24th day of February, 1905, in substance as follows: The plaintiff agreed to buy and the defendant agreed to sell, for the consideration of \$4,000 net, property in Tuscaloosa, Ala., on Madison street, known as the old jail and the opera house, and the contents of the latter; and plaintiff says that, although he was ready, able, and willing, and offered, to comply with his part of the contract, the defendant failed to comply with the following provisions thereof, viz.: The defendant refused to convey the property above described to plaintiff, to the damage of plaintiff in the amount aforesaid, with interest.

"(5) Same as 4, except it is alleged that said property was owned by Louise Brady, wife of the defendant.

"(6) Plaintiff claims of the defendant \$500 as damages for the breach of an agreement entered into by him on the 24th day of February, 1905, by which defendant promised to sell plaintiff and plaintiff was to buy, for the sum of \$4,000 net, property in Tuscaloosa [the same property as described in count 4],

(159 Ala. 432)

BRADY v. GREEN.

(Supreme Court of Alabama. Feb. 18, 1909.)

1. VENDOR AND PURCHASER (§ 76*)—CONTRACTS—CONCURRENT CONDITIONS.

A contract for the sale and purchase of real estate, whereby the purchaser agreed to purchase and the vendor agreed to sell for a specified consideration property described, contemplated that the payment of the price and the conveyance should be contemporaneous, thereby

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

which said agreement the defendant refused to carry out, although plaintiff was ready, able, willing, and offered, to comply with his part of the agreement, to the damage of plaintiff," etc.

The grounds of demurrers are sufficiently stated in the opinion of the court.

Fitts, Leigh & Leigh, for appellant. Inge & Armbrrecht, for appellee.

McCLELLAN, J. The three counts of the complaint as last amended, assailed by the demurrers, contain these presently important averments: "The plaintiff agreed to buy and the defendant agreed to sell, for the consideration of \$4,000 net, property in Tuscaloosa, Ala., on Madison street, known as the old jail and the opera house, and contents of the latter; and the plaintiff says that, although he was ready, able, willing, and offered to comply with his part of the contract, the defendant failed to comply with the following provisions thereof, viz.: The defendant refused to convey the property above described to the plaintiff. * * *" The demurrers, in their first phase, take the point that the averments quoted fall short of his necessary acts in order to put the defendant in default, and hence render him liable for breach of the contract, in that it is not averred that plaintiff tendered the money and a conveyance of the property to the defendant, or that no excuse for a failure to so tender the conveyance and the money is set forth in the counts. It is too clear for doubt that the intention of the parties, as expressed in the contract pleaded, contemplated that the payment of the money and the conveyance of the property should be contemporaneous, thus creating concurrent, dependent conditions upon each to do what each had engaged to do. 9 Cyc. pp. 719, 720, and notes; Jones v. Sommerville, 1 Port. 437; Broughton v. Mitchell, 64 Ala. 210; Jones v. Powell, 15 Ala. 824; Ledyard v. Manning, 1 Ala. 153; Davis v. Adams, 18 Ala. 264; Bank of Columbia v. Hagner, 1 Pet. 461, 7 L. Ed. 219; McKleroy v. Tulane, 34 Ala. 78; McGehee v. Hill, 4 Port. 170, 29 Am. Dec. 277; 4 Ency. Pl. & Pr. p. 639, and note.

With reference only to the question of necessity vel non to actually tender the price agreed upon, a controlling consideration in determining to what extent the pleader must go in allegation of his acts under the contract in order to fix, and thus declare in his complaint, liability of the opposite party for the breach of the contract, has been thus stated in *McGehee v. Hill*, supra: "The seller ought not to be compelled to part with his property without receiving the consideration, nor the purchaser to part with his money without an equivalent in return." From the quoted premise it is further said that one cannot proceed against his adversary in the contract "without an actual performance of the agreement on his part, or a *readiness* and

ability" to do so; "and an averment to that effect is always made in the declaration containing defendant's undertakings, and that averment must be supported by proof." (Italics supplied.) In *Ledyard v. Manning*, 1 Ala. 156, the same rule has been declared in this form: "When two acts are to be done at the same time on a day named, or *generally*, by the opposite parties, neither can maintain an action without showing performance, or an *offer to perform*, or, at least, a readiness to *perform*, though it was uncertain which of them was bound to do the first act." (Italics supplied.) Our decision in *McGehee v. Hill*, supra, in the respect quoted above, found authority in *Bank of Columbia v. Hagner*, 1 Pet. 461, 7 L. Ed. 219, and the influence of that opinion in the establishment of the phase of the law under consideration may be seen by reference to 2 Rose's Notes, p. 745 et seq.; and the doctrine announced and approved in *McGehee v. Hill* is thoroughly supported by the text-writers before cited, and such approval is based on the weight of authority. *Elliott v. Howison*, 146 Ala. 568, 40 South. 1018.

If actual tender of the money, rather than tender of performance, coupled with ability to perform, was required of the purchaser, whose actual performance was not contemplated by the parties to be more than a concurrent condition with that of his adversary to convey, he would be necessarily placed in the attitude of surrendering his money without the equivalent in return of the property he had engaged to buy. The readiness, willingness, ability, and offer of plaintiff to perform, and, on the other hand, the refusal thereupon of defendant to perform on his part, is averred. This phase of the demurrer was, therefore, properly overruled.

The phase of the demurrer objecting that it is not averred that the plaintiff prepared and tendered to the defendant a proper conveyance of the property affected by the contract cannot be sustained, since a refusal of the defendant to convey is expressly alleged. The decision of *Garnett v. Yoe*, 17 Ala. 74, is directly in point, and we will not depart from it.

The averment of agreement to buy at the sum stated in the complaint, no stipulation for credit being present, imports that the payment should be cash. *Robbins v. Harrison*, 31 Ala. 160. The counts are sufficiently definite in respect of the payment to be made by the plaintiff. In *Manier v. Appling*, 112 Ala. 663, 20 South. 978, cited for appellant, the counts were silent as to the sum to be paid for the shoes.

No error appears in the record, and the judgment overruling the demurrer is affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

(159 Ala. 230)

**CITY COUNCIL OF MONTGOMERY et al.
v. BRADLEY & EDWARDS.**

(Supreme Court of Alabama. Feb. 4, 1909.)

1. MUNICIPAL CORPORATIONS (§ 796*)—DEFECTS IN STREETS—GUARDING DANGEROUS PLACES.

A city violates its duty to keep its streets in safe condition when it permits an unguarded pit to remain in a street.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1655; Dec. Dig. § 796.*]

2. TRIAL (§ 199*)—INSTRUCTIONS—PROVINCE OF COURT AND JURY—QUESTIONS OF LAW.

A charge permitting the jury to determine what constitutes a reasonable precaution to prevent injuries from an excavation in a street is erroneous, as submitting a question of law, and is properly refused.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 467; Dec. Dig. § 199.*]

3. MUNICIPAL CORPORATIONS (§ 822*)—INJURIES FROM DEFECTS IN STREETS—INSTRUCTIONS—APPLICABILITY TO ISSUES.

Where the question at issue was whether defendant city failed to put up safeguards or barriers to prevent travelers from falling into a hole in a street, a charge submitting the question whether defendant took "reasonable precautions" to prevent injury was properly refused as inapplicable.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1762; Dec. Dig. § 822.*]

4. TRIAL (§ 191*)—INSTRUCTIONS—PROVINCE OF COURT AND JURY—ASSUMPTION AS TO FACTS.

Where the only physical circumstance surrounding the hole in the street into which plaintiff's mule fell was the dirt taken from the excavation, and the evidence as to this was conflicting, a charge assuming that there were "circumstances surrounding the hole" was properly refused.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 423-430; Dec. Dig. § 191.*]

5. MUNICIPAL CORPORATIONS (§ 822*)—DEFECTS IN STREETS—ACTIONS FOR INJURIES—INSTRUCTIONS.

A charge that defendant is not liable for leaving a hole in a street unguarded, if the circumstances surrounding it were such as to put a person exercising reasonable care upon notice of its existence, is erroneous, as failing to hypothesize any knowledge on the part of the plaintiff of the surrounding circumstances, and is properly refused.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1759; Dec. Dig. § 822.*]

6. MUNICIPAL CORPORATIONS (§ 806*)—DEFECTS IN STREETS—CONTRIBUTORY NEGLIGENCE—DUTY TO OBSERVE DEFECT.

A person using a street has a right to assume that it is in proper condition for use, and is not required to be on the lookout for an unguarded pit.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1678; Dec. Dig. § 806.*]

7. MUNICIPAL CORPORATIONS (§ 806*)—DEFECTS IN STREETS—CONTRIBUTORY NEGLIGENCE—DUTY TO OBSERVE DEFECT.

A person traveling on horseback and leading mules is under no duty to look ahead all the time to avoid defects in a city street.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1678; Dec. Dig. § 806.*]

8. APPEAL AND ERROR (§ 1078*)—ASSIGNMENTS OF ERROR—WAIVER.

Assignments of error, not insisted on, will not be considered.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4256; Dec. Dig. § 1078.*]

Appeal from City Court of Montgomery; A. D. Sayre, Judge.

Action by Bradley & Edwards against the City Council of Montgomery and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

The case made by the complaint is that Barrett was employed by Nathan Griel and the corporation of Griel Bros. Company to make certain water connections, and that by permission of the city council Barrett made an excavation in the street, about 4 feet in diameter and about 14 feet deep, and left the excavation unguarded and unattended, into which plaintiff's mule fell and was killed. The evidence sufficiently appears in the opinion of the court.

The charges refused to the defendant are as follows:

"(2) If the jury believe from the evidence that the defendant Barrett took reasonable precaution to warn the public using this street of the existence of the hole into which the mule fell, then the jury must find for the defendant.

"(3) If the circumstances surrounding the hole into which plaintiff's mule fell were such as to put a person exercising reasonable care upon notice of the existence of such hole, then the jury must find for the defendant.

"(4) If the physical circumstances surrounding the hole into which the plaintiff's mule fell were such as to put a person in the place of Bradley, exercising reasonable care, upon notice of the existence of such hole, then the jury must find for the defendant.

"(5) If the circumstances surrounding the hole into which plaintiff's mule fell were such as to put a person using the highway, occupying the place occupied by Bradley and exercising reasonable care, upon notice of the existence of such hole, then the jury must find for the defendant.

"(6) If the jury believe from the evidence that the accident resulting in the mule's death was proximately due to the failure of the witness Bradley to look ahead of him while in charge of the mule, the jury must find for the defendant."

Charges 7, 8, and 9 are the affirmative charges in varying forms.

C. P. McIntyre and Steiner, Crumm & Weil, for appellants. Holloway & Brown, for appellees.

DOWDELL, C. J. This is an action for damages for the killing of a mule, caused by the alleged negligence of the defendants. The general issue and contributory negli-

gence were pleaded in short by consent. The assignments of error are based on the refusal of the trial court to give written charges numbered from 2 to 9, inclusive.

The negligence as charged in the second count of the complaint consisted in the failure of the defendants "to put up any proper safeguards or barriers to prevent animals, persons, or vehicles passing along said street from danger of falling therein"; that is, into the hole, 4 feet in diameter and 14 feet deep, which had been dug by the defendant Barrett by permission of the city council in a public street of the city. The evidence is free from conflict as to the injury and as to how it occurred. It is likewise free from conflict that no "safeguards or barriers were put up to prevent animals, etc., from falling" into the hole. It is insisted as a defense by the defendants that a man was stationed at the hole to warn the public of its existence and danger, and that such person gave warning to the plaintiff. The evidence in this respect, however, was in conflict. There was evidence on the part of the defendants tending to show that the dirt taken from the excavation was around the hole to about 3 feet high, while the evidence on plaintiff's part tended to show that the dirt taken from the excavation was thrown on the side next to the sidewalk, and was not around the hole.

There is no question as to the duty under the law resting on the municipality to keep its streets in safe condition for public travel and uses. This duty was imposed upon the municipality by its charter. Acts 1892-93, p. 368. "A municipal corporation disregards one of its plainest duties when it permits an unguarded pit to remain in a city thoroughfare, where of necessity it is a constant peril to travelers." Mayor and Aldermen of Birmingham v. McCary, 84 Ala. 469, 4 South. 690; Mayor and Aldermen of Birmingham v. Lewis, 92 Ala. 352, 9 South. 243; Lord v. City of Mobile, 113 Ala. 360, 21 South. 366.

Charge 2, requested by the defendants, was properly refused. This charge not only ignores the duty that rested on one of the defendants, the city council of Montgomery, but refers to the jury to determine what constitutes a reasonable precaution, a question of law. Moreover, charges must be predicated upon the issues joined, which this charge does not do. Birmingham Ry. Co. v. City Stable Co., 119 Ala. 615, 24 South. 558, 72 Am. St. Rep. 955. The issue as made by the pleadings was the failure of the defendants to put up safeguards or barriers to prevent animals, etc., from the danger of falling into the hole, and not the failure to take "reasonable precautions."

Charges 3, 4, and 5 are substantially the same. Each of these is faulty in assuming that there were "circumstances surrounding the hole into which the plaintiff's mule fell." When the charge is referred to the evidence

in the case, which must always be done, the only "circumstances" mentioned "surrounding the hole" was the dirt taken from the excavation, and the evidence as to this was in conflict. Moreover, the charge fails to hypothesize any knowledge or notice on the part of the plaintiffs of the "surrounding circumstances." The plaintiff Bradley had the right to assume that the street was in a proper condition for use, and was under no duty to be on the lookout for the pit in the street, nor was he chargeable with culpable negligence in not discovering it. Mayor and Aldermen of Birmingham v. Tayloe, 105 Ala. 170, 16 South. 576.

Charge 6, refused to the defendants, when referred to the evidence, was palpably bad. Bradley, traveling, as he was, on horseback and leading several mules attached to a halter, was under no duty to be looking forward and ahead of him all the time. The very manner of his traveling justified him as a reasonable and prudent person in looking backward to the mules he was leading at times, as well as forward. Moreover, there is no evidence that Bradley failed to look ahead of him while in charge of the mules.

Charges 7, 8, and 9, refused to the defendants, were each the general affirmative charge, varying only in form. The assignments of error predicated on the refusal of these charges are not insisted on, and therefore require no further comment.

We find no error in the record, and the judgment is affirmed.

SIMPSON, ANDERSON, DENSON, and MAYFIELD, JJ., concur.

(159 Ala. 222)

CENTRAL OF GEORGIA RY. CO. v. STURGIS.

(Supreme Court of Alabama. Feb. 11, 1909.)

1. LIMITATION OF ACTIONS (§ 127*)—PLEADING—AMENDMENT.

Where the original complaint, in an action against a railroad company for damages by hogs entering on plaintiff's land through stock gaps of the railroad, alleged the failure of the company to keep the stock gaps in repair, an amendment alleging a negligent failure to keep cattle guards in repair, thereby allowing hogs to pass over the stock gaps into the lands of plaintiff, relates back to the original complaint, so as to intercept the running of limitations against it.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543-547; Dec. Dig. § 127.*]

2. APPEAL AND ERROR (§ 843*)—QUESTIONS REVIEWABLE—IMMATERIAL QUESTIONS.

Where an action for damages from trespassing animals was brought within one year after the injury, it was immaterial whether the action was within the one-year or the six-year statute of limitations.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331-3341; Dec. Dig. § 843.*]

Appeal from Circuit Court, Covington County; H. A. Pearce, Judge.

Action by R. M. Sturgis against the Central of Georgia Railway Company for damages to land from the trespass of stock. From a judgment for plaintiff, defendant appeals. Affirmed.

The action was begun in the justice court, and summons was executed on the 6th day of January, 1904. In the justice court the complaint was as follows: "Plaintiff claims of defendant the sum of \$100 for damages caused by hogs getting through the stock gaps of said Central of Georgia Railway Company's railroad into the fields of said plaintiff from the 12th day of September, 1903."

The second count is as follows: "The plaintiff claims of the defendant the sum of \$100 as damages, as follows: Plaintiff avers that he operates a farm in Covington county, Ala.; that said farm was inclosed by a fence; that he cultivated during the year 1903, on said farm, corn, cotton, potatoes, and ground peas. Plaintiff avers that defendant was engaged in operating a railroad in Covington county, Ala., and that the track of said defendant's railroad runs through plaintiff's farm; and plaintiff says that it is the duty of defendant to erect suitable stock gaps where defendant's railroad track enters into and passes out of plaintiff's farm, and to keep the same in such repair and condition at all times as will prevent stock from going over defendant's track and into plaintiff's farm. And plaintiff avers that defendant negligently allowed the stock gap where defendant's railroad track enters plaintiff's farm to remain out of repair, or in such condition that hogs could pass over the said stock gap and into plaintiff's farm. And plaintiff avers that, in consequence of said stock gap being allowed to remain in such condition, a great number of hogs went over the same and into plaintiff's farm, and said hogs broke down and destroyed a great deal of plaintiff's corn, and rooted up and destroyed a great many of his potatoes and ground peas, then growing thereon, namely, from the 19th day of September, 1903. All of which was caused by the negligence of defendant in allowing said stock gaps to remain out of repair, or in such condition that the stock would pass over it, to the great damage of plaintiff," etc.

The plaintiff by leave of the court amended his count by adding the following: Count 3: "Plaintiff claims of the defendant the further sum of \$100 as damages, for that he is the owner of a farm in Covington county, Ala., and was the owner of the same during the months of September, October, and November, 1903, and that defendant was dur-

ing such time engaged in operating a railroad in and through said county, which railroad passed through the said lands of the plaintiff. Where said railroad entered upon or into the cultivated land of plaintiff, the defendant had constructed a cattle guard; but, after demand made by plaintiff upon defendant's agent, H. B. Vardeman, the defendant negligently failed to keep the said cattle guard in good repair, whereby a great number of hogs were allowed to pass over, around, or through said stock gap, and into the said cultivated land of plaintiff, during said time, to wit, September, October, and November, 1903, and broke down and destroyed a great deal of plaintiff's corn, and rooted up and destroyed a great many of his ground peas and potatoes, planted and then growing on said cultivated land, which were of value to plaintiff, to his damage as aforesaid."

Demurrers were confessed to the first and second counts, and the trial was had on the third count, which appears to have been filed June 13, 1905. The ground of demurrer B, interposed to the third count, was that said count is a departure from the original complaint, in this: That the negligence complained of in the original complaint was a failure to keep the stock gap in repair, and the negligence complained of in the amended count 3 is a failure to keep the cattle guard in repair. The pleas were: The general issue to the whole complaint, and the statute of limitations of one year to the amended count.

Steiner, Crum & Well and Powell & Albritton, for appellant. C. E. Reid, for appellee.

ANDERSON, J. The third count, filed as an amendment, was within the lis pendens, and related back to the original complaint, so as to intercept the running of the statute of limitations as against the amended count. *L. & N. R. R. v. Woods*, 105 Ala. 561, 17 South. 41; *Alabama Co. v. Heald* (Ala.) 45 South. 686. The suit having been brought within a year after the alleged injury, the cause of action was not barred, and the pleas were not proven, even if this action was barred by the statute of one year, instead of six, which we need not decide. *Rasco v. Jefferson*, 142 Ala. 705, 38 South. 246; *N. C. & St. L. R. R. v. Hill*, 146 Ala. 240, 40 South. 612.

The judgment of the circuit court is affirmed.

Affirmed.

DOWDELL, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

(159 Ala. 650)

JERNIGAN v. WILLOUGHBY.

(Supreme Court of Alabama. Feb. 11, 1909.)

DETINUE (§ 25*)—JUDGMENT—SUFFICIENCY.

A judgment entry, which fails to show compliance with Code 1907, § 3781, requiring the value of each article sued for in detinue to be assessed separately, if practicable, and requiring the judgment to be for the property or its alternate value, is insufficient.

[Ed. Note.—For other cases, see Detinue, Cent. Dig. § 47; Dec. Dig. § 25.*]

Appeal from Circuit Court, Houston County; H. A. Pearce, Judge.

Detinue by Sidney Willoughby against J. B. Jernigan. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Willoughby sued Jernigan in detinue for a boiler, engine, and all attachments, known as the "Pennington mill property," with the value of the hire or use thereof. Jernigan gave a replevy bond for the property sued for. Suggestion was made that the property was claimed under and by virtue of a mortgage, and that the amount of the mortgage debt be ascertained. The judgment entry, omitting unnecessary parts, is as follows: "We, the jury, find for the plaintiff for the property sued for, to wit, one boiler and engine, known as the 'Pennington mill property.' We further find the amount due on the mortgage to the plaintiff in this case is \$338.53." The judgment entry follows the verdict.

Espy & Farmer, for appellant. Crawford & Byrd, for appellee.

ANDERSON, J. In an action of detinue, the statute (section 3781 of the Code of 1907) requires that the value of each article of the property sued for should be assessed by the jury separately, if practicable, and that judgment against either party must be for the property sued for or its alternate value, etc. The judgment entry fails to recite or show a compliance with the law, as the value of the property was not assessed, nor is there any judgment for the alternate value. Witticks v. Keiffer, 31 Ala. 199; Lassiter v. Thompson, 85 Ala. 223, 6 South. 33; Warehouse Co. v. Johnson, 85 Ala. 178, 4 South. 643.

The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

(159 Ala. 671)

MONTGOMERY TRACTION CO. v. PARK.

(Supreme Court of Alabama. Feb. 9, 1909.)

APPEAL AND ERROR (§ 1076*)—ASSIGNMENT OF ERRORS—EFFECT OF WITHDRAWAL.

Where appellant files an additional brief, in which it withdraws all assignments of error

and all insistence theretofore made as to error based upon the assignments, the judgment will be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1076.*]

Appeal from City Court of Montgomery; A. D. Sayre, Judge.

Action between Richard D. Park, by his next friend, and the Montgomery Traction Company. From the judgment, the company appeals. Affirmed.

Rushton & Coleman, for appellant. Hill, Hill & Whiting, for appellee.

MAYFIELD, J. The appellant having filed an additional brief, in which it withdraws all assignments of error and all insistence heretofore made as to error based upon such assignments, the judgment of the trial court must be affirmed for want of assignments of error.

Affirmed.

DOWDELL, C. J., and ANDERSON and McCLELLAN, JJ., concur.

SPURLIN MERCANTILE CO. v. M. H. LAUCHEIMER & SONS.

(Supreme Court of Alabama. Feb. 11, 1909.)

JUDGMENT (§ 129*)—DEFAULT JUDGMENTS—ACTION AGAINST CORPORATION—RECITAL AS TO SERVICE OF PROCESS.

To maintain a judgment by default against a corporation, the judgment record or entry must recite that the person on whom process was served was at the time of service an officer or agent of defendant authorized by law to receive service for and in its behalf.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 129.*]

Appeal from City Court of Andalusia; B. H. Lewis, Judge.

Assumpsit by M. H. Lauchelmer & Sons against the Spurlin Mercantile Company. There was a default judgment for plaintiffs, and defendant appeals. Reversed.

The summons and the complaint were issued to and filed against the Spurlin Mercantile Company, a corporation, and the judgment was by default; the judgment entry being as follows: "Come the plaintiffs, in person and by attorney, and, the defendant being called, came not, but made default; and upon motion of the plaintiffs it is considered and adjudged that the plaintiffs have judgment against the defendant for the amount of their damages; and, the amount of the damages being certain, it is thereupon considered and adjudged by the court that the plaintiffs have and recover of the defendant the sum of \$71.25, and the costs of this suit, for which let execution issue."

Parks & Rankin, for appellant. S. H. Gills, for appellees.

ANDERSON, J. It has been often held by this court that, to maintain a judgment by default against a corporation, the record or judgment entry must recite the fact that proof was made to the court that the person on whom process was served was at the time of service such an officer or agent of the defendant as by law, was authorized to receive service of process for and in behalf of the defendant. *Southern Home Co. v. Gillespie*, 121 Ala. 295, 25 South. 564, and cases cited. The judgment entry discloses no such fact in the case at bar, nor does it appear elsewhere in the record. Yet the defendant is sued as a corporation.

The judgment of the city court is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

(159 Ala. 6)

PIERSON v. STATE.

(Supreme Court of Alabama. Feb. 9, 1909.)

CRIMINAL LAW (§ 200*)—FORMER JEOPARDY.

Where a person, with intent to defraud, represented to another that he was 21 years of age, and by means of the false pretense entered into a written contract to work for him, and having thereby obtained a sum of money from him, without refunding it, refused to perform services under the contract, the state could elect whether to prosecute for obtaining money under false pretenses, under Code 1907, § 6920, or for fraudulently entering into a written contract for the performance of service, and, without refunding the money received thereunder, refusing to perform the service, under section 6845; but, accused having been prosecuted under the latter section, his acquittal was a bar to his prosecution for obtaining the money under false pretenses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 386-409; Dec. Dig. § 200.*]

Appeal from Law Court, Pike County; A. H. Owens, Judge.

Ramon Pierson was convicted of obtaining money under false pretenses, and appeals. Reversed and remanded.

The affidavit, on which the trial from which this appeal was taken was held, is as follows (omitting formal charging part): "Before me, R. E. McLure, a justice of the peace in and for said state and county, personally appeared G. W. Henderson, who, being first duly sworn, deposes and says, on oath, that he has probable cause for believing, and does believe, that in said county and within 12 months before making this affidavit Ramon Pierson did falsely pretend to G. W. Henderson, with intent to defraud, that he was 21 years of age, and by means of such false pretense entered into a written contract to work and labor for the said G. W. Henderson, and thereby obtained from the said G. W. Henderson \$16 in money, of

the value of \$16, the personal property of said G. W. Henderson," etc.

The special plea, which was stricken on motion of the solicitor, is as follows: "Now comes the defendant in the above-entitled cause and says in answer that he ought not to be further prosecuted on said cause, for that he has been tried and acquitted on said cause in your honor's court, the law court of Pike county, Alabama, at the July term, 1908, on complaint sworn out by G. W. Henderson, before O. Worthy, a notary public and ex officio a justice of the peace, and made returnable to the law court of Pike county, said complaint being as follows [omitting the formal charging part]: 'G. W. Henderson, who, being duly sworn, says, on oath, that he has probable cause for believing and does believe that in Pike county, within 12 months before the making of this affidavit, Ramon Pierson, with intent to injure or defraud his employer, G. W. Henderson, entered into a written contract for the performance of an act or service of the said G. W. Henderson, and thereby obtained \$16 in money from the said G. W. Henderson, and with like intent, and without just cause, and without refunding such money, refused or failed to perform such act or service. [Omitting the formal conclusion and signature.]' The defendant says that on this complaint he was tried in your honor's court at the July term, 1908, of the law court of Pike county, and acquitted of this charge in said court; that he is the identical Ramon Pierson that was charged in said complaint and acquitted in said law court of Pike county before your honor; and that G. W. Henderson was the identical G. W. Henderson that made the complaint in said court. The defendant further says that, he having been acquitted of this offense once in the law court of Pike county he ought not to be further prosecuted in this case. Wherefore he prays judgment," etc.

Boykin Owens, for appellant. Alexander M. Garber, Atty. Gen., for the State.

ANDERSON, J. While the affidavit, in the case at bar, charges an offense (false pretense) under section 6920 of the Code of 1907, and the plea sets up that the defendant was acquitted of a charge (for violating a labor contract) under section 6845, the averments of the plea show the same parties, and that the essence of each offense was the fraudulent getting of \$16 by the defendant from G. W. Henderson. Whether the money was obtained through a fraudulent and false representation as to the defendant's age, or by fraudulently entering into a written contract, the gist of each offense was fraud in obtaining the money, in the absence of which there could be no conviction under either charge. *State v. Vann*, 150 Ala. 66, 43 South. 357. The state would have the right to proceed under either statute; but, when

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

one involves the essential ingredient of crime involved in the other, the conviction or acquittal of one is a bar to the other. *Moore v. State*, 71 Ala. 307; *State v. Blevins*, 134 Ala. 214, 32 South. 637, 92 Am. St. Rep. 22; *O'Brien v. State*, 91 Ala. 25, 8 South. 560.

The trial court erred in striking the defendant's special plea, and the judgment of the said court is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and MCLELLAN and MAYFIELD, JJ., concur.

(159 Ala. 213)

LOUISVILLE & N. R. CO. v. PRICE.

(Supreme Court of Alabama. Feb. 11, 1909.)

1. CARRIERS (§ 94*) — FAILURE TO DELIVER GOODS—SUFFICIENCY OF PLEADING.

A carrier defended an action for failure to deliver one case of goods included in a shipment by setting up in a special plea the terms of a special contract under which the shipment was made, avoiding liability unless claim for the loss or damages was made promptly after arrival, and if delayed more than 30 days after the delivery of the property, or after a due time for delivery, no liability would be imposed on the carrier. The shipment, minus the case, was delivered February 27th, and claim was made May 16th. *Held*, that the plea was defective, since, the action being for a failure to deliver, the plea should have alleged that no claim was made within 30 days after due time for delivery.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 94.*]

2. CARRIERS (§ 94*) — DELIVERY OF GOODS — TIME.

Held, also, that in the absence of any agreement the court could not say as a matter of law that from February 27th to May 16th a due time for delivery had elapsed.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 94.*]

3. CARRIERS (§ 94*) — DELIVERY OF GOODS — TIME.

Neither could the court say as a matter of law that, because part of the freight had been delivered on February 27th, a reasonable time had elapsed for the case not delivered.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 94.*]

4. EVIDENCE (§ 353*) — DOCUMENTARY EVIDENCE — RECEIPT — ATTESTATION AND ACKNOWLEDGMENT.

A receipt, signed by an agent of the consignee of goods by his mark, admitting receipt of the goods, is a valid receipt, though not attested and acknowledged, and its effect cannot be limited on its admission in evidence in an action against the carrier for failure to deliver the same goods received for.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 353.*]

5. CARRIERS (§ 94*) — FAILURE TO DELIVER GOODS—EXCLUSION OF EVIDENCE.

In an action for failure to deliver a case of goods included in a shipment which was delivered, evidence of what freight charges consignor had paid on the case is admissible.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 380; Dec. Dig. § 94.*]

6. TRIAL (§ 244*) — INSTRUCTIONS — UNDUE PROMINENCE.

Requested charges, accentuating certain parts or phases of the evidence, are properly refused.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 577-581; Dec. Dig. § 244.*]

7. APPEAL AND ERROR (§ 1031*)—DETERMINATION OF CAUSE—REVERSAL.

Where the appellate court cannot know what effect a charge erroneously limiting the effect of evidence had upon the jury, the cause will be reversed and remanded.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4038-4046; Dec. Dig. § 1031.*]

Appeal from Circuit Court, Marengo County; W. W. Quarles, Special Judge.

Action by R. W. Price, agent, against the Louisville & Nashville Railroad Company, for failure to deliver goods. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The proof showed that the Louisville & Nashville Railroad Company received the first shipment under the bill of lading and delivered it on the 27th day of February, 1903, and that one case of cotton fabric was marked short; that on the 13th day of March, 1903, this particular case of fabric was delivered, and that he notified Mr. Price that the goods had arrived; that on the 31st day of March, 1903, Enoch Hester brought an order to the agent from Mr. Price to deliver any freight that he had; and that this particular case was delivered to Enoch Hester, a colored drayman, and his receipt taken for it. Witness identified the receipt shown, and testified that he wrote Enoch Hester's name to it and Enoch made his mark. The following is the receipt as set out in the record:

Form 701 Freight Receipt Slip No. 316

2

Revised October 8, 1902

M. R. W. Price, R 1767/Station, 3/28 1903.

Received of the Louisville and Nashville Railroad Company

In good order the following described property:

Articles	Weight	Rate	Freight and Charges
1 4 Fab.	330	24	3.10

Way Bill 1308

Car.

3/27 1903

From Selma

Consignor,

Original point of shipment

Original car

All bills payable in bankable funds. 3/31 1903

his
Enoch X Hester.
mark

Objection was introduced to the receipt because, first, the name of Enoch Hester is signed thereto by mark, and that there are no attesting witnesses, and because the same is not a valid signed receipt. The court in

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

its oral charge said: "I charge you that the receipt introduced in evidence is limited to a memorandum for the purpose of refreshing the recollection of the witness, and that the same is not a valid receipt." The following charges were requested by the defendant: "The court charges the jury that, if they believe the evidence in this case, they must find in favor of the defendant." The other two charges were the general affirmative charges as to the first and second counts.

A. M. & A. D. Pitts, for appellant. C. K. Abrahams, for appellee.

MAYFIELD, J. This is an action by appellee against appellant as a common carrier for failure to deliver one case of cotton fabrics. The defendant pleaded the general issue and two special pleas, Nos. 3 and 4. Special plea No. 3 attempted to avoid liability by setting up the provision of the contract of shipment reading as follows: "That claims for loss or damage must be made in writing to the agent at the point of delivery promptly after the arrival of the property, and if delayed for more than 30 days after the delivery of the property, or after a due time for the delivery thereof, no carrier hereunder shall be liable in any event." Plea No. 3 averred that on February 27, 1903, other goods shipped under this contract were delivered to the plaintiff, and that he did not file his claim for the goods, the subject of this suit, until May 16, 1903. The special contract set up in plea No. 4 was as follows: That the plaintiff was to file in writing his claim for damage or injury or for loss of said goods within 30 days after the receipt of the goods, or after the time of the receipt of the goods, with the agent of the defendant at the place of the delivery of the goods. The plaintiff demurred to these pleas.

These pleas are evidently insufficient, for the reason that the action was for a failure to deliver at the destination, and not for damages or destruction of the property. Consequently the plea should have alleged that there was a failure to make demand for more than 30 days after "due time for delivery." The plea should have alleged that no demand in writing was made for more than 30 days after due time for the delivery, because the 30-day period, in accordance with the special contract set up in that plea, did not begin to run until there was a delivery of the property at its destination, and that there was no delivery until after the lapse of due time for delivery. In the absence of a contract or an agreement, neither the trial court nor this court could say that there had been a lapse of due time for delivery. Of course, it could not be predicated upon the first clause of the special contract relied upon, because the 30 days in that case begins to run from the time of delivery; and there was no delivery—that is, the plea does not

allege any delivery, nor does it show that more than 30 days had elapsed after a reasonable time for delivery. The court could not say, as matter of law, that because a part of the freight had been delivered on February 27th a reasonable time had elapsed for the delivery of that part the subject of this suit. As a matter of fact, it appears from the evidence and from the plea, taken together, that there was a reasonable time; but, in order for the plea to be sufficient, it must specifically aver—that is to say, seeking to avoid liability because of a special contract, it must clearly bring the defendant within the provisions of the contract. This it fails to do.

Plea No. 4 was defective for the same reason. The contention in the lower court, as to these pleas, seems to have been whether or not the special contract relied upon was valid. It is not necessary for us to decide that question, because the pleas were each insufficient for the reason pointed out, if the special contract be valid. The decisions of our own court, as well as those of many other states, are at variance as to whether or not such contracts are valid. Our court, in the case of Southern Express Co. v. Caperton, 44 Ala. 101, 4 Am. Rep. 118, in effect held that such a special contract between a shipper and a common carrier was void. This case has been followed and cited approvingly by our court several times since its rendition. It was, however, criticised by the Supreme Court of the United States in the case of Express Co. v. Caldwell, 2 Wall. 264, 22 L. Ed. 556, wherein the Supreme Court, through Strong, J., referring to Caperton's Case, used this language: "This case is a very unsatisfactory one. It seems to have regarded the stipulation as a statute of limitations, which it clearly was not, and it leaves us in doubt whether the decision was not rested on the ground that there was no sufficient evidence of the contract." McClellan, C. J., speaking of a similar provision in a contract limiting liability of telegraph companies, in the case of Harris v. Western Union Telegraph Co., 121 Ala. 519, 25 South. 910, 77 Am. St. Rep. 70, which required the making of a claim in writing and presenting it within 60 days after the message was filed with the company for transmission, says: "The rule here set out is a reasonable one. It does not limit the defendant's liability for negligence, but only requires a reasonable notice to the defendant of claims for damages." Coleman, J., in the case of Southern Express Co. v. Bank of Tupelo, 108 Ala. 517, 18 South. 664, speaking of the provision of the contract which required presentation of the claim in writing to the defendant within 32 days from the date of the contract, used the following language: "In the case of Southern Express Co. v. Caperton, 44 Ala. 101, 4 Am. Rep. 118, a similar provision in a receipt given for money as in the present

case was held to be unreasonable and that it tended to fraud and was inoperative." No reason was given in the argument of counsel why the rule is not sound, and consequently the special contract in that case under consideration by Justice Coleman was declared to be void. Haralson, J., in the case of *Broadwood v. Southern Express Co.* (148 Ala. 17, 41 South. 769), speaking of a similar stipulation or provision in contracts of shipment of common carriers limiting liability to 90 days, used the following language: "The reasonableness vel non of the stipulation of the kind under consideration is one of law for the determination of the court. Whatever may be the decision of the courts of other states and of the Supreme Court of the United States, this court is committed to the proposition that a contract fixing 30 days as the time within which such claims must be presented is not reasonable"—citing *Caperton's Case*, 44 Ala. 101, 4 Am. Rep. 118; *Southern Express Co. v. Bank of Tupelo*, 108 Ala. 517, 18 South. 664; *Southern Express Co. v. Owens*, 146 Ala. 412, 41 South. 752, 8 L. R. A. (N. S.) 369, 119 Am. St. Rep. 41. "But these cases," says Justice Haralson, "are not conclusive of the question as to whether 90 days should be considered reasonable." But, referring to the case of *Harris v. Western Union Tel. Co.*, 121 Ala. 519, 25 South. 910, 77 Am. St. Rep. 70, holding that 60 days was reasonable, he thereupon held that presentation within 90 days was a reasonable stipulation and that it was valid.

There was no error in the court's overruling the objection of the defendant to the question, propounded to the plaintiff, as to what freight charges he paid on the goods.

This, if not a proper element of damages, was admissible and relevant for other purposes. But the court was clearly in error as to the limitation placed upon the receipt offered in evidence—the restriction of its use for any purpose, except as a mere memorandum to refresh the memory of the witness—as well as in the charge to the jury to the effect that the receipt offered was not a valid receipt. It was not necessary that the signature to this receipt should have been attested. It was clearly not within the provision of the Code, and if the party who signed it had the authority to receive the goods and to receipt for the same, and did sign it by mark and deliver it to the agent of the defendant company, it was as valid as a receipt as if it had been attested or acknowledged.

There was no error in the court's refusing to give either of the charges requested by the defendant. Such charges would be gratuitous accentuations of certain parts or phases of the evidence; and, while they are not strictly general affirmative charges for the defendant, they are in the nature thereof. This being true, the charges here in question, being based upon a part of the evidence only, were well refused.

We cannot know what effect, if any, the charge of the court upon the nature of the receipt offered by the defendant as evidence had upon the jury; and for the error of limiting the effect of the same as evidence the case must be reversed.

Reversed and remanded.

DOWDELL, C. J., and ANDERSON and McCLELLAN, JJ., concur.

(94 Miss. 373)

CLEARY v. MORSON. (No. 13,752.)

(Supreme Court of Mississippi. March 29, 1909.)

SALES (§ 472*)—CONDITIONAL SALES—REMEDIES OF SELLER AGAINST THIRD PERSONS—ENTIRETY OF CONTRACT.

Where a person contracted to sell a horse and other property in consideration of the buyer's working for him for a specified term, the title to the horse to remain in the seller until paid for, the contract was an entirety, and, the buyer having abandoned his contract, the seller had the right to reclaim the horse from a third person, to whom it had been sold by the buyer; the third person having no better right to it than the buyer had.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1371; Dec. Dig. § 472.*]

Appeal from Circuit Court, Hinds County; W. H. Potter, Judge.

Replevin by A. A. Morson against John Cleary. There was a directed verdict for plaintiff, and defendant appeals. Affirmed.

Greaves, Easterling & Manship, for appellant. J. C. Ward, for appellee.

FLETCHER, J. This is a replevin suit, brought by Morson against Cleary for the recovery of a mare sold conditionally by Morson to one Wilson, and by Wilson sold to Cleary. It appears that Morson and Wilson entered into a contract evidenced by the following memorandum: "This memoranda of agreement, made and entered into between A. A. Morson, party of the first part, and Reuben Wilson, party of the second part, witnesseth: That the said Reuben Wilson, party of the second part, for and in consideration of twenty dollars (\$20.00) to him in hand paid, the receipt of which is hereby acknowledged, and for the further consideration of \$40.00 per month, payable monthly, agrees to work for the said A. A. Morson, as also to furnish the services of Jim White from the 1st day of January, A. D. 1908, to the 1st day of January, 1909. The said A. A. Morson also agrees to give the said Reuben Wilson six (6) acres of land free of rent, and to sell to him one mare, named Alma, for \$125.00, said amount to be paid on the 15th day of December, 1908. Title to said mare to remain with said Morson until paid. The above \$20.00 is payable on the 15th day of December, 1908. [Signed] A. A. Morson. Reuben Wilson." It will be noted that the animal was not paid for until December 15th. Morson testified that at the time of making this contract he was badly in need of labor, and that the mare was sold and the six acres of land furnished as an additional inducement to secure the labor contract. In July Wilson abandoned his contract, sold the mare to Cleary outright, under the pretense that he was the unconditional owner, and fled the country. Thereupon Morson, after demand for possession and refusal, instituted this ac-

tion against Cleary without waiting for the maturity of the debt. Cleary's sole defense is that the debt was not due, and that he had the right to retain possession until December 15th, and the further right at that time to secure title by paying the purchase money. However, no offer to pay the debt was made by Cleary. From a peremptory instruction in favor of Morson, Cleary appeals.

It is earnestly and very forcibly contended, on appellant's behalf, that Wilson had a qualified property interest in the animal, which passed to Cleary by the sale, and that Cleary's right to possession could not be disturbed until default had occurred in the payment; and in support of this contention many authorities are cited, some of which, at least, undoubtedly maintain this contention. On the other hand, appellee argues that a contract for the conditional sale of property contains an implied condition that the purchaser will retain possession, and that a sale of the property, involving a change of possession, is a breach of the contract, which warrants the seller in treating the contract as rescinded. Quite a number of respectable authorities are produced in support of this view, some of which depend upon the distinction that, while the conditional purchaser may properly dispose of his interest in the chattel, he may not make a sale by which he undertakes to transfer the unconditional title. In this case we are not driven to decide between these conflicting lines of authority, or pass upon the soundness of this distinction. We think the contract made between Morson and Wilson should be considered as an entirety, and that the sale of the mare must be held to depend upon Wilson's agreement to labor. It is clear that the sale would not have been made, but for Morson's desire to secure labor, and, when that part of the contract was breached by Wilson, Morson had a right to treat the whole contract as at an end and reclaim the property. It is obvious that Cleary secured no higher or better right than Wilson had, and we think the property could have been retaken from Wilson before maturity, if Wilson had abandoned his employment and removed from Morson's premises. *Hall v. Draper*, 20 Kan. 137. In this view of the matter, the action of the circuit court was correct.

Affirmed.

AUSTIN v. STATE. (No. 13,869.)

(Supreme Court of Mississippi. March 29, 1909.)

RAPE (§ 16*)—ATTEMPT—VIOLENCE.

Where the evidence did not show the use of such violence as might be necessary to overcome resistance to the attempt, accused could not be convicted of attempt to commit rape.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 18; Dec. Dig. § 16.*]

Appeal from Circuit Court, Tishomingo County; E. O. Sykes, Judge.

"To be officially reported."

J. D. Austin was convicted of an attempt to commit rape, and he appeals. Reversed and remanded.

Lamb & Johnston, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

WHITFIELD, C. J. Looking carefully through the whole record, we are constrained to hold that the testimony in this case falls short of showing an attempt to commit rape. There is no satisfactory evidence of any purpose on the part of appellant to use such violence as might be necessary to overcome resistance to such an attempt. We do not think it would serve any useful purpose to detail the evidence.

Reversed and remanded.

(93 Miss. 785)

PALM et al. v. FANCHER et al. (No. 13,733.)
(Supreme Court of Mississippi. March 29, 1909.)

USURY (§ 49*)—USURIOUS CONTRACTS.

A note providing for interest from maturity at 10 per cent. per annum, and that if interest were not paid annually it should become principal and bear the same rate of interest, was not usurious, since it only required compound interest in case he failed to fulfill his contract for annual interest.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 105; Dec. Dig. § 49.*]

Appeal from Chancery Court, Attala County; J. F. McCool, Chancellor.

Action by C. C. Fancher and others against Alex Palm and another. Decree for complainants, and defendants appeal. Affirmed.

Alexander & Alexander and J. G. Smythe, for appellants. Dodd & Dodd and McWille & Thompson, for appellees.

MAYES, J. The chancellor has settled all questions in this case save one in law. On the 12th day of February, 1903, the appellants gave a deed in trust on certain property therein described to secure the appellees in the sum of \$356.42 then owing. The note is as follows: "\$356.42. McCool, Miss., Feb. 12, 1903. On November 1, 1903, after date, we or either of us promise to pay to the order of Seward & Fancher three hundred and fifty-six and ⁴²/₁₀₀ dollars, for value received, negotiable and payable, without defalcation or discount, and with interest from maturity at the rate of 10 per cent. per annum, and if interest be not paid annually to become as principal, and bear the same rate of interest. If suit be instituted on this note,

it is agreed that judgment shall include a reasonable amount as fee for the plaintiff's attorneys."

It is claimed that this note is usurious, because there is in it an agreement to compound the interest, if it be not paid annually as provided for in the note; and the case of Perkins v. Coleman, 51 Miss. 298, is relied on as authority on this point. We think that the case above referred to is, on its face, a different case from the one here presented. By the contract in Perkins v. Coleman it was provided that the principal debt was to run for 26 months, bearing interest at 10 per cent. annually, interest to be compounded and to become principal. No annual rest period was allowed for the payment of the interest, but the contract itself forbade the payment of interest under 26 months, and required its compounding, thus making it imperative that the borrower pay a greater rate of interest than a straight 10 per cent. on the principal amount borrowed, and the court held this contract to be usurious, because by its very terms it compelled the borrower to pay more than 10 per cent. interest on the amount borrowed by him. Under the facts of this case there is no stipulation compelling the borrower to pay compound interest, except in the event of his failure to pay the annual interest at maturity. If the borrower, under the agreement in this case, fulfill his contract, it is impossible for the lender to collect more than the legal contractual rate of interest. The note provides for annual payment of interest, in default of which the interest then becomes principal and bears interest; but the note here does not, as did the contract in case of Perkins v. Coleman, forbid annual payment of interest and require same to be compounded. There is a wilderness of authority on this subject. Decisions may be found taking almost any view of the question.

We do not think this contract is in any sense usurious. It would never be doubted but that the parties might, under a separate agreement, after the interest became due and default therein, have executed a second note for the interest and made this second note for the arrearage in interest become interest-bearing principal. It would not be seriously contended that such an agreement would constitute usury, though interest was thereby compounded. Conceding this, we fail to see why parties may not provide in the same instrument for the compounding of interest, when the stipulations of the contract are not such as require a compounding of the interest as a part of the contract, not leaving any option or right in the borrower to avoid paying compound interest. Such a contract is a mere matter of convenience to the parties, and places nothing in the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

contract they could not lawfully do as an independent transaction.

We concur in the view expressed in section 129 of Webb on Usury, which says: "It is difficult to understand how such an agreement, made after the loan contract, is generally accepted as valid; but, if made contemporaneously with the loan contract, it is in many cases held to be usurious."

Affirmed.

(95 Miss. 240)

STATE v. PEEK. (No. 13,804.)

(Supreme Court of Mississippi. March 29, 1909.)

1. HOMICIDE (§ 131*)—INDICTMENT—SUFFICIENCY—DESIGNATION OF PERSON KILLED.

An indictment charging the killing of an unnamed infant, the child of the persons named therein, was sufficient, being the same as if it had alleged the killing of the infant child of the parties named, whose name was unknown.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 207; Dec. Dig. § 131.*]

2. INDICTMENT AND INFORMATION (§ 65*)—SUFFICIENCY OF ACCUSATION—MATTERS OF EVIDENCE.

That the evidence upon which the state relied to support an indictment was not set out therein was not ground for a motion to quash; it being only necessary to allege the facts constituting the crime.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 187; Dec. Dig. § 65.*]

3. INDICTMENT AND INFORMATION (§ 147*)—DEMURRER—GROUNDS—INSUFFICIENCY OF EVIDENCE.

The sufficiency of the evidence to support the indictment cannot be raised by a demurrer to the indictment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 490; Dec. Dig. § 147.*]

4. INDICTMENT AND INFORMATION (§ 137*)—MOTION TO QUASH—GROUNDS—INSUFFICIENCY OF EVIDENCE.

The sufficiency of the evidence to support the indictment cannot be raised by motion to quash.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 483; Dec. Dig. § 137.*]

Appeal from Circuit Court, Neshoba County; J. R. Byrd, Judge.

Oscar Peek was indicted for manslaughter. From an order quashing the indictment, the State appealed. Reversed, and accused directed to be held for trial under the indictment.

Geo. Butler, Asst. Atty. Gen., for the state. Byrd, Wilson & Richardson, for appellee.

MAYES, J. We think the court erred in quashing the indictment in this case. The indictment in all respects informs the defendant of the nature of the charge against him as specifically and definitely as language

could make it. The indictment charges that the defendant "did unlawfully and feloniously kill and slay an unnamed infant, the child of J. R. Brantley and Mrs. Chessie Brantley," etc. This charge is the same as if the indictment had alleged the killing of the infant child of J. R. Brantley and Mrs. Chessie Brantley, whose name was unknown to the grand jurors. The demurrer to the indictment should have been overruled, and the motion to quash the indictment should have been dismissed.

It would introduce a novel procedure into the criminal practice if the method adopted in the motion to quash could be approved. In no indictment of this kind is it required that the evidence on which the state relies to prove the crime shall be set out in the indictment, and this is what the motion to quash asks to be done, and assigns as the reason why the indictment should be quashed. It was only necessary for the indictment to charge facts constituting the crime, and this the indictment did. When the state offers its evidence to prove the crime, if it fail to make out a case, then the prosecution should be dismissed; but that is beyond the question presented here by either the demurrer or the motion to quash.

The case of *State v. Prude*, 76 Miss. 543, 24 South. 871, has no application to the question here, at present, whatever the facts may show on the trial. The indictment in the *Prude* Case, supra, was for the slaying of an unborn quick child, and the court held the indictment bad on demurrer; but the indictment in this case charges the killing of an infant, without any hint in the indictment that the infant was unborn.

We think the court erred in holding the indictment bad. Cause reversed, and prisoner held to await trial under this indictment.

QUITMAN LUMBER CO. v. TURNER,
Sheriff. (No. 13,497.)

(Supreme Court of Mississippi. Feb. 8, 1909.
Decree Changed March 22, 1909.)

APPEAL AND ERROR (§ 1171*)—REVIEW—GROUNDS FOR REVERSAL—EXCESSIVE DECREE—ERRORS IN COURSE OF TRIAL.

Where it is evident from the entire record that under no possible view could there be a recovery for the amount decreed, and the course of the trial is not entirely satisfactory, the decree will be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4546; Dec. Dig. § 1171.*]

Appeal from Chancery Court, Quitman County; Percy Bell, Chancellor.

Injunction by the Quitman Lumber Company against W. V. Turner. From a decree for defendant, complainant appeals. Reversed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The Quitman Lumber Company filed a bill for injunction, seeking to restrain the appellee, sheriff and tax collector, from selling for taxes due by the Lilley Lumber Company certain property claimed by the appellant. At the next term of court the case was tried in the absence of appellant's attorney, and no proof was introduced in support of the bill. Proof was offered by the defendant, however, and a decree for defendant rendered, awarding the amount claimed as taxes, together with damages. The record shows that there was an evident miscalculation in the amount of the decree, and that, even if appellant is liable, the decree is excessive. Appellant, however, denies liability for the taxes of the Lilley Lumber Company, but admits liability for certain other property which was seized, and which belonged to appellant.

Julian C. Wilson, for appellant.

FLETCHER, J. If no other error be considered, it is clear that the decree is excessive to the extent of \$65.71. It is evident, from the entire record, that under no possible view could there be a recovery for the amount decreed by the lower court.

For this reason, and because we are not entirely satisfied with the course of the trial, the cause is reversed and remanded.

(94 Miss. 290)

REASON v. STATE. (No. 13,409.)

(Supreme Court of Mississippi. March 29, 1909.)

CRIMINAL LAW (§ 510*)—EVIDENCE—CONFESSION INDUCED BY THREATS.

Where a confession of murder was extorted by threats of hanging as soon as the accused prisoner reached a certain place, a repetition and confirmation thereof as soon as he reached such place must be held to have been induced by the same cause.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1164; Dec. Dig. § 510.*]

Appeal from Circuit Court, Marshall County; W. A. McDonald, Special Judge.

Brodie Reason was convicted of murder, and he appeals. Reversed.

Brodie Reason was convicted of the murder of his father, Henry Reason. On the trial, Frank Reason, aged 14, the brother of the defendant, testified with reference to certain threats which the defendant had made against his father shortly preceding the killing, and that at the time the shot was fired he saw defendant run from the house. There were no eyewitnesses to the killing; the defendant denying that he fired the shot. The state was also permitted to introduce testimony of an alleged confession to the sheriff and his

deputy, which confession the defendant contends was extorted by threats.

D. M. Featherston, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

FLETCHER, J. This conviction rests on the testimony of Frank Reason and the alleged confessions of appellant. There can be no doubt that Frank Reason's testimony is greatly weakened by the fact that he had twice previously testified that appellant was not guilty. This being conceded, it was of the first importance that appellant should not have his case prejudiced by the admission of incompetent testimony. Now, appellant testifies, without pretense of contradiction, that his original confession was extorted by threats to the effect that if he did not admit his guilt he would be hanged as soon as he reached Holly Springs. It is true this original confession was not admitted in testimony; but the court permitted the state, over appellant's objection, to show that this original confession was repeated and confirmed at the very instant the prisoner reached Holly Springs. It is too plain for argument that this reiterated confession was induced by the same cause that underlay the first confession, since the danger of immediate death at Holly Springs could, in the opinion of the prisoner, be averted only by adhering to his story. The case falls within the principles of *Whitley v. State*, 78 Miss. 255, 28 South. 852, 53 L. R. A. 402, where it is said: "Where a confession is made under the influence of threats, such influence is presumed to continue until removed by evidence, and a subsequent confession will not be received, unless the influence of the first confession is shown to have been totally done away with, by a warning of the consequences of a confession, or by other means." See, also, the cases of *Banks v. State*, 47 South. 437; *Durham v. State*, 47 South. 545.

Reversed and remanded.

(94 Miss. 422)

BOOZE v. YAZOO CITY. (No. 13,707.)

(Supreme Court of Mississippi. March 22, 1909.)

INTOXICATING LIQUORS (§ 235*) — CRIMINAL PROSECUTIONS—ADMISSIBILITY OF EVIDENCE — MATTERS OF DEFENSE.

A detective gave K. money to buy whisky, and K. brought him a pint of whisky, stating that he had bought it of defendant, and so testified in the prosecution of defendant, which was the only direct evidence of the sale. Defendant denied a sale to K. *Held*, that evidence was admissible to show that, on the day when K. claimed to have bought the whisky of defendant, K. had received by express a gallon of whisky, and had told others that he had whisky and could let them have it, and did let

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

others have whisky, as tending to raise a reasonable doubt of the truth of K.'s testimony.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 299; Dec. Dig. § 235.*]

Appeal from Circuit Court, Yazoo County; W. H. Potter, Judge.

Albert Booze was convicted of the unlawful sale of booze. He appeals. Reversed.

Campbell & Campbell, for appellant. Holmes & Holmes and Geo. Butler, Asst. Atty. Gen., for the State.

MAYES, J. We take no notice of any of the objections urged by counsel for appellant, other than what shall be stated in the opinion, as it is our view that none of the objections have any merit, save the one herein discussed.

The testimony shows that one Carpenter was employed as a detective to ferret out the blind tigers in Yazoo City. Some time in October, 1908, he approached one Pierce Kennedy and asked him if he could get him some whisky, saying at the time that he (Carpenter) had the money if Pierce Kennedy knew where to get it. Kennedy stated he thought he could get the whisky, whereupon Carpenter gave him 75 cents and Kennedy left, shortly returning with a pint of whisky. Pierce Kennedy was introduced as a witness on the part of the state in the prosecution against Albert Booze, and testified that he bought the whisky from the defendant, and if this conviction is to stand it rests alone on the testimony of Pierce Kennedy. On cross-examination the defendant offered to show that, on the very day when Pierce Kennedy claims to have bought the whisky from him (the defendant), Pierce Kennedy had gotten out of the express office a gallon of whisky himself. This testimony was objected to, and the court sustained the objection. The defendant, after denying that he had sold any whisky to the prosecuting witness, Kennedy, then offered to prove by Mr. Howard, the agent of the American Express Company, that the records in his possession as express agent show that, on the very day it is claimed by Kennedy that the sale of whisky was made to him by Albert Booze, the defendant, Kennedy himself had a gallon of whisky which he had that day gotten from the express office. The defendant also offered to prove that on that day Pierce Kennedy had told other parties he had whisky and could let them have it, and that he did let other parties have whisky. All this testimony was objected to and excluded, and in this we think, under the peculiar facts of this case, the court erred.

Any testimony which tended to show that the testimony of Kennedy, the prosecuting witness, was untrue, or which would raise in the minds of the jury a reasonable doubt of its truth, should have been admitted.

Carpenter only knew that he had given Kennedy 75 cents, and that Kennedy had taken the money, and kept it, and returned with the whisky. Kennedy disclaimed selling the whisky to Carpenter, and asserts that he bought it from Booze, which Booze denies. As tending to support his denial, he offers to show that Kennedy did on that day have whisky; that he had told others that he had it, and offered it to them. This testimony should have gone to the jury for what it was worth, as tending to show that the claim of Kennedy that he bought the whisky from the defendant and did not sell it himself was untrue. In the language of Mr. Wigmore, this testimony should have gone to the jury "because, if it really was of no appreciable value, no harm is done in admitting it; while, if it is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative, but should afford the accused every opportunity to create that doubt. A contrary rule is cruel to a really innocent accused." 1 Wigmore, Ev. § 139.

Reversed and remanded.

(95 Miss. 336,

THOMAS v. YAZOO CITY. (No. 13,705.)†

(Supreme Court of Mississippi. March 29, 1909.)

1. CRIMINAL LAW (§ 1169*)—HARMLESS ERROR—ADMISSIBILITY OF DOCUMENTARY EVIDENCE—AUTHENTICATION.

The error in admitting in evidence in a criminal prosecution a compilation of city ordinances, without the certificate of the clerk as to its official character, is cured by permitting the city clerk on the trial to supply the missing certificate.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3138, 3140; Dec. Dig. § 1169.*]

2. INTOXICATING LIQUORS (§ 10*)—POWER TO PROHIBIT.

A city charter, conferring on the city council the power "to restrain, prohibit, or suppress tippling houses, dramshops, * * * and all other disorderly houses," and to "ordain all needful laws for preventing and suppressing all crime, obscenity, profanity, drunkenness, and other disorderly conduct," gives the power to prohibit the sale of intoxicating liquor.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 12; Dec. Dig. § 10.*]

3. MUNICIPAL CORPORATIONS (§ 639*)—PROSECUTION UNDER CITY ORDINANCE—AFFIDAVIT.

Under Const. 1890, § 26, providing that in all criminal prosecutions the accused shall have a right to know the nature and cause of the accusation, a criminal prosecution may be instituted under an ordinance, though no mode of procedure is provided in the ordinance for such a prosecution, as, in the absence of any provision regulating the procedure, an affidavit

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† For concurring opinion, see 48 South. 1041.

or some definite description of the offense is sufficient.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1406; Dec. Dig. § 639.*]

4. CRIMINAL LAW (§ 1213*)—PUNISHMENT—CRUEL OR UNUSUAL PUNISHMENT—SALE OF INTOXICATING LIQUORS.

Where a city charter confers large powers upon the city in the enforcement of its police powers, the fact that a minimum punishment for the offense of selling intoxicating liquors exceeds the minimum punishment provided by the state law will not constitute cruel and unusual punishment.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 8308; Dec. Dig. § 1213.*]

5. CRIMINAL LAW (§ 869*)—ADMISSIBILITY OF EVIDENCE—OTHER OFFENSES.

Code 1906, § 1762, providing that in prosecutions for violation of the liquor laws the state may give evidence as to anterior offenses, applies to prosecutions for the violation of city ordinances prohibiting the sale of intoxicating liquors.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 822; Dec. Dig. § 869; * *Intoxicating Liquors*, Cent. Dig. § 286.]

6. INTOXICATING LIQUORS (§ 223*)—CRIMINAL PROSECUTION—VARIANCE.

In a prosecution for the violation of a city ordinance forbidding the sale of intoxicating liquors, where evidence of another sale anterior to the one charged was admitted under Code 1906, § 1762, providing for the admission of such testimony, it was not error for the court to charge the jury to convict, if they believe that either of the sales had been proven.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 273; Dec. Dig. § 223.*]

Appeal from Circuit Court, Yazoo County; W. H. Potter, Judge.

Cicero Thomas was convicted of the unlawful sale of whisky, and appeals. Affirmed.

Barnett & Perrin, for appellant. Holmes & Holmes and Geo. Butler, Asst. Atty. Gen., for the State.

FLETCHER, J. This appellant was charged in the mayor's court of Yazoo City with the unlawful sale of whisky, and, being there convicted, appealed to the circuit court. On the trial in the circuit court the city not only proved the same sale relied on in the mayor's court, but an additional sale, made some six months previously. The court declined to compel the city to elect one of these sales upon which to stand, and charged the jury that, if either sale had been proven, then the jury was authorized to convict. Several objections were then made to the validity of the city ordinances, all of which were overruled. From a conviction in the circuit court, this appeal is prosecuted.

Many of the questions presented by this record were before the court in the case of *Booze v. Yazoo City* (No. 13,707, decided March 22, 1909) 48 South. 820, and it was

said in the opinion in that case that these contentions were without merit. Although this has been expressly decided, we deem it not amiss to refer to these points more in detail.

It is said that the compilation of the ordinances of Yazoo City known as "Holmes' Code" should not have been admitted in evidence, because it did not contain any certificate of the clerk as to its official character. But we think this defect, if it may be so called, was cured by permitting the city clerk on the trial to supply the missing certificate.

It is made ground of objection that the charter of Yazoo City gave no power to the city council to prohibit the sale of intoxicants. But section 11 of the charter expressly confers the power "to restrain, prohibit, or suppress tippling houses, dramshops, gaming, gambling houses, houses of ill fame, and all other disorderly houses." By article 20 of the charter power is given to "ordain all needful laws for preventing and suppressing all crime, obscenity, profanity, drunkenness, and other disorderly conduct." It is said that the power to suppress does not authorize an entire prohibition of the sale of whisky, but only permits disorderly and improper houses to be suppressed. But the case of *Corinth v. Crittenden*, 47 South. 525, dealing with pool rooms in special charter towns, is a complete answer to this contention, and the reasoning of that opinion need not be repeated.

It is said, again, that Yazoo City cannot institute a criminal prosecution, since there is no mode of procedure provided in the ordinance for inaugurating such a prosecution. But this court has held in *Telheard v. Bay St. Louis*, 87 Miss. 580, 40 South. 326, that a prosecution for a violation of a municipal ordinance is governed by the provisions of section 26 of the Constitution of 1890, and in effect that in such prosecutions there must be a complaint in writing, which shall specify the nature and cause of the accusation. So it would appear that, in the absence of any ordinance regulating the procedure, an affidavit, or at least some definite description of the offense, is demanded by the terms of the Constitution.

We cannot yield to the earnest argument that the penalty prescribed by the Yazoo City ordinance is so severe as to constitute cruel and unusual punishment. True, it provides a minimum punishment far in excess of the minimum punishment carried by the state law; but by section 30 of the charter large powers are conferred upon the city in enforcing its police powers. It must necessarily be left largely to the discretion of the city as to what penalties are imposed for violating its police ordinances.

This brings us to the consideration of the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

principal questions urged upon the attention of the court, which questions are not involved in the Booze Case and are peculiar to the case now under consideration. It is earnestly argued that it was error for the circuit court to permit evidence to go to the jury of any sale of intoxicating liquor except the one counted on and proven in the mayor's court. Especially is it said that the court erred in charging the jury to convict if the jury believed that either of the two sales had been proven. The argument is that section 1762 of the Code of 1906 is but a rule of evidence, and that its provisions must be construed so as to harmonize with the holding of this court in cases like *Hudson v. State*, 73 Miss. 784, 19 South. 965. Therefore counsel contend that the state must select one particular sale upon which to predicate a conviction, and that proof of other sales should be considered merely as evidence of the defendant's guilt. If this view be correct, it is evident that the court fell into error in giving the second and third instructions for the state.

This question has been before the court more than once, and convictions resting upon evidence of several sales have been affirmed without written opinions, and that, too, in cases where the court declined to put the state to an election. The view which has controlled the court, and which is now for the first time set out in a written opinion is that section 1762 amounts to far more than a rule of evidence. This conclusion is inescapable, when proper weight is given to that part of the statute which provides: "But in such cases, after conviction or acquittal on the merits, the accused shall not again be liable to prosecution for any offense of the same character committed anterior to the day laid in the indictment, or in the affidavit." If it be true that the defendant is tried for making a single sale, then no reason can exist for making a conviction a bar to subsequent prosecution for any offense committed within two years of the date laid in the indictment. When this statute is considered in connection with the general statute on the subject, it would seem clear that the rule announced in such cases as *Hudson v. State*, supra, *Naul v. McComb City*, 70 Miss. 699, 12 South. 903, and *Ware v. State*, 71 Miss. 204, 13 South. 936, has been abrogated.

It is said, however, that if this be the correct view of the law this case must be reversed, because by no ordinance of Yazoo City has there been any adoption of section 1752, which it is said applies only to prosecution by the state. We think this is taking too narrow a view of the scope and evident meaning of the statute. It should be borne in mind that this court has decided, in the case of *Telheard v. Bay St. Louis*, supra, that prosecutions under municipal or-

dinances are subject to the provisions of the Constitution. If a person charged with violating a city ordinance is entitled to the protection guaranteed to persons charged with crime by the provisions of the Constitution, it must further follow that he is subject to statutory provisions dealing with the identical crime, whether it is sought to be fastened on him by state or municipal authority. Now, this section 1762 provides that, in the trial of all prosecutions for violating the liquor laws, proof may be given of more than one violation. We think this language is as much applicable to a prosecution under a city ordinance as is the language of section 26 of the Constitution. It is true that the statute provides that "the state shall not be confined to the proof of a single violation," etc.; but this word "state," we think, is used in a general sense to designate any authority in the name of which the prosecution is carried on. It is broad enough to embrace, not in its terms, but in its meaning, a municipal corporation seeking to punish for the violation of its ordinance, as well as the state prosecuting under the ordinary criminal statutes.

Affirmed.

(94 Miss. 484)

GULF & S. I. R. CO. et al. v. BARNES et al.
(No. 13,823.)

(Supreme Court of Mississippi. March 15, 1900.)

1. RAILROADS (§ 288*)—CROSSINGS—INTERLOCKING DEVICES—DUTY OF COMPANIES.

Where an interlocking device was maintained by railroad companies at a crossing of their tracks, within Code 1906, § 4896, authorizing the running of trains over crossings without stopping where such devices are used, it was the companies' duty to the public to keep the device in order.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 931; Dec. Dig. § 288.*]

2. NEGLIGENCE (§ 90*)—CONTRIBUTORY NEGLIGENCE—IMPUTED NEGLIGENCE.

If defendant railroad company's negligence in failing to keep in order an interlocking device at a crossing of another company's tracks prevents it from recovering for damage caused by a collision, it does not affect the right of defendant's fireman and the widow of defendant's engineer, who were involved in the collision, to recover from the other company.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 139; Dec. Dig. § 90.*]

3. NEGLIGENCE (§ 92*)—CONTRIBUTORY NEGLIGENCE—IMPUTED NEGLIGENCE.

Negligence of defendant company in failing to keep in order an interlocking device at a crossing of another company's tracks does not affect the right of defendant's passengers to recover from the other company for their injury.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 145; Dec. Dig. § 92.*]

4. EQUITY (§ 51*)—JURISDICTION—MULTIPLICITY OF SUITS—ACTIONS FOR INJURY.

Complainant and defendant railway companies' trains having collided at a crossing, defendant sued complainant for its damage; and defendant's engineer's widow sued the com-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

panies jointly and separately. The fireman sued complainant, and two of defendant's passengers sued both companies. *Held*, that a bill does not lie to compel an adjudication of the claims in one suit, to avoid a multiplicity of suits, since the same law and facts do not apply to all the claims.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 167, 168; Dec. Dig. § 51.*]

5. EQUITY (§ 51*)—JURISDICTION—MULTIPLICITY OF SUITS.

Equity jurisdiction to avoid a multiplicity of suits is not exercised merely to avoid many suits; it being necessary that the suits be governed by the same principles of law and practically the same facts.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 167; Dec. Dig. § 51.*]

6. EQUITY (§ 51*)—JURISDICTION—MULTIPLICITY OF SUITS—PLEADING.

A bill to avoid a multiplicity of suits should show that complainant has a good cause of action, whether by way of claim or defense, legal or equitable.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 167; Dec. Dig. § 51.*]

Appeal from Chancery Court, Forrest County; T. A. Wood, Chancellor.

"To be officially reported."

Bill by the Gulf & Ship Island Railroad Company against Mrs. Virginia M. Barnes and others; the Mobile, Jackson & Kansas City Railroad Company filing a cross-bill. From the decree, complainant and cross-complainant appeal. Affirmed.

Jas. H. Neville, R. L. Dent, N. C. Hill, and Flowers & Whitfield, for appellants. Sullivan & Tally and Campbell & Campbell, for appellees.

WHITFIELD, C. J. The case made by this record is as follows: The original bill was filed by the Gulf & Ship Island Railroad Company on the 15th day of June, 1908; the fiat for the injunction having been issued by Circuit Judge W. H. Hardy on the 13th day of June, 1908, and the bill invoking the exercise of the equitable jurisdiction of the chancery court in prevention of a multiplicity of suits. To this original bill Virginia M. Barnes and John Goldsby were made respondents. Virginia M. Barnes had sued the Gulf & Ship Island Railroad Company separately at law, and had also brought a suit against the Gulf & Ship Island Railroad Company and the Mobile, Jackson & Kansas City Railroad Company at law, for damages for the death of her husband, the engineer on the Mobile, Jackson & Kansas City Railroad Company engine at the time of the collision. The Gulf & Ship Island Railroad Company pleaded, as one of its defenses to her suit, the contributory negligence of her said husband, Barnes, the engineer. Goldsby sued for damages for personal injury. On the 16th day of June, 1908, the Gulf & Ship Island Railroad Company filed its amended bill against the same two defendants, Virginia M. Barnes and John Goldsby, and also

against certain new parties, Mrs. Maggie Gilbert and the Mobile, Jackson & Kansas City Railroad Company, as two additional defendants. The allegation in this amended bill was that Mrs. Gilbert had sued the Gulf & Ship Island Railroad Company for damages growing out of the same collision, and that the Mobile, Jackson & Kansas City Railroad Company was threatening to sue the Gulf & Ship Island Railroad Company for damages to its locomotive and cars injured in the same collision. On the 20th day of October, 1908, the Gulf & Ship Island Railroad Company filed its supplemental bill against Virginia M. Barnes and John Goldsby, defendants to the original bill, and Mrs. Maggie Gilbert, defendant to its amended bill, and also made the Mobile, Jackson & Kansas City Railroad Company a defendant. This supplemental bill alleged, amongst other things, that the Mobile, Jackson & Kansas City Railroad Company was threatening to sue the Gulf & Ship Island Railroad Company for damages amounting to \$1,400, growing out of the collision, said damages being due to injury to its locomotives, etc., and further alleged that Virginia M. Barnes had instituted another suit in the circuit court of Forrest county against it, the Gulf & Ship Island Railroad Company, joining with it as a defendant the Mobile, Jackson & Kansas City Railroad Company. The said suit was based on the same cause of action as her original suit. The prayer of this supplemental bill was that Virginia M. Barnes be restrained from prosecuting this last suit against the two railroads, and that all the defendants to the supplemental bill be required to propound their cases to the chancery court, and that all the cases be consolidated into one case, and tried and determined by the chancery court in one suit, for the purpose of avoiding a multiplicity of suits.

On the 10th day of October, 1908, the Mobile, Jackson & Kansas City Railroad Company presented its cross-bill to Judge W. H. Hardy, praying for and obtaining the issuance of a writ of injunction, requiring all these parties, the Gulf & Ship Island Railroad Company, Virginia M. Barnes, and Maggie Gilbert, to come into the chancery court and have all these claims settled there. This answer and cross-bill of the Mobile, Jackson & Kansas City Railroad Company prayed also that the Gulf & Ship Island Railroad Company be adjudged liable to the Mobile, Jackson & Kansas City Railroad Company for \$2,000 damages to its engine and cars, growing out of the same collision; and it was alleged in said answer and cross-bill that, since the filing of original bill by the Gulf & Ship Island Railroad Company, Virginia M. Barnes had sued the Mobile, Jackson & Kansas City Railroad Company, separately and also jointly with the Gulf &

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Ship Island Railroad Company, for damages growing out of the same collision, and that Maggie Gilbert had instituted suit against the Mobile, Jackson & Kansas City Railroad Company in the circuit court of Greene county, growing out of the same collision. The injunction issued on this answer and cross-bill restrained Virginia M. Barnes from prosecuting her suit against the Mobile, Jackson & Kansas City Railroad Company, and also her suit against the Mobile, Jackson & Kansas City Railroad Company and the Gulf & Ship Island Railroad Company jointly. On December 2, 1908, the Gulf & Ship Island Railroad Company presented a second supplemental bill against Virginia M. Barnes, John Goldsby, Maggie Gilbert, the Mobile, Jackson & Kansas City Railroad Company, and one L. W. Youmans, to Judge W. H. Hardy, and obtained another injunction against L. W. Youmans, to restrain him from prosecuting a suit he had brought in the circuit court of Jones county against the Gulf & Ship Island Railroad Company and the Mobile, Jackson & Kansas City Railroad Company jointly for injuries sustained by him in the same collision, while a passenger on the Mobile, Jackson & Kansas City Railroad Company's train.

Some comment is made by the learned counsel for the appellee to the effect that Mrs. Gilbert was never made a party, and to the effect that certain of the writs were not served on all the parties against whom they were prayed to be issued, and that none of the defendants appeared at said proceedings, except Virginia M. Barnes and John Goldsby, who filed demurrers and motions to dissolve injunctions against them, and the Mobile, Jackson & Kansas City Railroad Company, which filed its answer and cross-bill as hereinbefore stated. To this it is replied by the learned counsel for appellants that none of these points were made in the court below, and that the object of the attorneys for all the parties to these various proceedings is to have this court determine, once for all, whether the equitable jurisdiction to avoid multiplicity of suits can be invoked on the case thus shown by the record. We shall therefore deal with the case generally, without reference to these minor objections.

The collision in question occurred on July 12, 1907, at an intersection of the Mobile, Jackson & Kansas City Railroad and the Gulf & Ship Island Railroad near the city of Hattiesburg. It will be noted, as a peculiar feature of the litigation, that the two railroads in question in some respects seem to be making common cause against all the plaintiffs suing them, whether separately or jointly. As an example, the attitude of the Mobile, Jackson & Kansas City Railroad Company is that by its cross-bill it not only seeks to recover \$2,000 from the Gulf & Ship Island Railroad Company for damages to its locomotive and cars, but at the same

time enjoins Mrs. Barnes and Maggie Gilbert from prosecuting their suits against it; and so the Gulf & Ship Island Railroad Company also seeks to enjoin Mrs. Barnes and John Goldsby from prosecuting their suits against it—one for the death of her husband, and one for a personal injury—while at the same time it is contesting with the Mobile, Jackson & Kansas City Railroad Company the question of its liability to that company for alleged damages done to the locomotive and cars of the Mobile, Jackson & Kansas City Railroad Company. In other words, these two railroad companies occupy the attitude of seeking to contest with each other in a court of chancery the question of damages to the locomotive and cars of the Mobile, Jackson & Kansas City Railroad Company, and at the same time both said railroads by means of injunctions are seeking to enjoin all the plaintiffs, in all their suits at law, from prosecuting their suits at law. It appears, from the declarations, that Mrs. Barnes sued for the death of her husband, who was the engineer of the Mobile, Jackson & Kansas City Railroad at the time of the collision. John Goldsby sues for damages sustained from an injury to his leg; he being a fireman on the same locomotive of the Mobile, Jackson & Kansas City Railroad Company, operated by Mr. Barnes as engineer. Maggie Gilbert and Youmans were both passengers on the same train of the Mobile, Jackson & Kansas City Railroad Company, and were hurt in the collision, and sue for damages. The Mobile, Jackson & Kansas City Railroad Company claims damages for injury to its cars and locomotive, and sues the Gulf & Ship Island Railroad Company for such damages. One of the defenses set up against Mrs. Barnes is the contributory negligence of her husband. Again, section 4896 of the Code of 1906 provides as follows: "Where the main track of two or more railroads shall cross at grade, and the companies owning and operating them shall establish at the crossing an interlocking, derail or other safety device, the commission, if satisfied that it is sufficient to protect persons and property from danger at the crossing, may authorize the railroad companies to run their trains over it without stopping at a rate of speed to be fixed by the commission, and in such event the companies shall not be liable to any penalty for failing to stop their trains before running them over the crossing." "Where interlocking or other safety device is used, trains need not stop before crossing." Laws 1896, p. 75, c. 61.

The declarations of Mrs. Barnes and John Goldsby charge that these roads did cross at grade, and that the interlocking device had been established, and that at the time of the collision, and for some time prior thereto, it was not in working order, and was spiked down, but that this fact was not known to Engineer Barnes. They further charged that

the Mobile, Jackson & Kansas City Railroad Company had obtained the consent of the railroad commission to run over the crossing without stopping, which fact was known to Engineer Barnes, and that on this account he was accustomed to run over the said crossing without stopping, but that the Gulf & Ship Island Railroad Company did not have such permission. Now, it is perfectly obvious that it was the duty of both these railroads to keep this interlocking device in order, so far as the public were concerned, and that both were negligent as regards the public in not doing so. If the negligence of the Mobile, Jackson & Kansas City Railroad Company in this particular would prevent its recovery from the other railroad for damages to its locomotive and cars, such negligence, nevertheless, would in no way affect the right of Mrs. Barnes and John Goldsby to recover from the Gulf & Ship Island Railroad Company, nor the right of Mrs. Gilbert and Youmans.

Again, if, under section 1985, Code of 1906, the proof should show that the death of Barnes, and the injuries to Mrs. Gilbert, to Goldsby, to Youmans, and to the locomotive and cars of the Mobile, Jackson & Kansas City Railroad Company, were all caused by the running of the locomotive of the Gulf & Ship Island Railroad Company, then manifestly there would arise prima facie cases for all these parties against that company; and that company, the Gulf & Ship Island Railroad Company, might overcome this presumption by proof that its locomotive was operated in the manner required by law, and not negligently. Suppose, however, the proof should show that the locomotive of the Gulf & Ship Island Railroad Company was negligently operated, and that this negligent operation was the proximate cause of the death of Barnes, the injury of the other persons, and the damage to the locomotive and cars of the Mobile, Jackson & Kansas City Railroad Company; then the Gulf & Ship Island Railroad Company would be liable for all the injuries and damages, unless it could show contributory negligence on the part of the servants of the Mobile, Jackson & Kansas City Railroad Company, in charge of that company's locomotive, in which case the Gulf & Ship Island Railroad Company would not be liable to Mrs. Barnes for the death of her husband, nor to the Mobile, Jackson & Kansas City Railroad Company for the damage to its locomotive and cars.

Let us take one other view of this curiously conceived bill, and let us present this feature of the case in the language of the very able brief of the learned counsel for appellee. The counsel say:

"The amended and supplemental bills of the Gulf & Ship Island Railroad Company and the cross-bill of the Mobile, Jackson & Kansas City Railroad Company allege that the same law and facts apply to all the par-

ties injured in the collision, yet it may be possible under the law and the testimony for both roads to escape liability for the death of the engineer Barnes; but it is utterly impossible for both roads to avoid liability to John Goldsby and the passengers, Mrs. Gilbert and Youmans, for the two locomotives collided on the crossing, thus causing the injuries, and it is inconceivable that the fireman and the passengers could be responsible for the collision, but one or the other of the railroad companies, or perhaps both, are responsible. Therefore the same law and facts do not apply to all the persons suing. If the collision was caused by the negligence of Barnes, then Mrs. Barnes cannot recover from either of the railroad companies; but the very negligence of Barnes would entitle the injured passengers and John Goldsby to recover from the Mobile, Jackson & Kansas City Railroad Company, and would prevent the Mobile, Jackson & Kansas City Railroad Company from recovering against the Gulf & Ship Island Railroad Company for damages to the locomotive and cars, for the reason that the negligence of Barnes is the negligence of the Mobile, Jackson & Kansas City Railroad Company.

"If these cases were being tried separately in the circuit court, as they should be, but for these injunctions, the following would be about the way the cases would be tried:

"(a) In the case of Mrs. Barnes v. Gulf & Ship Island Railroad Company the plaintiff would prove that Barnes was the engineer of the Mobile, Jackson & Kansas City Railroad Company; that he was proceeding over the crossing under the belief that the derail switch was in good order, and with the consent of the commission to pass over without stopping, and that he had a clear board; that the engineer of the Gulf & Ship Island Railroad Company was seen by witnesses to approach the crossing at high speed, and that he was signaled to stop, but ignored the signals, and the collision occurred, and Barnes was killed. The defendant would attempt to contradict this testimony, especially as to the manner in which its engineer approached the crossing, and would try to show that Barnes was guilty of contributory negligence. This defense would be met by the contention that the Gulf & Ship Island Railroad Company engine was run over the crossing in a reckless and criminally negligent manner, and that contributory negligence would not avail to avoid liability.

"(b) In John Goldsby v. Gulf & Ship Island Railroad Company the sole question would be the negligent operation of the switch engine of the Gulf & Ship Island Railroad Company as the proximate cause of the injury. No question of contributory negligence could arise on this trial. No evidence in regard to the derail switch and the duty to keep it in repair would be admissible.

"(c) The cases of Mrs. Gilbert and You-

mans against the Gulf & Ship Island Railroad Company would be controlled largely by the same law and evidence as the John Goldsby case, except evidence of the nature of the injuries sustained. This evidence would have to be established by different witnesses in all the cases."

The trial of the case of Mobile, Jackson & Kansas City Railroad Company v. Gulf & Ship Island Railroad Company would not be controlled by the same law and evidence as the other cases, or any one of them, entirely. The question of contributory negligence of the engineer of the Mobile, Jackson & Kansas City Railroad Company might be raised by the Gulf & Ship Island Railroad Company; but the further question which might arise between the railroads as to the special duty of one or the other to keep the derail switch in operation or repair, and in the event the Gulf & Ship Island Railroad Company should prove that it was the duty of the Mobile, Jackson & Kansas City Railroad Company under a special arrangement to keep the derail switch in repair, and it had neglected to do this, and this was the cause of the injury, the breach of duty of the Mobile, Jackson & Kansas City Railroad Company would prohibit recovery by it; but the other persons injured would not be bound by this arrangement, for as to them it was the duty of both roads to keep the derail switch in repair. Other questions of law and fact can arise between these railroads that the other litigants can have no interest in.

"Looking at this case from the standpoints of the suits against these railroads jointly, we see, for the reasons given above, that the same law and facts will not apply to all the persons injured. In such event the Mobile, Jackson & Kansas City Railroad Company would not be governed and controlled by any law applicable to the plaintiffs suing the roads jointly. If the suits should not be tried against the Gulf & Ship Island Railroad Company individually, nor against the two roads jointly, but should be tried against the Mobile, Jackson & Kansas City Railroad Company individually, then the Gulf & Ship Island Railroad Company is not concerned in the litigation at all, and the law and the facts would not apply alike to all the parties suing; nor would the same law and facts apply in the defense of the Mobile, Jackson & Kansas City Railroad Company, for some of the persons suing were its servants and others were its passengers."

It surely cannot be necessary to do more than thus clearly state the case made by this record, to show that equity has no sort of jurisdiction in this case; that the grounds upon which jurisdiction of equity may be successfully invoked in order to present a multiplicity of suits have no existence in this case. The true ground of this equitable jurisdiction was most admirably stated by Chalmers, Justice, in the opinion of this court in

Pollard v. Okolona Savings & Trust Co., 61 Miss. 203. And this same doctrine has been announced in *Nevitt v. Gillespie*, 1 How. (Miss.) 108, 28 Am. Dec. 696. Yet, strange to say, in the case of *Tribette v. I. C. Railroad Co.*, 70 Miss. 192, 12 South. 32, 19 L. R. A. 660, 35 Am. St. Rep. 642, the directly opposite doctrine was laid down, without the slightest reference being made to either the *Nevitt-Gillespie* Case or the *Pollard-Okolona Savings & Trust Co. Case*. This court has in many cases recently most carefully re-examined this whole subject, and has re-established the doctrine announced in *Pollard v. Okolona Savings & Trust Co.*, and overruled the case of *Tribette v. I. C. Railroad Co.* These latter cases to which we refer are *Railroad v. Garrison*, 81 Miss. 257, 32 South. 996, *Crawford v. Railroad Co.*, 83 Miss. 708, 36 South. 82, 102 Am. St. Rep. 476, *Tisdale v. Fire Ins. Co.*, 84 Miss. 709, 36 South. 568, and *Whitlock v. Railroad*, 91 Miss. 779, 45 South. 861. All these cases receive the hearty indorsement of the learned counsel for both the appellant and appellee in this cause.

There is a scant suggestion in the brief of the learned counsel for appellant, that the *Whitlock Case* is authority for the exercise of this jurisdiction here; but that contention is not seriously pressed, as most manifestly it could not possibly be. That the total dissimilarity of the two cases, so far as the exercise of this jurisdiction in prevention of the multiplicity of suits is concerned, may appear at a glance, it is only necessary, having set out the facts making this case, to now set out, over against them, the facts making the *Whitlock Case* in 91 Miss. 779, 45 South. 861. What were those facts? These in brief: That *Whitlock* and 49 other negroes had sued the *Yazoo & Mississippi Valley Railroad Company* for damages in 49 separate actions at law. Each one of these plaintiffs claimed to have been a passenger on the very same excursion train, and that he was unreasonably delayed on that train by the negligence of the railroad company, and each demanded actual and punitive damages for the delay, and the demand of each was based upon the identical facts on which the demand of every other plaintiff was based, and the principles of law applicable to each one of these 49 suits were precisely the same. It certainly would be idle to waste further time showing the utter lack of similarity between these two cases. The *Whitlock Case* rested, like all the other cases, securely upon the basic proposition that this jurisdiction is exercisable where the principles of law are identically the same and the facts are substantially the same. Indeed, one of the learned counsel for appellees not only correctly says that the *Whitlock Case* was properly decided, but that it is perfectly manifest it is not at all analogous to the case under consideration, and further states the correct proposition that the *Whitlock Case* is supported in all

particulars by the recent case of *Southern Steel Co. v. Hopkins*, decided by the Supreme Court of Alabama on the 13th of February, 1908, and reported in 47 South. 274, to which we especially refer. It is too plain for serious discussion that the same principles of law will not apply in all the suits here involved, and just as plain that the same facts will not determine the liability in all the various suits. It would be needless to enter into any further detailed statement to show this. What we have quoted from the very able brief of the learned counsel for appellee has already demonstrated that beyond cavil.

Before passing from this discussion of the true principle on which the equitable jurisdiction to prevent multiplicity of suits in reason rests, we must call especial attention to the masterly opinion of Chief Justice Tyson, of Alabama, in the case of *Southern Steel Co. v. Hopkins et al.*, 47 South. 274, just above referred to. In the judgment of the writer of this opinion, this is the ablest discussion of the subject he has met with in any of the Reports, and we will therefore be pardoned for a liberal quotation from that opinion. That court says, at page 276:

"The question here, then, is: What is the principle upon which equity interferes to avoid a multiplicity of suits? In determining this, it may be borne in mind that the jurisdiction is not to be invoked when the remedy at law is plain, adequate, and complete, and that no court has the right to infringe upon the wholesome doctrine of multifariousness which prevents a mingling in one suit of entirely distinct and separate causes of action between different parties. Subject to these restrictions, the principle and rule is that where numerous parties are jointly and severally claiming against one, or where one is claiming against many liable or severally, and the same title or right of defense will be called in question, and will be determinative of the issue for or against all, a case for the interposition of equity to avoid a multiplicity of suits is made, without the aid of any independent equity. The fact that this unity of claim or defense frequently or generally arises from privity or joint action by or between the many affords an obvious instance of the application of the rule, and it has induced some to suppose that the junction and unity of interest calling for the application of the rule is limited to such cases. But the association and unity of interest in the many as to the other party may be brought about just as well by the nature of the transaction, or the situation and relation of the parties, independent of all privity or joint action. And therefore privity, or joint right or liability, although good examples for the application of the principle, afford no test for the propriety of its application.

"The case made by the bill in this case is this: An explosion in a coal mine killed 110 persons. The several administrators of these

persons have brought several suits against the appellant as the owner and operator for damages, insisting that its negligence was the proximate cause of the accident. The appellant in effect says, if these actions are allowed to proceed at law, it will be ruined in costs and expenses, though it be successful in every suit; that the plaintiffs are all insolvent, and thus could not pay the taxed costs against them, should they be unsuccessful; that the suits are pending in different courts, and will be called for trial in different courts at the same time; that by reason of this, and the necessity of having the same witnesses in each trial, it is impossible for the defendants to present a proper defense to these multitudes of claims. The appellant says, moreover, that it has one and the same and a perfect defense or defenses to all these suits, which will be put forward in each case, and which will be determinative of all alike; and on this ground it is insisted that this is a plain case for the application of the jurisdiction of a court of equity to avoid a multiplicity of suits. We agree with this contention on principle.

"The first thing to obliterate from the mind in considering the question is that it is immaterial how the unity of title, claim, or defense is brought about. It is the factum of a single title against many, or a common defense against many, which is the foundation of the jurisdiction. A vested right of property and a vested cause of defense for protection against liability stand precisely on the same basis; and whence and how such right originated is wholly immaterial. 8 Cyc. 911; *Pritchard v. Norton*, 106 U. S. 125, 132, 1 Sup. Ct. 102, 27 L. Ed. 104. If the unfortunate persons who lost their lives by the explosion had jointly leased the mine, and their administrators had instituted several actions, as in this case, against the owner, it is conceded that the privity between the plaintiffs established by the contract would justify a bill to have the question of liability determined in one suit. But why? Only because a single and common defense would, if successful, determine all the suits. Suppose, however, the owner leased to a third party, instead of the operators, and the same accident happened, and a thousand suits were brought or threatened by solvent, or especially by insolvent, parties; what reason is there for, or could there be for, denying the jurisdiction to enforce in a single suit the common cause of defense against all? Ingenuitly, we think, cannot discover a substantial distinction between the two cases, under which the owner in one instance may take shelter in a court of equity against the wrongful and vexatious suits, while in the other he must submit to financial ruin in defending a thousand vexatious actions at law."

The learned Chief Justice Tyson then goes on to show, by reference to the case of *Lord Tenham v. Herbert*, 2 Atk. 483, and other

English cases, that that doctrine has been "followed and approved in England to the present day." He especially refers to the case of *Sheffield Waterworks v. Yeomans*, L. R. 2 Chan. 8, decided in 1866. Chief Justice Tyson then proceeds further to show that the same view, the correct modern view, was approved in *Hale v. Allinson*, 188 U. S. 77, 23 Sup. Ct. 244, 47 L. Ed. 380, and in *Bitterman v. L. & N. R. Co.*, 207 U. S. 205, 28 Sup. Ct. 91, 52 L. Ed. 171, decided in 1907, that great court in those two cases holding "that it did not require a common title, nor community of right or interest in the subject-matter, among the defendants, but only a common interest in the questions of law or fact in controversy." In concluding his opinion, Chief Justice Tyson reviews both the case of *Turner v. Mobile*, 135 Ala. 77, 33 South. 132, and *Tribette v. Railroad Co.*, 70 Miss. 182, 12 South. 32, 19 L. R. A. 660, 35 Am. St. Rep. 642. In speaking of the case of *Turner v. Mobile*, he distinguishes that case from the fourth class of cases mentioned by Mr. Pomeroy; but he frankly says that there are many expressions in the opinion in *Turner v. Mobile* that cannot be approved, but that those expressions are not to be taken as decision, but the *Turner Case* is to be looked at, as every case should be looked at, in the light of the exact facts before the court. He thus distinguishes that case, the case of *Turner v. Mobile*. Then, turning to the case of *Tribette v. Railroad Company*, supra, he says as follows:

"The case, however, of *Tribette v. Railroad Co.*, 70 Miss. 182, 12 South. 32, 19 L. R. A. 660, 35 Am. St. Rep. 642, is directly opposed to our views. That case we consider as overruled by the subsequent one in the same court of *Hightower & Crawford v. Railroad Co.*, 83 Miss. 708, 36 South. 83, 102 Am. St. Rep. 476, in which the court expressly approved the view repudiated in the *Tribette Case*. It is said in the *Hightower Case*: 'We think the doctrine announced by Pomeroy is sound and clearly established by the best-considered modern cases.' After this repudiation of the *Tribette Case* by the Supreme Court of Mississippi, we will not follow the reasoning of the opinion in that case to point out its defection from and opposition, in our opinion, to the ancient, as well as modern, view of the extent of the jurisdiction of courts of equity in reference to multiplicity of suits. That jurisdiction is too well established and too beneficent, when wisely exercised, to be any longer called in question. It would be a strange casus in juridical evolution to meet the needs of society if there was no remedy against a party being vexatiously prosecuted at the same time by over 7,000 separate invalid claims held by insolvent plaintiffs, as in the *Sheffield Waterworks Case*, L. R. 2 Chan. 8, when each case is founded upon the same facts, and when it is alleged and admitted, by the

objection to the jurisdiction, that there is a defense common to all the claims. It is to avoid the monstrosity of such a result that the court of chancery extends its plenary jurisdiction to stay the proceedings at law until the question of liability can be determined in one suit, and therefore we hold that the bill in the case was well filed."

There are one or two other observations due to be made. First, it is said by one of the learned counsel for appellant, that the principal controversy in this case is whether the *Mobile, Jackson & Kansas City Railroad Company* is liable, or the *Gulf & Ship Island Railroad Company* is liable. This is an ingenious effort to save the case, but it cannot suffice so to do. The injunctions here were not sued out on the ground that the complainant, the *Gulf & Ship Island Railroad Company* was likely to be held liable twice for the same injury, because it was sued individually, and also jointly with the *Mobile, Jackson & Kansas City Railroad Company*. Indeed, there could be but one recovery, and that recovery against one railroad could be pleaded in bar of any other suit for the same injury. Besides, the mere doubt as to which railroad was responsible falls far short of entitling this jurisdiction to be exercised, in view of the manifest differences in other respects, both as to principles of law applicable, and as to the different facts involved in the different suits by the different parties. Again, it must be remembered that there is a very marked difference between a "multiplicity of suits" and "a multitude of suits." It is not because there are so many suits that this jurisdiction is exercised; but it is only where, there being many suits, they may all be determined by the same principles of law and the proof of practically the same facts. In other words, mere multitude of suits does not confer this jurisdiction, but it is conferred solely by the existence of a condition precedent, no matter how many suits there shall be, that all of them may be determinable by the application of the same principles of law, and by the establishment of practically the same facts. See *High on Injunctions*, p. 329; *Murphy v. City of Wilmington*, 6 Houst. (Del.) 139, 22 Am. St. Rep. 345. And especially see *Hale v. Allinson*, 188 U. S. 77, 23 Sup. Ct. 252, 47 L. Ed. 380.

We quote from this last case the following: "Manifestly, as it seems to me, the defendants have no common interest in these questions, or in the relief sought by the receiver against each defendant. The receiver's cause of action against each defendant is, no doubt, similar to his cause of action against every other; but this is only part of the matter. The real issue, the actual dispute, can only be known after each defendant has set up his defense, and defenses may vary so widely that no two controversies may be exactly,

or even nearly, alike. If, as is sure to happen, differing defenses are put in by different defendants, the bill evidently becomes a single proceeding only in name. In reality it is a congeries of suits, with little relation to each other, except that there is a common plaintiff, who has similar claims against many persons. But as each of these persons became liable, if at all, by reason of a contract entered into by himself alone, with the making of which his codefendants had nothing whatever to do, so he continues to be liable, if at all, because he himself, and not they, has done nothing to discharge the liability. Suppose A. to aver that his signature to the subscription list was a forgery; what connection has that averment with B.'s contention that his subscription was made by an agent who had exceeded his powers, or with C.'s defense that his subscription was obtained by fraudulent representations, or with D.'s defense that he has discharged his full liability by a voluntary payment to the receiver himself, or with E.'s defense that he has paid to a creditor of the corporation a larger sum than is now demanded? These are separate and individual defenses, having nothing in common; and upon each the defendant setting it up is entitled to a trial by jury, although it may be somewhat troublesome and expensive to award him his constitutional right. But, even if the ground of diminished trouble and expense may sometimes be sufficient, I should still be much inclined to hesitate before I conceded the superiority of the equitable remedy in the present case. Such a bill as is now before the court is certain to be the beginning of a long and expensive litigation. The hearings are sure to be protracted. Several, perhaps many, counsel will no doubt be concerned, whose convenience must be consulted. The testimony will soon grow to be voluminous. The expense of printing will be large. The costs of witnesses will not in any degree be diminished, and, if some docket costs may be escaped, this is probably the only pecuniary advantage to be enjoyed by this one cumbersome bill over separate actions at law. We are in accord with the views thus expressed, and we therefore must deny the jurisdiction of equity, so far as it is based upon the asserted prevention of a multiplicity of suits." The above we think directly applicable to this case.

Finally, there is one other most important fact to which attention should be called, and that is that the Gulf & Ship Island Railroad Company, in all its bills, never once set up its defenses to any of the several actions. It merely says that it was not liable, without showing by any statement of facts, why it was not liable in any of the cases. Before any injunction should be issued in the exercise of this jurisdiction, the bills should show, by a statement of the facts, plainly, that the complainant has a good cause of ac-

tion, whether by way of claim or defense, either legal or equitable. It need not necessarily be an equitable cause of action. This principle is clearly stated in *Pomeroy, Equity Jurisdiction*, vol. 1, p. 365: "In the first place, and as a fundamental proposition, it is plain that prevention of a multiplicity of suits is not, considered by itself alone, an independent source or occasion of jurisdiction, in such a sense that it can create a cause of action where none at all otherwise existed. In other words, a court of equity cannot exercise its jurisdiction for the purpose of preventing a multiplicity of suits in cases where the plaintiff invoking such jurisdiction has not any prior existing cause of action, either equitable or legal—has not any prior existing right to some relief, either equitable or legal. The very object of preventing a multiplicity of suits assumes that there are relations between the parties out of which other litigations of some form might arise. But this prior existing cause of action, this existing right to some relief, of the plaintiff, need not be equitable in its nature"—citing *Storrs v. Pensacola & A. R. R. Co.*, 29 Fla. 617, 11 South. 226, 231; *Roland Park Co. v. Hull*, 92 Md. 301, 48 Atl. 366; *Turner v. City of Mobile*, 135 Ala. 73, 33 South. 133, 141; *Purdy v. Manhattan El. R. R. Co.* (Com. Pl.) 13 N. Y. Supp. 295; *Alleghany & K. R. R. Co. v. Weidenfeld*, 5 Misc. Rep. 43, 25 N. Y. Supp. 71, 76.

In the case of *Storrs v. Pensacola & A. R. R. Co.*, 29 Fla. 618, 11 South. 231, that able court said: "A reading of the bill discloses the fact that no community of title or right, or joint interest in the subject-matter of the suit, is alleged in the persons sought to be enjoined; but it does appear that there is a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind of relief asked against each individual person insisting on similar claims against appellee. In view of the fact that the bill fails to allege any sufficient defense, either at law or in equity, on the part of appellee in the suits instituted or threatened, it becomes unnecessary for us to decide whether or not its allegations are sufficient in other respects to justify the interposition of the court of chancery by injunction. The jurisdiction of chancery to prevent a multiplicity of suits cannot be extended to confer upon a party remedial rights where none of any kind existed before. Its exercise necessarily assumes that the complainant in the class of cases before us has some defense, either legal or equitable, to the numerous suits instituted or threatened against him."

There need be no apprehension that this court will ever recede from the doctrine approved by all the best-considered modern authorities, the doctrine as announced in *Pollard v. Okolona Savings & Trust Co.*, 61 Miss. 293, or that we will hesitate to approve the

exercise of this equitable jurisdiction to prevent multiplicity of suits, in a case falling within the limitations marked out in that case, and in the later cases recently decided by this court. But, when this court is asked, on facts such as appear in this record, to approve the exercise of this jurisdiction in this sort of case, it is asking what no court of equity could by any possibility be brought to consider for one moment.

Just look, in one closing view, at the incongruities of the situation. Here Mrs. Barnes has brought two actions at law, she being the widow of the deceased engineer, an employé of the Mobile, Jackson & Kansas City Railroad Company—one suit against the Mobile, Jackson & Kansas City Railroad Company, and one against the Mobile, Jackson & Kansas City Railroad Company and the Gulf & Ship Island Railroad Company jointly. Her husband was an employé of the one company, and not of the other. Her rights of action, as regards the two railroads, were distinct in many respects. So Goldsby sues, being an employé of the Mobile, Jackson & Kansas City Railroad Company, not an employé of the Gulf & Ship Island Railroad Company. One of the defenses against Mrs. Barnes is the contributory negligence of her husband. That defense is not pleaded against the other plaintiffs, and in some of these suits manifestly could not be pleaded against some of the plaintiffs. Mrs. Gilbert sues in the capacity of passenger on the Mobile, Jackson & Kansas City Railroad, and, it is to be specially noted, sues on an entirely distinct ground from any of the other suits, to wit, that the collision occurred from the negligence of the tower employé in not giving the proper signals to the engineers on the two engines on the two railroad trains. Here is a wholly different cause of action presented by Mrs. Gilbert from any in the entire list of cases. Again, the Mobile, Jackson & Kansas City Railroad Company sues the other railroad company for damages to its locomotive and cars, raising a question in which these two railroads are concerned, but with respect to which the other parties have no concern whatever.

And, lastly, the questions which arise in respect to section 4896, Code of 1906, under the facts in this record, are wholly different, according to the parties whose rights are being considered. In short, there is no possible view of the particular case made by the precise facts in this record under which the exercise of this equitable jurisdiction is entitled to be invoked. And let it always be kept religiously in mind that what a court always decides is the exact case made by the precise facts in the particular record examined.

From these views it follows that the decree of the court below was correct, and it is affirmed.

(34 Miss. 595)

ADAMS v. BANK OF MEADVILLE.

(No. 13,786.)

(Supreme Court of Mississippi. March 29, 1909.)

APPEAL AND ERROR (§ 935*)—REVIEW—INSUFFICIENT RECORD.

The attachment sued out by a creditor of a failing bank was levied at 4 a. m. February 17th. At 11:50 p. m. February 16th a bill had been filed against the bank for the appointment of a receiver. The decree appointing a receiver was filed at 6 a. m. February 17th, and the receiver took charge of the property. The creditor obtained judgment and applied for an order directing the receiver to pay the debt, or, in default thereof, release the property levied on. The record on appeal contained no showing as to the prior right of the creditor, or that the property was not subject to mortgages, attachments, or other liens superior in right. *Held* that, in view of the record, the motion would not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 935.*]

Appeal from Chancery Court, Franklin County; J. S. Hicks, Chancellor.

Suit by E. C. Adams against the Bank of Meadville. From a decree denying relief, complainant appeals. Affirmed and remanded.

McKnight & McKnight, for appellant.

FLETCHER, J. Appellant, a creditor of the Bank of Meadville, a failing institution, sued out an attachment against the bank and levied on certain property here in controversy. This attachment was levied at 4 o'clock on the morning of February 17th. At 11 o'clock on the evening of February 16th a bill had been filed against the bank by Mrs. Norma M. Hardy, praying among other things for the appointment of a receiver. The decree appointing a receiver was filed at 6 o'clock on the morning of February 17th, and the receiver so appointed took charge of the property in controversy. By leave of the chancery court in which the receivership proceedings are pending, the plaintiff in attachment prosecuted his suit to final judgment. Thereupon Adams applied to the chancery court for an order directing the receiver to pay his debts, or in default thereof to release the property levied on, that a sufficiency thereof might be sold to satisfy his judgment. This application was denied by the chancery court, and Adams appeals.

Appellant contends in the first place that he should prevail, for the reason that the appointment of the receiver was illegal, because made before the suit was filed. This contention is disposed of in the case of *Bank of Meadville v. Mrs. Norma M. Hardy* (decided March 22, 1909) 48 South. 731, in which case the validity of this precise appointment is upheld upon grounds fully set forth in the opinion in that case. In the second place, it is insisted that appellant should prevail because his attachment was levied before the decree appointing the receiver was filed, and that

for this reason his right to subject the property is superior to the receiver's right to possession. It is sufficient to say that on this meager record we cannot say that the chancellor was wrong. There is no showing here as to the prior right of the attaching creditor. For all we can tell from this record, this very property may be subject to mortgages, attachments, or other liens which are prior in time or superior in right to the claim of appellant. We cannot know what consideration controlled the chancellor in denying the application. We can only say now that this case must be developed further on the proof before we are called upon to decide between this creditor and others in respect to property the true status of which is left in doubt.

Affirmed and remanded.

(94 Miss. 413)

COOPER et al. v. MOBILE, J. & K. C. R. CO. (No. 13,566.)

(Supreme Court of Mississippi. March 22, 1909.)

RAILROADS (§ 60*) — STATIONS — CHANGE OF LOCATION.

A railroad company having been restrained from abandoning the old location of its road through a town after it had constructed a new line and built a depot thereon, it cannot be restrained from removing the new depot to the old location, though the location of the depot was not directly involved in the litigation.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 134; Dec. Dig. § 60.*]

Appeal from Chancery Court, Pontotoc County; J. Q. Robins, Chancellor.

Bill by J. W. Cooper and others for injunction against the Mobile, Jackson & Kansas City Railroad Company. From a decree for defendant, complainants appeal. Affirmed.

C. Lee Orum, for appellants. Flowers & Whitfield, for appellee.

BRAME, Special Judge. This is an appeal from a decree dissolving an injunction and dismissing a bill, which bill was filed in the court below July 20, 1908, by appellants to enjoin appellee, the Mobile, Jackson & Kansas City Railroad Company, from removing its depot from the present site in the western part of the town of Pontotoc to what is known as the old site near the center of the town, and where the old depot of the Gulf & Chicago Railroad Company was before it was destroyed by fire. The history of the case is substantially as follows:

The appellee operates a railroad from Mobile, Ala., to Middleton, Tenn., which railroad traverses Pontotoc and other counties in the state of Mississippi. That part of the line extending from a point near Decatur, Miss., to Middleton, Tenn., is owned by the Gulf & Chicago Railroad Company, and

was leased by the appellee about the year 1903. The Gulf & Chicago Railroad Company had built a narrow-gauge railroad from Middleton, Tenn., down to the town of Pontotoc, and this had been operated as a narrow-gauge road some time prior to the lease. In the year 1903 the Gulf & Chicago Railway Company, with a Tennessee corporation of the same name, presented a petition to the Mississippi Railroad Commission asking leave to consolidate under the name of the Gulf & Chicago Railroad Company, and agreeing to widen and standardize the narrow-gauge road from Middleton, Tenn., to the southern terminus near Decatur. It seems that there was some controversy as to whether the petitioners obligated themselves to broaden and standardize the narrow-gauge line throughout its entire length; but in the litigation hereinafter referred to this court upheld the contention of the Railroad Commission that there was such an obligation. When the narrow-gauge road was being operated from Middleton to Pontotoc, the southern terminus was at the depot in the town of Pontotoc, and in a valley. After the Railroad Commission had given its consent to the consolidation, and about the time of the above-mentioned lease, work was begun to standardize the line and extend it southward from Pontotoc. The railroad company decided that it would be cheaper and better to change the location of the line at the town of Pontotoc, and, instead of extending it south from the old depot, to diverge to the westward, about a mile and a half north of Pontotoc, and run the line through the western part of the town. The purpose of the railroad company was thus to abandon a part of the old narrow-gauge road, and it was claimed that this was not a violation of the agreement made with the Railroad Commission at the time it gave its consent to the consolidation. Thereupon the deflection was made, and the railroad was built around on the hills and through the western part of the town of Pontotoc, as the corporation limits had then been extended. Meantime the old depot building at the southern terminus of the narrow-gauge line in the town of Pontotoc had been destroyed by fire, and the question arose as to building another depot.

About this time a petition of citizens was presented to the Railroad Commission to require the railroad company to rebuild the depot on the old site, and a counter petition opposing this was also filed; it being the desire of the counter petitioners and the railroad company at the time to have the depot at a point on the diverted line about three-quarters of a mile west of the site of the old depot. On January 12, 1904, the petition and counter petition came on to be heard before the Railroad Commission, which had visited the town of Pontotoc and examined

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the two proposed sites, when the following action was taken by the commission: "Ordered, that the Gulf & Chicago Railroad Company, leased by the Mobile, Jackson & Kansas City Railroad Company, erect a freight and passenger depot of sufficient size and dimensions to transact the business of the said town of Pontotoc, on the old site or on the grounds now occupied by them as a temporary depot; that said work be commenced not later than the 20th day of January, 1904, and completed within 90 days from said date, on or about April 20, 1904." The railroad company did not desire to obey this order, and thereupon shortly afterwards it filed its bill in the United States Circuit Court for the Southern District of Mississippi, seeking to enjoin the commission from enforcing the order. A preliminary injunction was granted, and while this was pending negotiations were had by the railroad company with certain citizens of Pontotoc, who desired to have the depot located on the new site, and accordingly it was determined to build it there and it was so built, and stands there to this day.

It appears from the record that the railroad company believed that the courts would finally decide that it was proper to locate the depot upon this new site. The road having been diverted and built through the western part of the town, and a small portion of the old line having thus been abandoned, on August 3, 1904, the state of Mississippi and the Railroad Commission joined in a bill in the chancery court of Pontotoc county, against the railroad company and its lessor, seeking to enjoin the defendants from abandoning that part of the line extending from the point of deflection on the north down to the old depot site in the town of Pontotoc, and a preliminary injunction was granted. The order of the Railroad Commission above mentioned was not directly involved in this litigation, but the location of the line of railroad through the town was involved; for if the old line was to be followed, unless there should be two depots, the location of the depot site was indirectly involved. A motion was made by the defendants to dissolve this injunction, which motion was sustained, and the complainants appealed to this court, and upon full consideration the decree was reversed, and the injunction was reinstated, and the cause was remanded. For a full report of this case, see *State v. Railroad Co.*, 86 Miss. 172, 38 South. 732, 122 Am. St. Rep. 277. The cause, being remanded, was again heard in the chancery court of Pontotoc county, and on March 10, 1906, a decree was rendered in favor of complainants, making perpetual the injunction which had been granted to prevent the abandonment by the railroad company of the old line. By its decree the court found as a fact that the citizens of the town of Pontotoc had never given their consent to the change of the depot from the old site to the new. From

this decree the defendants prosecuted an appeal to this court at the November term, 1906, and the case was again considered by this court, and the decree was affirmed. See *Railroad Co. v. State*, 89 Miss. 724, 41 South. 259, 122 Am. St. Rep. 295. In delivering the opinion on that appeal, this court expressly stated that the location of the depot was not considered, but it was held that the old line had to be followed. The railroad company, still being unwilling to follow the old line, or to construct a depot on the old site, took the case to the Supreme Court of the United States, which on May 18, 1908, rendered a decision affirming in every respect the decision of this court. 210 U. S. 187, 28 Sup. Ct. 650, 52 L. Ed. 1016.

After the final decision by the Supreme Court of the United States, on June 15, 1908, Hon. R. V. Fletcher, as Attorney General of the state and as a citizen of the town of Pontotoc, filed a petition before the Railroad Commission, reciting therein the former order of the commission in reference to the depot site made January 12, 1904, and the litigation hereinbefore set out between the state and the Railroad Commission on the one hand and the railroad companies on the other, and the fact that a final decision had been rendered, as above set forth, fixing the location of the line of railroad, and reciting, also, that the injunction suit, which had been reinstated by the railroad companies to enjoin the execution of the order of the Railroad Commission made January 12, 1904, had been abandoned and dismissed; and it was prayed in this petition that the commission would make an order requiring the railroad companies to discontinue the use of the depot in the western part of the town of Pontotoc and comply with the former order of the commission as to the depot site. On June 17, 1908, this petition came on to be heard before the Railroad Commission, and an order was entered reciting the filing of the petition and that the railroad companies were present and consenting that the prayer of the petition should be granted, and thereupon it was ordered that the depot should be removed from its location to the old site, the order to be effective 30 days from its date. While the railroad companies steadfastly opposed following the old line and rebuilding the depot on that line, it seems that by this time they had become convinced that further opposition was futile, and thereupon it seems that a temporary arrangement was made between the railroad company and the representative of the state, by which the line as built and the depot as constructed should be used until such time as the road could be changed to the old line, when it was contemplated that the depot should be established and rebuilt on the old site.

This being the status of affairs, on July 20, 1908, the appellants, J. W. Cooper and 10 other citizens of Pontotoc, filed the bill in

this case against the appellee, the Mobile, Jackson & Kansas City Railroad Company, averring that on or about January 1, 1904, having no railroad depot in Pontotoc, the railroad company invited the co-operation of the citizens in determining the place at which a depot should be established, in order that it might be accessible and convenient for the citizens of the town and for the railroad company; that in response to said invitation there was a public mass meeting of the citizens of Pontotoc and vicinity, at which were present the officials of the defendant company; that a committee was appointed to consult with the officials of the company as to a proper and suitable location for the depot, with full authority to agree with such officials as to the location of the depot, having due regard to the convenience and accessibility thereof for the railroad company and the public; that the committee came to an agreement with the railroad company that the depot should be established at the present location in the western part of the town; that in accordance with this agreement the railroad company immediately thereafter in apparent good faith, claiming to believe that the place selected was most convenient and suitable for the depot, erected a commodious depot building and opened the same for the transaction of business; and that the same has since that time been maintained as the depot of the defendant. The bill further alleged that the place selected and agreed upon and being now used as a depot by the public and the defendant company is reasonably accessible and convenient for both the company and the public, and more so than any other location within the corporate limits of the town; that complainants, relying upon the express and implied agreement of the railroad company to maintain the depot at this place, expended large sums of money in the purchase and improvement of property situated near by, and that they are individually interested in having the depot maintained at said place. The bill further alleged that the railroad company, without lawful excuse or justification, threatened to and was undertaking to remove said depot building to another place, and would do so unless restrained by legal proceedings; that to discontinue said depot would be a great inconvenience to the public, and would cause special, pecuniary, and irreparable damage to plaintiffs. The bill further alleged that the company had no legal right to abandon said depot, and that the attempt to do so would be to exercise arbitrary and unlawful discretion. The bill prayed for a temporary injunction forbidding the defendant from removing the depot, and asked that on final hearing this injunction should be made perpetual and for general relief. The bill was sworn to, and an answer under oath was waived. By the fiat of the judge of the Third district the temporary injunction was ordered to issue upon the complainants giv-

ing bond, conditioned according to law, in the sum of \$1,500.

The injunction was duly issued, and the defendant railroad company answered the bill, not under oath, setting up as exhibits the records and opinions in the chancery suit above referred to, and also the orders of the Railroad Commission in reference to the location of the depot. The answer admitted the allegation as to there being no depot in the town, and the invitation to the citizens, and their participation in the selection of a depot site; admitted that the railroad company and a large part of the citizens agreed upon the location in the western portion of the town; and admitted that it was then believed that the site agreed upon was as convenient and accessible to the interested public as any that could be obtained. It was not denied that the complainants had expended large sums of money in the purchase and improvement of property situated near the depot site; but it was denied that without lawful excuse or justification the defendant was undertaking to discontinue and remove the depot. Defendant denied the allegation that to remove the depot would be a great inconvenience to the public, but admitted that some pecuniary damage might be suffered by complainants or some of them; but it was contended that the defendant was in no way responsible for such damage. It was denied that the company had no lawful right to remove the depot. The answer then set up the orders of the Railroad Commission and the litigation before referred to, and it was averred that the defendant did not desire to obey the order of the commission of January 12, 1904, and that it had filed its bill in the federal court to enjoin the enforcement of this order. Further, the answer set up that the defendant had resisted to the last the litigation instituted by the state and the Railroad Commission to compel the building of the road on the old line; but the defendant stated that after it had failed in the litigation, and it had been finally decided that the railroad should be built upon the old line, and the Railroad Commission had by two orders directed the building of the depot on the old line, it had concluded that further resistance was useless, and that it would obey the decree of the court and said orders of the Railroad Commission in reference to the location of the depot; that it was in good faith proceeding to comply with the decree and said orders, and had entered into a temporary arrangement by which it was to have time to rebuild the railroad and to locate the depot on the old site, when it was enjoined from doing so; and it was averred that no alternative was left it but to obey the decree of the court under heavy penalties for any disobedience. The answer further set up that the defendant had its men and equipments at the town of Pontotoc for the purpose of executing its agreement with the Railroad Commission and the state of Mis-

Mississippi to remove the depot to the old site, and that it had been delayed in this work by the suing out of the injunction.

A motion was made by the defendant to dissolve the injunction upon bill, answer, exhibits, affidavits, and records in said chancery case. Notice was given of this motion, and the same being heard by the chancellor in vacation on August 3, 1908, a decree was entered sustaining the motion, dissolving the injunction, and dismissing the bill. The decree also awarded damages to the defendant on the injunction bond in the sum of \$188.33. The complainants prayed and obtained an appeal to this court, but supersedeas was disallowed. In this court an agreement of counsel is filed, showing that the case was heard on the pleadings, exhibits, and records hereinbefore set forth, and that the transcript contains all the pleadings and proceedings in the case, except the evidence that refers to the amount of damages awarded for the suing out of the injunction; it being agreed that the court did not err in assessing damages, unless it should be held that the injunction was improperly dissolved. The one assignment of error is that the court erred in sustaining the motion to dissolve the injunction and awarding damages. It may be noted that in 1906, pending the litigation above set out, a special act of the Legislature was passed which attempted to ratify and confirm the abandonment of the old line of the narrow-gauge railroad before mentioned; but this act was held unconstitutional and void. See *Railroad Co. v. State*, 89 Miss. 724, 41 South. 259.

It seems obvious that the decree must be affirmed. The orders of the Railroad Commission fixing the location of the depot are not assailed, except indirectly and collaterally. The commission is not made a party defendant. Obedience to its orders has never been restrained or enjoined by the judgment of any court. But we do not consider it necessary to decide whether or not these orders are of themselves valid and conclusive as to the location of the depot. The decree of this court, affirmed by the decision of the Supreme Court of the United States, finally and definitely fixed the location of the railroad on the old line. While the location of the depot was not directly involved in that litigation, the effect was to remove the depot from the present site, because, of necessity, the depot must be on the railroad, and it is apparent that there is no necessity for two depots in the town of Pontotoc. It is true the railroad company desired to build the line around through the western part of the town, and to locate the depot there, and it took the position that this was a convenient, accessible, and proper place for the depot; but, since the location of the main line has been determined adversely to its contention, there is nothing left for it to do but to build

the railroad on the old line, and the relocation or the removal of the depot necessarily follows.

The decree is affirmed.

(95 Miss. 375)

PARKER v. PAYNE. (No. 13,679.)

(Supreme Court of Mississippi. Jan. 18, 1909
On Suggestion of Error, March 22, 1909.)

1. SALES (§ 460*)—CONDITIONAL SALES—RETENTION OF TITLE BY VENDOR.

Personal property may be sold, with verbal retention of title, and the claim of the seller to the purchase money will prevail over the claims of the buyer's subsequent grantees.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 1348; Dec. Dig. § 460.*]

2. CHATTEL MORTGAGES (§ 6*)—MORTGAGE OR CONDITIONAL SALE—TITLE OF SELLER.

L., who owned certain mules, subject to a trust deed for \$135, on becoming plaintiff's tenant, desired plaintiff to take up the debt on the mules and to advance him \$50 in cash. Plaintiff and L. thereupon agreed that L. should sell the mules to plaintiff for \$185, and that plaintiff should immediately resell them to L., and reserve the title until the \$185 was repaid. This was done by parol, after which L. mortgaged the mules by a trust deed for supplies for the benefit of another. Held that, since plaintiff never had title to the mules, except momentarily, for the purpose of creating a conditional sale to L., the transaction was but a verbal mortgage, and unsustainable.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 24; Dec. Dig. § 6; * *Sales*, Cent. Dig. § 1332.]

3. SALES (§ 450*)—CONDITIONAL SALE—TITLE OF SELLER.

In order that a conditional seller may enforce his claim of title to the property on non-payment of the price, he must have been in fact the owner of the property, and must have made a bona fide sale thereof to a bona fide purchaser, by which the actual possession was changed in fact.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 1321; Dec. Dig. § 450.*]

Whitfield, C. J., dissenting.

Appeal from Circuit Court, Lee County;
E. O. Sykes, Judge.

Replevin by R. S. Payne against W. L. Parker, as trustee under a deed of trust for the benefit of W. M. Thompson & Son, to recover possession of two mules and a mare, conveyed by such deed to the trustee by one James Little, to which plaintiff claimed the right of possession under an alleged reservation of title in him as vendor until the full amount of the purchase price had been paid. The court peremptorily instructed for plaintiff, and defendant appeals. The case was affirmed without a written opinion January 18, 1909; but, on suggestion of error, the former decision was vacated, and the judgment reversed, and cause remanded.

Anderson & Long, for appellant. Clayton, Mitchell & Clayton, for appellee.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

FLETCHER, J. The learned circuit judge gave a peremptory instruction to find for the appellee upon the following state of facts: One Little, late in the year 1906, became Payne's tenant, and moved upon his plantation. At the time Little owned two mules, upon which a third party held a trust deed for about \$135. It appears that Mr. Payne had been advised by his attorney that personal property could be sold conditionally and the title thereto reserved to the vendor, and that the lien so reserved would be superior to any subsequent incumbrance by the conditional purchaser. Payne testifies that he acted in the transaction upon the idea that such an arrangement was a convenient, safe, and economical method of securing his debt, since it would obviate the need for recording fees and other expenses. Little was anxious for his landlord to take up the debt, and desired a further advance of \$50 in cash. Thereupon Payne and Little entered into an agreement by which Little was to sell Payne the mules for \$185 and Payne was to immediately resell the property to Little and reserve the title. This was done; the entire transaction resting in parol. Subsequently Little mortgaged the property to W. M. Thompson & Son by a trust deed, in which Parker is substituted trustee. The former trust deed, which was paid by Payne, was satisfied, so that, when Thompson & Son took their security, no incumbrance against the property appeared of record. It is shown that Little, with Payne's knowledge, obtained supplies from Thompson & Son throughout the year, and, indeed, Payne admits that he encouraged Little to buy from Thompson all the supplies he needed; that, to use his own phrase, he said to Little that "he missed it in not going and loading up on him."

We have no disposition to depart from the rule, now thoroughly established in this state, that personal property may be sold with verbal retention of title, and that the claim of the vendor to the purchase money will prevail over the claim of subsequent grantees. But we cannot hold as a matter of law that Payne ever actually owned the mules here in controversy. The whole transaction must be examined. The mules were not purchased from Payne in the first instance. They were bought from one Lawson. The sole purpose of the alleged sale to Payne was that title might momentarily vest in him for the purpose of an instantaneous resale, in order that the relation of the vendor and conditional purchaser might exist. The whole transaction might well be considered as nothing more than a verbal mortgage—an effort to substitute for a trust deed a pretended sale and resale, whereby innocent purchasers and incumbrancers would be defrauded. If this transaction is to be upheld, chattel mortgages will disappear. All borrowers upon personal property as security will simply agree with the lender to

make a sale, accompanied by constructive delivery of the property, and buy the property back in the same transaction. We have here an illustration of a most flagrant wrong committed to the manifest injury of an innocent supply merchant. It is true that, under the previous decisions of this court, one taking a trust deed upon personal property must see to it that the person from whom the property was purchased has not reserved the title, or that he has been paid; but he cannot be defeated by constructive sales and resales, had between persons who in reality sustain no other relation than that of creditor and debtor. We will not push the doctrine one inch further than it has already gone. In order for the seller to enforce his claim, he must be in fact the owner of the property, and make a bona fide sale thereof to a bona fide purchaser, by which sale the actual possession of the property shall be in truth changed. The peremptory instruction should have been given for the appellant, and not for the appellee. A full statement of the facts will be set out by the Reporter.

The suggestion of error is sustained, the former judgment vacated, and the cause reversed and remanded.

WHITFIELD, C. J. (dissenting). The judgment originally rendered in this case was, in my opinion, manifestly correct, and the suggestion of error should be overruled. Indeed, I think a simple statement of the facts is an end to the argument, and I propose to state those facts fully. There was a mare sold to a negro, Little, by appellee, about three years before this transaction, and a trust deed given by Little to secure the payment of the purchase money in 1906; Little at that time having moved off of the appellee's place. In 1907 Little moved back on appellee's place. At this time he, being unable to pay for the mare, let appellee take her back, and the trust deed was by appellee canceled on the record January 10, 1907.

We come, now, to the two mules in controversy. Those mules had been sold by one J. N. Lawson to Jim Little, on the 24th day of August, 1905, and Little had given Lawson on that date a note, due October, 1905, at 10 per cent. interest from maturity, for \$220, and the trust deed of same date, August 24, 1905, to secure said note; said trust deed covering the two said mules. When Little came back to the place of appellee in 1907, being unable to pay for the mare appellee had sold him, as stated, that mare was delivered back to appellee, and that trust deed canceled, January 10, 1907. At the same time Little brought the two mules he had bought from Lawson onto the appellee's place, and had them there in his (Little's) possession. The note and trust deed, executed by Jim Little on the 24th of August, 1905, to secure J. N. Lawson in the purchase

money of these mules, had been, on October 30, 1905, transferred and delivered to one John D. Payne, and at the time Little moved back on appellee's place, in January, 1907, there was still remaining due on these two mules, under this note and trust deed, the sum of about \$135. The appellee, having canceled his trust deed on the mare above referred to, on January 10, 1907, bought from Little the two mules, and resold them to Little, reserving the title in himself until the purchase price of the mules should be repaid to him by Little.

There is only one witness to the terms of this sale, and that is R. S. Payne, the appellee in this case. He testifies in the most positive and explicit manner that Little sold him these mules, and he resold them, and also the mare, for \$325, and that he was to pay off the trust deed of Lawson, which had been assigned to John D. Payne in October, 1905. Here is what he says: "In 1906 he [Little] moved to my place just a few days before Christmas. There was a deed of trust on these two mules he had, and he came to me and told me that if I would pay the deed of trust off, and let him have \$50, that he would let me have the mules. We counted up that and the interest on it, and it made it something a little over \$145; but I put it all at \$175, and when I let him have the \$50, with interest on that, that made it \$55, and that made \$200 in all. And I said, 'All right, I will take the mules at \$200 on this, and I will sell them back to you at \$200;' and then I sold him a mare for \$125. The agreement then was that I take the deed of trust on the mare in 1906, and he was to live on my place that next year, and when he moved back to my place, I told him that we would do away with the deed of trust [that is, appellee's deed of trust on the mare], and that he would fix it up with notes, or a note, binding all the stock. And I also let him have a mare for \$125, and we fixed up the three in the same note." He again and again, repeatedly, testifies expressly, in the most positive terms, that this sale and resale was made.

Now, let us see whether he carried out, on his part, the terms of this sale. He paid the negro the \$50. He paid John Payne, who held, by transfer, the Lawson note and trust deed on the mules, \$135.40, the balance due under that trust deed, on the 16th day of January, 1907, and canceled that trust deed. As stated, he had already canceled the trust deed on the mare on the 10th of January, 1907. The negro, Jim Little, seems to have disappeared from the scene. On January 1, 1908, a year later, for the first time the appellants, Thompson & Son, took a trust deed from Jim Little, some little while before his disappearance, to secure an indebtedness of \$182, only \$48 or \$49 of which was for supplies furnished Little during the year 1907; all the balance being an indebtedness antecedent to all these other transactions—ante-

cedent to the year 1907, as shown by W. M. Thompson's testimony, at page 86 of the record. This sale of the two mules by Little to appellee, and the resale by appellee to Little, was reduced to writing, and a note given by Little, and that note was in pursuance of that sale. Appellee testifies as follows: That he "told Little that he was on the John Payne place, and that he [appellee] would pay the trust deed of John Payne off on the mules, and that he [appellee] would furnish him [Little] \$50 and would take the mules, and would then sell them back to him [Little] at the same price, reserving title, if Little would move on his [appellee's] place; and that that was the express contract—that he bought the mules from him in that way, and sold them back to him at the same time and under the same agreement."

Now, a few months later this contract was reduced to writing, and was signed by Jim Little, and is as follows, being a note for the purchase money of these mules:

"\$325.00. On or before the 17th day of June, 1907, I promise to pay R. S. Payne, or order, the sum of three hundred and twenty-five dollars, same being for the purchase money for the following described property bought of said R. S. Payne, viz.: One black horse mule, about six years old, name Joe, and one black mare mule, about six years old, name Hat, and one Texas mare, about six years old, name Emer, all said stock now in my possession; and it is hereby expressly understood and agreed by me that the title and ownership to said stock is to be and remain in the said R. S. Payne until this note is fully paid and satisfied. This 17th day of June 1907.

his
"James X Little."
mark

In view of the fact that this note, reserving title, is in writing, the statement of the majority that "the entire transaction rests in parol" is misleading. What the majority meant to say was that the part of the transaction, the original agreement, was in parol; but it is absolutely due to be stated, that the case may be put as it is, that this transaction was subsequently reduced to writing. This is very important, in view of another statement in the opinion, that the "whole transaction might well be considered as nothing more than a verbal mortgage." If there be any mortgage in this case, it is not a verbal mortgage, but a written mortgage; and it is inconceivable how a mortgage can be worked out of the four corners of this simple promissory note. There is not a particle of evidence in the case about a mortgage of any kind. The appellee expressly states that there was a sale of these mules by him to Little. There is not a hint anywhere in his testimony, or anywhere else in any other testimony, that there was any mortgage dreamed of. There is no verbal

mortgage, according to the testimony; but the best evidence of what the transaction was, in the eyes of the law, was the note, and, of course, it is too plain for discussion that that note is nothing but a simple promissory note, without the semblance of a mortgage in its terms. I dismiss, therefore, the suggestion that there was in this case any mortgage with simply this other observation that the very case cited by appellant (*Klien v. McNamara*, 54 Miss. 90) states three tests as between a mortgage and conditional sale: First. Was the treaty in reference to a borrowing and lending of money, and was the obligation to repay incurred? The record shows nothing of this sort. Second. Did the relation of creditor and debtor exist before the conveyance, and did that relation continue? If appellee told the truth, and he is the only witness, the record completely negatives this test. Third. Was there great disparity between the price of the property and the loan? No reason for this test exists in the record. In short, the mere reading of the note ends at once any suggestion of a mortgage.

But, turning aside from that, we have here the positive and express testimony of the appellee that this transaction was a sale, and nothing but a sale; that it was made in pursuance of legal advice—perfectly sound advice, too, be it remarked; and there was a note taken showing the terms of the sale, and corroborating in every detail the verbal statement of the appellee as to the terms of the sale. Now, let it be noted and emphasized that there is not in the record a scintilla of testimony, written or oral, as to the terms of the sale of these mules. Absolutely the appellee's testimony, as stated, is corroborated entirely by the note, and is not contradicted in the least degree by any testimony of any kind whatsoever; and yet the majority hold that, not only the suggestion of error must be sustained, but that the court below should have charged the jury to find for the appellant. The court below, in my judgment, most properly charged the jury to find for the appellee, because there was no other testimony than that I have given as to the terms of the sale. And, as to this transaction being a sale with reservation of title, the court below had at least to support its instruction the positive and uncontradicted testimony of Payne and the note. My Brethren have not only no testimony as to what this transaction was to support their conclusion that a peremptory instruction should be given for the appellant, but they assume the jury's function of passing upon the truthfulness of Payne, even when supported absolutely in every respect, by the note. This, it seems to me, is entirely beyond the province of the court; for, if the court were right in any possible view, most clearly and indubitably it could do no more than reverse the case for the determination of the facts of this case by the jury.

But this is not all. The argument of the learned counsel for appellant is self-destructive plainly. First, he argues that appellee never at any time had any title to these mules; and, when that does not work out satisfactorily, he then proceeds to argue that he did have title to the mules, because he must have had it to take the mortgage on the mules, which he says the transaction amounts to. In other words, he strenuously argues, in the first place, that there never was any sale, and that is the whole burden of his argument in this suggestion of error, citing many authorities to show it—that is to say, that there never was any sale by Little to appellee—and then proceeds immediately thereafter to insist that appellee did have title, but simply mortgaged the mules to Little, instead of selling them to him. Another most striking thing in this record is that, to my mind, at least, it is clearly shown that the appellants were guilty of the grossest negligence in not making inquiry of the appellee as to what claim he had on these mules. Surely it was the duty of these supply merchants, knowing, as they admit they did know, that Little was appellee's tenant, living on appellee's place, and necessarily needing supplies, to inquire of appellee what claim he had on these mules, or what security he had, both for the mules and for supplies. What does the evidence show in this respect? Mr. Thompson testified that he did ask the negro whether this stock was under any incumbrance whatever, and that he said he didn't owe Mr. Payne a cent, and, further, that he never took a mortgage unless he asked if there was any incumbrance on the stuff or stock. That is his express testimony. Think of this man asking a negro, instead of asking Payne, the appellee, on whose place the negro lived; and it further appears that he knew the negro lived on Payne's place throughout the year 1907, yet never asked Payne's permission to supply him, and never asked Payne if he was supplying him, or what claim he had on this stock. Thompson actually embraced in his trust deed the mare, and the only singular thing on his part is that he did not claim the mare. Again, appellee testifies that he told Parker, the trustee, when he came to get the stock, that he had a claim on the stock sufficient to hold them, and that he thinks he told him of the note. Now, the appellant attempted to contradict this by showing that the claim appellee mentioned to the trustee, Parker, was that he had a landlord's lien for supplies; and appellant introduced two witnesses to thus contradict appellee, to wit, the trustee, Parker, and one Pope Tanner, white. But Parker testified that he went to see appellee twice about getting possession of the mules, and that the second time he went back, about two hours after the first time, the appellee did tell him that he had some papers by virtue of which he claimed these mules, and that they (the papers) were good against the stock; and Tanner testified positively

that the appellee told him he did have papers under which he claimed this stock. I mention this merely to show that the effort to break down appellee entirely failed, and that the two witnesses, the trustee and Tanner, corroborated the appellee, instead of contradicting him.

One other curious obliquity of vision to me in the opinion of the court: That opinion states: "We have here an illustration of a most flagrant wrong committed to the manifest injury of an innocent supply merchant." I think the testimony which I have quoted fails to disclose any particular innocence on the part of this supply merchant. He knew this negro, Little, lived on the appellee's place throughout the year 1907. He knew the negro had to be supplied. He himself, at that time, held a past indebtedness from the negro to himself, unsecured, and which he was naturally very anxious to get. He does the curious thing of asking the negro, and not asking the appellee, whether the appellee had any claim on these mules, either for supplies to be advanced, which must be advanced, or for the purchase price of these mules; and all, absolutely all, even the cost of the trust deed, which this innocent supply merchant is out, so far as this transaction is concerned, is \$56.07, according to his own testimony. And yet the appellee, who first sought legal advice, and got sound legal advice, and acted on that legal advice, actually paid \$135.40 to John Payne, and \$50 to this negro, making \$185.40, all of which he loses, without the court being at all concerned about this innocent farmer's loss. So far as the "flagrant wrong" is concerned, doubtless one has been committed; but it has been to the injury of the appellee, the landlord.

Once more, and finally, I refer to another expression in the opinion. It is there stated that the "sole purpose of the alleged sale to Payne was that title might momentarily vest in him for the purpose of an instantaneous resale, in order that the relation of the vendor and conditional purchaser might exist." My Brethren have used great felicity of expression in this sentence. The momentary vesting, and the instantaneous resale, are the very extremes to which language can be pressed, in the effort to make, out of mere language, a transaction which the facts in the case do not show. One can almost see the "verbal mortgage" rising into being, out of the mere intensity of the phrasing. But, besides, are not sales and resales on the same day, aye, in the same hour, of every day occurrence in the business world? I think we are on far safer ground when we interpret this plain, simple, promissory note to mean what it says it means; and then, if the court was not right in charging the jury to find for the appellee, we should simply hold that there should have been no charge to find for either party peremptorily, but that the case should be left to be tried by

the jury. The court not only sustains a suggestion of error to a charge, not only in perfect harmony with all the testimony in the case as to the sale and resale, but then absolutely proceeds to hold that the jury should have been charged, in the face of all the evidence, to find for the appellant—something which passes my comprehension.

One other observation: The court stresses an expression of the appellee to the effect that appellee told Little that "he missed it in not going and loading up on him." Presumably the court thought there arose an implication from this statement that there was a fraudulent combination between Little and appellee to enable appellee to get supplies from appellant. It is singular my Brethren did not notice that in the redirect examination of appellee he explained this statement, and said positively that that conversation occurred after this lawsuit was begun, and had no reference whatever to the year 1907 and the transactions of that year, which last statement makes it manifest, as it seems to me, that the implication that the court would work out of the first statement does not fairly arise out of the testimony of the appellee.

But I must repeat, in closing, that I think the case ought to have been taken from the jury, and was properly taken from the jury, and the peremptory instruction for the appellee was correct, as we first held, because the testimony of Payne is absolutely without any contradiction, and is, in addition, supported by the written note. Really this is an exceedingly simple case, with absolutely nothing in it, except the long-established doctrine that the vendor of personal property may retain title thereto by parol, which title would be good against innocent purchasers for value without notice, subsequently purchasing. The real trouble with appellant's counsel is not so much the fact that the case made by this record does not plainly show he has no case, but that he entertains the view that these secret reservations of title are iniquitous and ought not to be tolerated. He is struggling against what he thinks is an unwise law. On this ground I can stand with him without the least hesitation. But who shall change this law, this court or the Legislature? Manifestly, as long as the secret reservation of title is the law, we have nothing to do but enforce it. I sincerely trust an act will be passed by the next Legislature, requiring that all reservations of this character be recorded. But that is another story.

It seems to me, with all deference to my Brethren, that their holding is erroneous, manifestly, in two respects: Certainly, in not limiting their holding to mere reversal, so that the jury, and not this court, may pass upon the facts upon this case; and, second, because their holding, so far as the

right to reserve title to personal property is concerned, absolutely abolishes that right.

For these reasons, I dissent in toto from the opinion and judgment in this case.

(95 Miss. 226)

SAUCIER v. STATE. (No. 18,619.)

(Supreme Court of Mississippi. March 29, 1909.)

1. CRIMINAL LAW (§ 417*)—EVIDENCE—DECLARATIONS BY THIRD PERSONS.

On trial for perjury for falsely swearing to an alibi for a third person on trial for robbery, declarations of the third person, made in the absence of accused, showing disreputable conduct of the third person, with which accused did not have any connection, were inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 950; Dec. Dig. § 417.*]

2. PERJURY (§ 32*)—EVIDENCE—ADMISSIBILITY.

On a trial for perjury for falsely swearing to an alibi for a third person on trial for robbery, evidence of the flight of the third person and of the judgment of forfeiture of his bond was inadmissible.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 108; Dec. Dig. § 32.*]

3. PERJURY (§ 32*)—EVIDENCE—ADMISSIBILITY.

On a trial for perjury for falsely swearing to an alibi for a third person on trial for robbery, the admission in evidence of the clothing worn by the person alleged to have been robbed by the third person, though in condition to show the third person's guilt, was erroneous.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 108; Dec. Dig. § 32.*]

4. PERJURY (§ 37*)—INSTRUCTIONS—NUMBER AND CORROBORATION OF WITNESSES.

The state, on a trial for perjury, when asking the law applicable to the indictment, must in some of its charges inform the jury that perjury must be established by the testimony of two witnesses, or one witness and corroborating circumstances.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 138; Dec. Dig. § 37.*]

5. PERJURY (§ 36*)—MATERIALITY OF TESTIMONY—QUESTION FOR COURT.

On a trial for perjury, the court must determine the materiality of the alleged false testimony; and an instruction leaving that question to the jury is erroneous.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 133; Dec. Dig. § 36.*]

6. PERJURY (§ 29*)—INDICTMENT—VARIANCE.

While the day on which perjury is committed is not of the essence of the crime, yet where the indictment alleges one term of court, when the perjury occurred at another, or where the perjury was committed in reference to records, depositions, or affidavits which are to be identified by the day on which they were made, a variance between the proof and the date in such records, etc., or a variance as to when the court was really held, is fatal.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 101; Dec. Dig. § 29.*]

7. INDICTMENT AND INFORMATION (§ 160*) — AMENDMENT TO CONFORM TO PROOF.

An indictment for perjury, which alleges that the perjury was committed on August 26th, which shows who the presiding justice was, who the parties to the case were, what the case on trial was, and that accused was properly sworn,

may be amended by changing the day so as to conform to the proof.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 515; Dec. Dig. § 160.*]

Appeal from Circuit Court, Harrison County; W. H. Hardy, Judge.

"To be officially reported."

Wallace Saucier was convicted of perjury, and he appeals. Affirmed orally. On suggestion of error, reversed and remanded.

The indictment charged that "on the 26th day of August, 1908, at a term of the justice of the peace court," Saucier swore falsely, etc. Upon the trial it developed that the justice of the peace court was held on the 27th day of August, and the district attorney was allowed to amend the indictment.

J. H. Mize, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

WHITFIELD, C. J. It was error in the court below to permit the state to show, by the testimony of George Malone, Emma Speers, and Lillian Gardner, the different conversations had, in the absence of the appellant, between Bryant Lemon and these parties. This testimony had nothing on earth to do with the guilt or innocence of this appellant on the charge preferred against him, and it would only have tended to inflame the jury against him, by clouding the question of his guilt or innocence on this specific charge with a lot of incompetent testimony showing the disreputable conduct of Lemon, with which conduct this appellant is not shown to have any connection whatever. This testimony is expressly condemned in the case of *Brown v. State*, 57 Miss. 424, a case of perjury.

It was also manifest error to allow the state, over the objection of the appellant, to prove that Bryant Lemon had fled, and introduce the judgment of forfeiture on his bond in the trial of this case for perjury. Lemon had been arrested, charged with robbery. Whether he (Lemon) had fled or not had nothing upon earth to do with the guilt or innocence of Saucier on this charge of perjury. The case of *Pulpus v. State*, 82 Miss. 555, 34 South. 2, settles this. See, also, *Wigmore on Evidence*, vol. 1, p. 353, § 276, note "c," and *People v. Stanley*, 47 Cal. 114, 17 Am. Rep. 401.

It was also manifest error to allow the state to introduce in evidence the pants of Beleaise, the man whom Bryant Lemon had been charged with robbing. The court admitted these pants on the ground, as stated in the record, "that Beleaise testified that somebody had robbed him, and therefore his pants were competent, and that it might be in some way connected." It is perfectly obvious that the pants of Beleaise were offered in evidence for no other purpose than to show that Beleaise had been robbed; this being hoped to

be shown by the condition of the pants. But what possible relevancy to Saucier's innocence or guilt of perjury had the pants of Bealeise, even if they were in condition to show that Lemon had robbed Bealeise? They are two distinct, disconnected offenses. Indeed, the learned judge below seems, unfortunately, to have confused, throughout the entire trial of this case, the charge against Lemon for robbing Bealeise with the charge against Saucier for perjury, and to have supposed that in some way it was essential to show, or at least competent to show, these things which we have pointed out, on the trial of Saucier for perjury. In all this he was clearly in error, and it is impossible to say, with any certainty, that these errors, when combined, do not constitute reversible error, and that these flagrant errors may not have contributed materially to produce a verdict of guilty.

It was also error to give the first instruction for the state, which is in the following words: "The court instructs the jury, on behalf of the state, that if you believe from the evidence beyond a reasonable doubt that defendant, Wallace Saucier, testified as a witness in the justice of the peace court before H. D. Moore, on the 27th day of August, 1908, on the trial of the case of the State of Mississippi against Bryant Lemon, charged with the robbery of S. E. Bealeise, and that said defendant, Saucier, was sworn by the said H. D. Moore, justice of the peace as aforesaid, to testify to the truth in said matter, and that the said Saucier then and there, under said oath, did willfully, corruptly, knowingly, and feloniously testify in said court in said cause that he, the said defendant, Saucier, was with the said Bryant Lemon from 4 o'clock of the evening of August 26, 1908, until the following day, and that the same was a material matter in said cause, and that the said defendant, Wallace Saucier, then and there knew that in fact and truth he was not with the said Bryant Lemon from 4 o'clock of the evening of August 26, 1908, until the following day, you should find the defendant guilty as charged in the indictment."

When the state asked the law applicable to this indictment for perjury, it should, in some of its charges, have told the jury that the assignment of perjury should be established by the testimony of two witnesses, or one witness and corroborating circumstances. The quantum of proof required in perjury is well known, and somewhere in the state's charges that quantum should be stated to be necessary. It is true it is stated in the ninth and eleventh charges for the defense; but, even if it could properly be said that these charges 9 and 11 cured this omission in the first charge for the state, it nevertheless remains true that the state ought always, on a charge of perjury, somewhere in its own charges, to state the quantum of proof necessary, in order that the law of the case may be properly given. Suppose no instructions had been given for the

defense on this subject; manifestly the case should be reversed for this erroneous charge No. 1 in that attitude of the case. The charge No. 1 for the state in this respect is therefore none the less erroneous. Whether, in view of the fact that the ninth and eleventh instructions were given, this omission in the first instruction for the state on this point would constitute reversible error of itself alone, it is not necessary now to decide.

This instruction is erroneous in a second particular, which is not cured by any instruction given for the defense, to wit: This first instruction left it to the jury to decide whether the assignment of perjury was a material matter in the case. This is expressly held error in *Cothran v. State*, 39 Miss. 541. See *State v. Fannon*, 158 Mo. 149, 59 S. W. 75, also. But this, also, we do not hold reversible error.

Another assignment of error most earnestly insisted upon is that the indictment alleged that the perjury was committed on the 26th day of August, whereas on the trial the evidence showed that it was committed on the 27th day of August, and that this was a fatal variance, not amendable under our statutes. The court allowed the amendment to be made, whereby the indictment was made to charge that the perjury was committed on the 27th day of August. Learned counsel for the appellant, in his very ingenious and able brief, puts the matter as if the day on which the perjury was committed was of the essence of the crime of perjury. This is a misconception, or, as Mr. Bishop calls it, a mistake, in his first volume on *New Criminal Procedure* (section 401, par. 5), where he says: "In swearing," says the report, "at a trial before the Circuit Court of the United States, holden at Portsmouth on the 19th day of May, A. D. 1811," a record which showed this court to have been in that year holden "on the 20th day of May, the 19th of May being Sunday," was rejected as not sustaining the allegation. The liability of the pleader incautiously to make the allegation of the time of this offense thus descriptive, and the consequence when he mistakes the date, are probably the origin of the mistake, occasionally appearing in the books, that, speaking in general terms, the common-law indictment for perjury must allege correctly, and the evidence must so prove, the day of its commission, or there will be a fatal variance." It is not that the time or the day on which the perjury is committed is of the essence of the crime of perjury; but if the indictment incautiously alleges one term of court, for instance, when the perjury really occurred at another term, or especially if the perjury was committed in reference to records, depositions, or affidavits, etc., which said records, etc., were to be identified by the day on which they were made, then, if there shall be a variance between the proof and the date shown in such records, etc., or a

variance as to when the court really was held, such variance is fatal.

The true doctrine on this subject is very clearly stated in the opinion of Mr. Justice Peckham in the case of *Matthews v. United States*, 161 U. S. 500, 18 Sup. Ct. 640, 40 L. Ed. 787. That opinion is so valuable on this point that we quote it in full: "The only point suggested by counsel for plaintiff in error upon which to obtain a reversal of the judgment is the fact of the variance between the indictment and the proof as to the day when the alleged perjury was committed. We think the decision of the court below was clearly right. The cases cited by counsel for plaintiff in error, in regard to the necessity for specific and accurate proof of the very day upon which the perjury was alleged to have been committed, were those in relation to records, depositions, or affidavits, which were to be identified by the day on which they were made or taken. Under such circumstances a misdescription of the date of the particular record, deposition, or affidavit has sometimes been held fatal on the ground, substantially, that it has not been identified as the particular one in which the perjury is alleged to have been committed, because the record or other paper itself bears one date and the indictment describing it bears another. It is not the same record, and therefore there is variance, which has been held fatal to a conviction. In this case there was no record which was contradicted by the proof given upon this trial. The trial was described accurately, the parties to it, the court in which it took place, the term, and the time at which it was tried, and the only difference between the allegation in the indictment and the proof in the case is that during this trial, which occupied several days, the plaintiff in error swore on the 6th of June, instead of on the 7th, as alleged in the indictment, to the matter which was alleged to be false. The date upon which the evidence was given, which was alleged to have been false, appeared by the stenographer's minutes, who took the evidence on the trial, to have been the 6th of June. This is no record, and it is not within the principle upon which the cases relied upon by counsel for plaintiff in error were decided. Such a variance as appears in this case is not material. *Rex v. Coppard*, 3 Car. & P. 59; *Keator v. People*, 32 Mich. 484; *People v. Hoag*, 2 Parker, Cr. R. 9. It will be seen that the time was stated under a *videlicet* in this indictment, although that fact is probably not very material. The opinion written by the learned judge in denying the motion for a new trial and in arrest of judgment says all that is necessary to be said in this case, and

we concur entirely in the conclusion reached by him." The same doctrine is laid down in 2 McClain on Criminal Law, § 882, and in 18 Enc. Pl. & Pr. p. 348, including note 2, and the authorities therein cited, especially *Commonwealth v. Soper*, 133 Mass. 393, and *Keator v. People*, 32 Mich. 484.

It is to be most especially observed, further, that the indictment in this case nowhere charges that the justice's court was held on the 26th day of August. The allegation, so far as time is concerned, is merely, and only, that Saucier, the appellant, committed the perjury on the 26th day of August. There is no allegation that the court was held on the 26th day of August. It is simply averred on this point in the indictment that Wallace Saucier, late of the county aforesaid, on the 26th day of August, A. D. 1908, at a term of the justice of the peace court held in the city of Gulfport, supervisor's district 2, Harrison county, Miss., and presided over by H. D. Moore, justice of the peace for said supervisor's district, in said county and state, in said court of law, in the case of the State of Mississippi against Bryant Lemon, charged with robbery, testified, etc. The "then and there" refer to the time of the alleged commission of the perjury by said Saucier, not to any time when the court was held. Besides all which, it is further to be observed that there is no particular term of the court of a justice of the peace when such court is held as a committing court. There is, therefore, not in this case any allegation as to the term of the justice of the peace's court being held at any particular time, and so no necessity for treating such description of the term of the court as one not to be contradicted by parol. In short, when the indictment is critically examined, it appears that the only point left to be made is that it was a fatal variance to allow evidence to be introduced to show that Wallace Saucier delivered verbal testimony wherein he committed perjury on August 27th, when the indictment alleged merely that he committed this perjury on the 26th. It is perfectly clear who the presiding justice was, who the parties were to the case, what the case was on trial, that he was properly sworn, etc. The only thing objected to, when the record is closely scanned, is that he is alleged to have committed perjury on the 26th, and the testimony was offered to show that he committed it on the 27th. This is no variance fatal to the prosecution—no variance preventing a proper amendment on an indictment, such as was had.

But for the many manifest errors which we have hereinbefore pointed out the judgment is reversed and the cause remanded.

NEW YORK LIFE INS. CO. v. EASTERLING. (No. 13,859.)

(Supreme Court of Mississippi. March 29, 1909.)

Appeal from Circuit Court, Hinds County; W. H. Potter, Judge.

Action by Annie J. Easterling against the New York Life Insurance Company. Judgment for plaintiff. Defendant appeals. Affirmed.

McWillie & Thompson, for appellant. Hallam & Cooper, for appellee.

PER CURIAM. Judgment affirmed.**COHN v. WEISSINGER, Sheriff.** (No. 13,745.)

(Supreme Court of Mississippi. March 29, 1909.)

Appeal from Chancery Court, Sunflower County; M. E. Denton, Chancellor.

Action between M. Cohn and R. S. Weissinger, Sheriff. From the judgment, Cohn appeals. Affirmed.

Chapman & Williams, for appellant. Frank E. Everett, for appellee.

PER CURIAM. Judgment affirmed.**MISSISSIPPI COTTON OIL CO. v. NUTT et al.** (No. 13,896.)

(Supreme Court of Mississippi. March 29, 1909.)

Appeal from Circuit Court, Washington County; Sydney Smith, Judge.

Action between the Mississippi Cotton Oil Company and John K. Nutt and Putnam & King, Limited, claimants. From the judgment, the oil company appeals. Affirmed.

Campbell & Cashin, for appellant. Percy, Moody & Percy, for appellees.

PER CURIAM. Judgment affirmed.**HOWELL v. FALKNER et al.** (No. 13,603.)

(Supreme Court of Mississippi. March 29, 1909.)

Appeal from Chancery Court, Attala County; J. F. McCool, Chancellor.

Action between William S. Howell and William J. Falkner and others. From the judgment, Howell appeals. Affirmed.

Dodd & Dodd and McWillie & Thompson, for appellant. J. A. Teat and Watkins & Watkins, for appellees.

PER CURIAM. Judgment affirmed.**COOPER v. GOLDFARB et al.** (No. 13,215.)

(Supreme Court of Mississippi. March 29, 1909.)

Appeal from Chancery Court, Sharkey County; W. P. S. Ventress, Chancellor.

Action between Katie Cooper and E. I. and S. P. Goldfarb. From the judgment, Cooper appeals. Affirmed.

Mayes & Longstreet, for appellant. Campbell & Cashin, for appellees.

PER CURIAM. Judgment affirmed.**PHOENIX INS. CO. v. DE LOACH.** (No. 13,601.)

(Supreme Court of Mississippi. March 29, 1909.)

Appeal from Circuit Court, Holmes County; Sydney Smith, Judge.

Action between the Phoenix Insurance Company and M. C. De Loach. From the judgment, the insurance company appeals. Affirmed.

McLaurin, Armistead & Brien and Tim E. Cooper, for appellant. Boothe & Pepper, for appellee.

PER CURIAM. Judgment affirmed.

(160 Ala. 196)

STATE ex rel. SIGSBEE et al. v. CITY OF BIRMINGHAM et al.

(Supreme Court of Alabama. Dec. 17, 1908. On Rehearing, Feb. 5, 1909.)

1. QUO WARRANTO (§ 16*)—GROUNDS—EXERCISE OF CORPORATE FRANCHISES.

Under Code 1907, § 5453, authorizing quo warranto for usurpation of franchises, the writ lies to test the validity of an election by which territory was annexed to a city, where the city has designated such territory as a ward, and has sworn in councilmen therefrom, and has assumed to exercise sanitary and police authority over the territory, claiming that the same is a part of the city.

[Ed. Note.—For other cases, see Quo Warranto, Dec. Dig. § 16.*]

2. STATUTES (§ 90*)—LOCAL LAWS—CONSTITUTIONAL PROVISIONS.

Const. 1901, § 104, par. 29, prohibiting local legislation for the conduct of elections, places of voting, changing the boundaries of wards or districts, etc., when considered in connection with paragraph 18, providing that the same shall not prohibit the Legislature from altering or rearranging the boundaries of a city, etc., refers only to changes as to elections, and boundaries of wards already in the municipality, but does not touch the subject of changing the boundaries by adding new territory; and Act Aug. 8, 1907 (Loc. Acts 1907, p. 902), authorizing the annexation of territory to a city and providing for an election to determine whether the act shall go into effect, is not invalid.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 97; Dec. Dig. § 90.*]

3. MUNICIPAL CORPORATIONS (§ 34*)—ANNEXATION OF TERRITORY—STATUTES—ELECTIONS—"SIMILAR."

Under Code 1907, §§ 1070-1074, 1125, authorizing the annexation of territory to a city, providing that after an election has been held in any territory on the question of annexation, under this or any "similar" law, no subsequent election shall be ordered for such territory or any part thereof within six months, an election under section 1073, to annex territory to a city, held within six months after an election for the annexation of such territory and other territory to the city, under Act Aug. 8, 1907 (Loc. Acts 1907, p. 902), authorizing the annexation of territory to the city on the act being approved by the voters at an election, is invalid; the word

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"similar" not meaning "precisely alike," but meaning "with more or less resemblance."

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 34.*

For other definitions, see *Words and Phrases*, vol. 7, pp. 6515, 6516.]

On Rehearing.

4. APPEAL AND ERROR (§ 835*) — QUESTIONS REVIEWABLE ON REHEARING.

The Supreme Court on rehearing will not consider constitutional questions not considered in the trial court, and not presented in the argument of the case in the Supreme Court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3241-3246; Dec. Dig. § 835.*]

Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge.

Quo warranto by the State, on the relation of J. N. Slgsbee and others, against the City of Birmingham and others. From a judgment of dismissal on sustaining demurrers to the petition, relators appeal. Reversed and remanded.

John C. Forney and Pinkney Scott, for appellants. R. H. Thatch, for appellees.

SIMPSON, J. This is a quo warranto proceeding, instituted by the appellants to test the validity of certain elections by which certain territory, described in the petition, was annexed, or intended to be annexed, to the city of Birmingham. On the 8th day of August, 1907, the act of the Legislature was approved, being "An act to alter or rearrange the boundary lines of the city of Birmingham, Alabama." Said act provided for altering and rearranging the boundary lines of said city, by adding thereto the territory described in the petition, but by section 3 thereof provided for an election to be held to determine whether said act should go into effect, and that, if a majority of the qualified voters participating in said election should vote in favor of "Greater Birmingham," "said act shall become in full force and effect on the 1st day of October, 1909," but, if a majority be against the proposition, "then this act shall be null and void." Loc. Acts 1907, p. 902. Under and by virtue of said act an election was held on January 6, 1908, and the returns were duly made, though the record does not show what the result of said election was. The city council of said city then passed a resolution (purporting to be under section 1071, Code of 1907) requesting the probate judge to call an election for the purpose of annexing a part of the same territory to the said city, and the election was accordingly held June 30, 1908, resulting in a vote in favor of said annexation. Under the act of August 8, 1907, as will be seen, if that election of January 6, 1908, resulted favorably, the act was not to go into effect until October 1, 1909, so that, whether that election was lost or carried, the

result will be the same as to this case. Demurrers were sustained, and the circuit court dismissed the petition for a writ of quo warranto, and the relators appealed.

The appellees insist that said action of the court was without error, because, first, a quo warranto is not the proper proceeding, and it appears that the exercise of the franchise was only threatened (as was the case in the cause of *State ex rel. Johnson v. and City Council of Ensley*, 142 Ala. South. 802); but the petition, as it alleges that said city has annexed territory described, has designated it as "all," "has sworn in councilmen for ward, and assumed to exercise sanitary police authority over said territory, every respect claims the said part territory a part of the municipal city of Birmingham, and is exercising municipal functions and privileges, through mayor, police officers, sanitary officers others intrusted with such duties in city." This shows actual exercise, and not mere threat to exercise, the franchise over said territory. Quo warranto is the proper remedy in this case.

5453, Code of 1907; *City of Union v. State ex rel. Glass*, 145 Ala. 471, 39 So. 814.

It is next insisted that section 3 of the act of August 8, 1907, is void, as being in violation of paragraph 29 of section 1 of the Constitution of 1901. Said paragraph prohibits local legislation in regard to the number of subjects; said paragraph 2 as follows: "Providing for the conducting of elections or designating places of voting, changing the boundaries of wards, precincts or districts, except in the event of the organization of new counties, or the change of the lines of old counties." This paragraph evidently refers to making changes in regard to elections, and changing the boundaries of wards already in the municipality, and does not touch the subject of changing the boundaries of the municipality by adding new territory to it. This is made very clear by paragraph 18 of the same section, which, after prohibiting the "amending, confirming or extending the charter of any private or municipal corporation, or remitting the forfeiture thereof," adds these words: "Provided, this shall not prohibit the Legislature from altering or rearranging the boundaries of the city, town or village." Section 3 of the act of August 8, 1907, is not violative of section 104 of the Constitution; and as said act provides for only one election, and the election of January 6, 1908, having been held thereunder, and being valid, no other election could be called thereunder.

Article 3 of chapter 32 of the Code of 1907 (sections 1070-1074) provides for the extension

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

sion of the limits of any town or city, and article 4 of the same chapter provides for extending the corporate limits of "any city having 25,000 inhabitants or more," in which class the city of Birmingham is (sections 1075-1125, Code of 1907). Section 1073 (being in said third article) provides that "after an election has been held in any territory, under the provisions of this article, or any other law, no other or subsequent election shall be ordered or held for the same territory or any part thereof within six months next after said election." Section 1125 (being in article 4) provides that "after an election has been held in any territory, under the provisions of this or any other similar law, no other or subsequent election shall be ordered or held for the same territory, or any part thereof, within six months next after said election." Whether the provisions of article 4 were intended to be the only law by which the limits of a city of 25,000 or more inhabitants could be extended, or whether, to effect such end, article 3 might also be proceeded under, need not be decided, as the result would be the same in this case. If said city acted under article 3, then section 1073 is an absolute prohibition on any election within six months. If the election could be held to have taken place under the fourth article, then an election is equally prohibited within six months, provided the act of August 8, 1907, is a "similar law" to that contained in the Code.

The word "similar" is derived from the Latin word "similis," meaning "like," and while its meaning in some connections is "exactly corresponding," "precisely alike," yet it is frequently used to mean "nearly corresponding," "resembling in many particulars," "somewhat like," "having a general likeness." Webster's Internat. Dict. Worcester defines it as "like," "resembling," "having a resemblance." And the Century Dictionary defines it: "Having characteristics in common, like in form, appearance, size, qualities, relations, etc.; having a more or less marked resemblance; in some respects identical; bearing a resemblance." So, in arriving at its meaning in legislation, it is necessary to consider its connection, and the object intended to be accomplished by its use. In construing the tariff laws, holding that goods which were woven from threads already dyed were "of similar description" to goods which were woven in gray and afterwards printed, although they differed in several other particulars, the Supreme Court of the United States said: "The statute does not contemplate that goods classed under the words 'of similar description' shall be in all respects the same." *Greenleaf v. Goodrich*, 101 U. S. 278, 283, 25 L. Ed. 845. Where a testator left bequests to certain charitable and educational institutions, it was said: "Similarity is not identity, but

resemblance between different things." The "Friends' School" and the "East Greenwich Academy" were similar institutions to "Brown University," though "the studies taught by them are narrower in range and lower in grade, to some extent, than those which are taught in Brown University," and they differed in some other particulars. The court, continuing, said: "It was apparently the purpose of the testator to advance the higher education of the people," etc. In the same case it was held that a "Home for Aged Women" and a "Home for the Aged of the Little Sisters of the Poor" were similar institutions to a "Home for Aged Men." *Rhode Island Hospital Trust Co. v. Olney et al.*, 16 R. I. 184, 13 Atl. 118.

The evident purpose of section 1125 of the Code of 1907 was to provide that, after the people had once been called on to vote on the question of the annexation of the additional territory to the municipality, they should not be called to vote on substantially the same proposition again within six months. In this case the territory involved was included in both elections. The electors are the same; for, while the act of August 8, 1907, provides that "all the qualified electors, residing in the territory," may vote, and that the election shall be held under the provisions of the general election laws of the state, and section 1082 of the Code provides that "each qualified voter, who has resided within the boundaries of the territory proposed to be brought into the city for three months next preceding the election, may vote," the Constitution requires that, in order to be a qualified elector, the person shall have resided in the precinct or ward three months. The provisions in article 4 of the Code, not found in the act of August 8, 1907, relate mainly to matters of detail, within the powers of the governing body of the city at any rate.

However that may be, the limitation is peremptory, and it results that the election of January 6, 1908, is valid, and that that of June 30, 1908, is invalid; and as under the election of January 6, 1908, the law does not go into effect until October 1, 1909, the city of Birmingham is without authority to exercise its franchise over said territory now.

The judgment of the court is reversed, and the cause remanded.

TYSON, C. J., and ANDERSON and DENSON, JJ., concur.

On Rehearing.

PER CURIAM. As the only constitutional question presented by the demurrer is whether the act of August 8, 1907, is violative of section 104, par. 29, of the Constitution, and that was the only question considered by the court below and in the argument of the case here, we cannot consider other constitutional questions suggested to us.

(160 Ala. 181)

STATE ex rel. MCKINLEY et al. v. MARTIN.
(Supreme Court of Alabama. Feb. 11, 1909.)

1. STATUTES (§ 60*)—ENACTMENT.

The court will go behind a statute to the legislative records to ascertain whether it has a legal existence only where the attention of the court is called to the particular error.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 55; Dec. Dig. § 60.*]

2. STATUTES (§ 23*)—ADOPTION—CONSTITUTIONAL PROVISIONS.

Under Const. 1901, § 63, providing that on the final passage of a bill the vote must be taken by yeas and nays and the names of those voting for and against entered on the journals, etc., the official journal of the Senate, showing that on the final passage of a bill there were 14 yeas and 14 nays, and that the Lieutenant Governor gave the casting vote in favor of the bill, and only setting out the names of those voting yea, does not show the legal passage of the bill.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 27; Dec. Dig. § 23.*]

3. STATES (§ 37*)—LEGISLATURE—"OFFICIAL JOURNAL."

The "official journal" of each of the houses of the Legislature is the journal filed in the office of the Secretary of State in accordance with law, and it controls in case of any discrepancy between it and the printed journal.

[Ed. Note.—For other cases, see States, Dec. Dig. § 37.*]

4. STATUTES (§ 23*)—ADOPTION—CONSTITUTIONAL PROVISIONS.

Under Const. 1901, § 125, authorizing the Governor to return to the Legislature a bill with proposed amendment, and providing that the vote shall be taken on such amendment only, the fact that the journal of the Senate shows that the Governor returned a bill suggesting an amendment and that the amendment was passed, giving the yeas and nays properly entered, does not cure a defect in the passage of the original bill.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 23.*]

5. EVIDENCE (§ 387*)—LEGISLATIVE JOURNALS—PABOL EVIDENCE.

The journals of the two houses of the Legislature are the sole records of legislative proceedings, and they can neither be contradicted nor amplified by memoranda of the clerical officers of the houses.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1699; Dec. Dig. § 387.*]

Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge.

Quo warranto by the State of Alabama, on the relation of E. W. McKinley and others, against H. L. Martin, to test defendant's right to the office of alderman in the city of Birmingham. From an order denying the writ, relators appeal. Affirmed.

Jere C. King and J. S. Kennedy, for appellants. F. E. Blackburn, for appellee.

SIMPSON, J. This appeal is from the order of the circuit judge denying a writ of quo warranto to the respondent to test his right to the office of alderman in the city of Birmingham, etc. The substance of the petition is that the "act to alter or rearrange the

boundary lines of the city of Birmingham," approved August 8, 1907 (Loc. Acts 1907, p. 902), known as the "Greater Birmingham Act," having become a law, and an election thereunder held on January 6, 1908, the subsequent election for attaching the city of Avondale to said city of Birmingham, held June 6, 1908, being within the six months fixed by statute, within which no other election could be held, is void, and that therefore the election of the respondent, as a result of said election, is void.

When this question was recently before this court, in the case of State ex rel. Sigsbee et al. v. City of Birmingham et al., 48 South. 843, the only question raised by the pleading and insisted on by counsel was as to whether section 3 of said "Greater Birmingham Act" was violative of paragraph 29 of section 104 of the Constitution of 1901. It is now insisted that said "Greater Birmingham Act" is void, because the journals of the Legislature show that the requirements of the Constitution were not complied with in the passage of the bill through the Senate. The question now before the court was not involved in that decision. The case of *M. & A. of Wetumpka v. Wetumpka W. Co.*, 63 Ala. 611, does not touch this question, but decides merely that this court will take judicial notice of the charter of a municipal corporation.

This court has frequently decided, both before and since the adoption of our present Constitution, that when the question is properly presented the court will "go behind the statute to the legislative records, to ascertain whether it has a legal existence" (*Jones v. Hutchinson*, 48 Ala. 721; *Moody v. State*, 48 Ala. 115, 17 Am. Rep. 28; *Moog v. Randolph*, 77 Ala. 597; *Sayre v. Pollard*, 77 Ala. 608; *Walker v. City Council of Montgomery*, 139 Ala. 468, 36 South. 23); but the court has never undertaken to go into an examination of the journals, when no suggestion is made of a defect therein. On the contrary, in a case which was not reported, this court refused to examine the journals on the mere general suggestion that error was apparent therein, without calling the attention of the court to the particular error. This rule is manifestly correct; for, in the numerous constitutional questions which come before this court, it would entail an enormous, and in most cases a fruitless, labor on the court to make an exhaustive investigation through the journals of both the Senate and the House. It is but reasonable, then, to presume that, if the diligence of counsel has not discovered any error in the journals, there is no failure to comply with the law therein shown, and that the act is constitutional on that point.

Our attention being now called to it, we find, from an examination of the Senate Jour-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

nal of 1907, that House Bill No. 929, "to alter or rearrange the boundary lines of the city of Birmingham," was not passed in accordance with the requirements of the Constitution. Section 63 of the Constitution is imperative to the effect that, on final passage of a bill, the vote must be "taken, by yeas and nays, the names of the members voting for and against the same be entered upon the journals, and a majority of each house be recorded thereon as voting in its favor." The only official journal is that which is filed in the office of the Secretary of State, in accordance with law. While, for the convenience and information of the public, a printed journal is published, yet, where there is a discrepancy, the record in the office of the Secretary of State must govern. Referring to this original record, we find that while, on the final passage of this bill, it is stated that there were 14 yeas and 14 nays, and that the Lieutenant Governor gave the casting vote in favor of the bill, and, while the names of those voting for the bill are set out, the names of those who voted against it do not appear, and those voting for it do not constitute a quorum of the Senate.

It is insisted, however, that, inasmuch as the journal shows that the Governor returned the bill, suggesting an amendment, and that amendment was passed, and the fact, together with the yeas and nays, properly entered on the journal, this, being really the final passage of the bill, shows a sufficient compliance with section 63 of the Constitution. Section 125 of the Constitution provides for such return by the Governor, with the proposed amendment, and then provides that the vote shall be taken on such amendment only, not on the entire bill as amended, and if both houses concur in the amendment the bill shall again be sent to the Governor and acted on by him as other bills. From the reading of said section it will be seen that no vote is taken on the bill as amended, but only on the amendment, and the journal shows that this was the only action taken. Consequently this vote cannot cure the defect, apparent on the journal, in the passage of the bill.

The relator offered to prove by the witness Kyle that the latter was Secretary of the Senate of 1907, and kept the journals, and that the printed copy is correct, and sought also to introduce, in connection with his testimony, certified copies of the original bill, with indorsements, showing that the law had been complied with, which was excluded by the court; and said action of the court is here assigned as error. The Constitution requires the requisite facts to be shown by the "journals," and "to the journals only, of the two houses, which constitute the memorial of legislative proceedings, can we look, to ascertain the nature, character, and extent"

of the action taken by the body, "and, where the journals fail to disclose the nature and character of" the action, "it is not permissible to resort to other evidence for that purpose." *Jackson v. State*, 131 Ala. 21, 24, 31 South. 380, 381. "The journals can neither be contradicted nor amplified by loose memoranda made by clerical officers of the house. To these the courts cannot look for any purpose." *Ex parte Howard-Harrison Iron Co.*, 119 Ala. 491, 24 South. 516, 72 Am. St. Rep. 928; 5 Mayfield's Dig. p. 194, § 41.

It results that said "Greater Birmingham Act" never became a law. The judgment of the court is affirmed.

Affirmed.

DOWDELL, C. J., and ANDERSON, McCLELLAN, and MAYFIELD, JJ., concur.

(160 Ala. 190)

STATE ex rel. WARD et al. v. MARTIN.

(Supreme Court of Alabama. Feb. 9, 1909.)

1. MUNICIPAL CORPORATIONS (§ 34*)—ANNEXATION OF TERRITORY—STATUTES—ELECTIONS.

Code 1907, §§ 1073, 1125, providing that after an election has been held in any territory under this law, authorizing the annexation of territory to a city, or "any other similar law," no other election shall be held for the same territory, or any part thereof, within six months, prohibits an election on the question of annexation of territory to a city within six months of a prior election on that subject; and where an election held in territory to determine whether the same shall be annexed to a municipality resulted in the defeat of the proposed annexation, a subsequent election within six months thereafter, submitting the proposition of the annexation of such territory, with other territory, to another municipality, is void.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 34.*]

2. STATUTES (§ 224*)—CONSTRUCTION—CONFLICT WITH OTHER STATUTES.

The court, in construing a statute, must, if possible, avoid such a construction as will place the statute in conflict with other statutes.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 302; Dec. Dig. § 224.*]

3. MUNICIPAL CORPORATIONS (§ 31*)—ANNEXATION OF TERRITORY.

Under Code 1907, § 1126, authorizing the consolidation of municipalities lying contiguous to each other, one municipality cannot be annexed to another, where territory belonging to neither intervenes between them.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 78; Dec. Dig. § 31.*]

Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge.

Quo warranto by the State of Alabama, on the relation of George B. Ward and others, against L. H. Martin, to determine the right of defendant to hold office as alderman from a ward of the city of Birmingham. From a judgment sustaining a demurrer to the information, relators appeal. Reversed and remanded.

J. Q. Smith, for appellants. R. H. Thatch, for appellee. John B. Weakley, amicus curiæ.

MCLELLAN, J. Quo warranto to determine the right of the appellee to hold office as alderman from the Tenth ward of the city of Birmingham. The existence of such office depends upon whether a territory, called in the record "Mountain Terrace," previously connecting the city of Birmingham with the territorial limits of the municipality of Avondale, became, by an election to expand the corporate limits of the city of Birmingham so as to embrace the Mountain Terrace territory, a part of the city of Birmingham. If not, then the contiguity of the territory comprising the municipality of Avondale and that of the city of Birmingham, essential to permit the consolidation of Avondale with the city of Birmingham, did not exist, and the effort to consolidate Avondale with the city of Birmingham was abortive. Code 1907, § 1126. Whether the Mountain Terrace district came into the city of Birmingham depends upon the effect of sections 1073 and 1125 of the Political Code of 1907.

The question stated arises out of this status of fact: On November 15, 1907, an election was held in the Mountain Terrace district to determine whether that territory, lying between and touching both the city of Birmingham and Avondale, should be annexed to Avondale. The election resulted in the defeat of the proposed annexation to Avondale. On the 20th day of April, 1908, less than six months after the election of November 15, 1907, an election was held submitting the proposition of annexing the Mountain Terrace district, with other territory, to the city of Birmingham. This election resulted in favor of annexation. On the assumption that the Mountain Terrace district had, on April 20, 1908, become a part of the city of Birmingham, an election was held on June 8, 1908, for the submission of the proposition of the consolidation of Avondale with the city of Birmingham. This election resulted favorably to such consolidation. Sections 1073, Code 1907, is as follows: "Subsequent Elections Not Held Within Six Months.—After an election has been held in any territory under the provisions of this article or any other law, no other or subsequent election shall be ordered or held for the same territory or any part thereof within six months next after said election." Section 1125, Code 1907, appears to be in terms, if not in effect, otherwise a substantial duplicate of section 1073, quoted above.

The whole contention in the premises may be summarized in the question: Must the election, to be within the prohibition of the sections, be for the same purpose, viz., in this instance, for annexation to the same municipality? In taking up the construction of these sections it is rather natural, as a first impression, to conclude that the intention of the Legislature was to prohibit the continued

vexatious resubmission of the same question to the electorate. This conclusion, however, is dissipated, we think, when the evident purpose of the sections is considered. In terms, in these sections, it is provided that a second election, within six months, "for the same territory or any part thereof," shall not be held. This provision necessarily negatives any intent to leave the legal propriety of the second election dependent upon the same question as regards the territory to be affected. This being true, can it be safely concluded that, notwithstanding the express prohibition against a second election for annexation of any part of the territory involved in the first election, the legislative purpose was to qualify this broad provision to the extent that such second election should be for annexation to the same municipality? That this qualification has not been written in terms in either section is evident. Does the object to be attained by these sections warrant a construction leading to such a qualification?

We see no escape from the conclusion that the purpose in enactment was and is to forbid recurrent (within six months) elections having for their object the alteration of corporate boundaries as affecting a given territory or any part thereof. This purpose would be largely thwarted if the identity of the question submitted, rather than the territory to be affected by the proposed annexation, afforded the sole ground upon which the prohibition of the sections rested. The motive for their enactment was to save the people in the territory, or a part of it, proposed to be annexed, from the vexation of elections, within intervals of six months, held to determine the annexation vel non of that territory, or a part of it, to a municipality. They are statutes of repose. They must be construed to effect, not defeat, that object. It is, of course, not essential to the accomplishment of the purpose stated that the forbidden election should be for annexation to the same municipality. Whether the proposition be for annexation to the same or a different municipality, the natural disturbance wrought by an election is the same. The proper electorate are called, in both instances, to decide whether the territory, or a part of it, shall be annexed to a municipality. It may be true, as argued, that there can be or will be few instances where territory is so situate as to be subject, in reason, to annexation to two municipalities; and it may be true, also, as argued, that unless these statutes are construed as forbidding the submission, in six months, of the same question, annexation to the same municipality, a hostile neighboring municipality, by diligent action in calling elections for annexation of such territory to it, may defeat annexation thereof to a municipality to which the public good requires, and those concerned really desire, its annexation. These are possibilities, of course; but

such mere possibilities, the former suggested almost wholly by geographical situation, and the latter resting only upon an anticipated prostitution of a power conferred, cannot exert serious influence in the interpretation of statutes expressive of the purpose to free the people concerned from the vexation of such elections within intervals of six months, unless the statutes are more equivocal than these appear. And this is especially true when the period required to elapse between the elections is so reasonable in duration as is six months.

We have many statutes inhibiting recurrent elections within stated periods. Some of these relate to elections for county bond issues, for municipal bond issues, for stock districts, for the levy of a special school tax in a county, and for the removal of county seats. In the statutes authorizing elections on propositions for the issuance of municipal or county bonds, the inhibition is qualified to the extent that the proposed issue must be for the same purpose. The inclusion in such statutes of the qualification emphasizes the legislative intent indicated by its omission from the sections 1073 and 1125. All such statutes are suggested by the same care, as is said in *Reed v. State*, 136 Ala. 91, 34 South. 348, to "prevent the people * * * from being harassed with elections * * *" oftener than after stated intervals. To entertain the opinion indicated, it is not at all necessary to affirm that sections 1073 and 1125 prohibit, within six months, all other elections in the territory or municipality involved in such annexation or consolidation election. True, section 1073 predicates the inhibition upon an election held under that "article or any other law"; but, if the interpretation just recited was adopted, the effect would be to place this statute in conflict with numerous others, for instance, those touching elections for municipal officers. A construction leading to that result must, under familiar rules, be avoided, if possible. However, the employment of the expression "for the same territory or any part thereof," and the prohibition against the *ordering* of a subsequent election, clearly shows that elections for purposes other than annexation or consolidation were not intended to be forbidden within the interval. Section 1125 confirms this view in the particular that it predicates the prohibition against a second election upon "the provisions of this or any other *similar* law." (*Italics supplied.*)

The result is that the election of April 20, 1908, attempting to annex the Mountain Terrace district to the city of Birmingham, was invalid; and, in consequence, the election of June 8, 1908, attempting to annex Avondale to the city of Birmingham, was also invalid, for the reason that the Mountain Ter-

race district intervened between Avondale and the city of Birmingham, thus leaving these municipalities without contiguity.

It follows that the demurrer to the information should have been overruled, for the ward assumed to be represented by the respondent and to be composed of the territory embraced in the proposed annexation voted upon April 20, 1908, and in the limits of Avondale at the time of the consolidation election, June 8, 1908, had no legal existence as a part of the city of Birmingham.

The judgment sustaining the demurrer to the information is reversed, and the proceeding is remanded.

Reversed and remanded.

DOWDELL, C. J., and ANDERSON and MAYFIELD, JJ., concur.

(159 Ala. 122)

STATE v. SPURLOCK.

(Supreme Court of Alabama. Feb. 4, 1909.)

1. CRIMINAL LAW (§ 32*)—JURISDICTION—LOCAL AND SPECIAL STATUTES—REPEAL—CODE PROVISIONS.

Code 1907, § 6733, fixing and defining the jurisdiction of justices of the peace in certain criminal matters, and concluding, "And all local or special laws in conflict herewith are expressly repealed," repeals such local and special laws, notwithstanding section 10 providing that local or special statutes are not repealed by the Code; this applying only to repeals by implication.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 32.*]

2. CRIMINAL LAW (§ 84*)—CRIMINAL JURISDICTION—STATUTES.

Code 1907, § 6733, providing that justices of the peace have, in their respective counties, concurrently with the county courts, jurisdiction of certain enumerated offenses, and concluding, "And all local or special laws in conflict herewith are expressly repealed," is not in conflict with, and so does not repeal, *Loc. Acts 1900-01, p. 794*, which withdrew from justices in Mobile all criminal jurisdiction; the Code provision applying only to those justices of the peace who at the time of its enactment had some criminal jurisdiction, power to confer or take away which is with the Legislature, as recognized by the present Constitution, as well as by its predecessor.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 84.*]

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

William Spurlock, convicted and committed by a justice of the peace, petitioned for his discharge. From an order of discharge, the State appeals. Affirmed.

Alexander M. Garber, Atty Gen., for the State.

ANDERSON, J. Section 6733 of the Code of 1907 fixes and defines the jurisdiction of justices of the peace, and concludes as follows: "*And all local or special laws in conflict herewith are expressly repealed.*" (*Ital-*

ics supplied.) While the repealing clause of the section in question does no more than to repeal laws in conflict therewith, and which would be the result, regardless of the insertion of said clause, but for the proviso of section 10 of the Code of 1907 in reference to local laws on this subject (*Ogbourne v. Ogbourne*, 80 Ala. 616; *District of Columbia v. Sisters of Visitation*, 15 App. D. C. 308), yet it was a legislative declaration of the effect of the law, and evinces an intent to repeal all local or special laws in conflict therewith, regardless of section 10 of the Code. Indeed, the insertion of such a clause in a section of the Code is unusual, and it was evidently put there to emphasize an intention to repeal all laws in conflict therewith, regardless of section 10. Conceding, therefore, that section 10, notwithstanding it appears in the first chapter of the Code, is the last legislative expression, as it applies to the whole Code and was inserted to explain and qualify same, we think that so much thereof, providing against the repeal of local and special laws, upon the subjects therein enumerated, applies to repeals by mere implication—not to sections of the Code containing an express declaration of the repeal of special and local laws, or to those that are so worded as to clearly indicate a legislative intent to repeal same. We are of the opinion that section 10 has no application to section 6733, and that this last section repeals all laws in conflict with same. To hold that section 10 prevented the repeal of all local laws in conflict therewith would in effect defeat the very purpose and intention of this law, as there are few counties in the state where the jurisdiction of justices of the peace is uniform, and the section in question was inserted in the Code to fix and make uniform the jurisdiction of justices then exercising under the law criminal jurisdiction.

The question then is: Does section 6733, by fixing and making uniform the jurisdiction of justices of the peace, repeal Acts 1900-01, p. 794, which withdrew from justices in Mobile all criminal jurisdiction? If there is a conflict, it does; but, if there is a field of operation for both laws, it does not. "In order to harmonize legislative acts, courts are required to adopt, if necessary, rules of general and liberal construction. If it be possible to reconcile the two statutes, so as to permit both to stand without violating sound rules of construction, this will be done. The court will not ordinarily declare a prior act to be repealed by a subsequent one, in the absence of express words of repeal, unless the provisions of the two are directly repugnant, or, as frequently expressed, irreconcilably inconsistent." *Roberts v. Pippen*, 75 Ala. 103; *Parker v. Hubbard*, 64 Ala. 207; *Board of Revenue v. Barber*, 53 Ala. 593. Section 6733 does not say all justices of the peace, and, when taken in connection with our statutory and organic laws on this subject, can be construed, without doing violence to the let-

ter, as applying only to those justices of the peace who, at the time of its enactment, were clothed with some criminal jurisdiction, and not to those who had been shorn of all jurisdiction in criminal cases.

A justice of the peace is a constitutional officer, and is given by the terms of the Constitution certain civil jurisdiction; but the right to exercise criminal jurisdiction is of statutory creation. This the Legislature can give, and this the Legislature can withdraw when previously given. The present Constitution, like its predecessor, left the power to confer criminal jurisdiction on justices of the peace, but, unlike its predecessors, gives the Legislature a discretion as to justices of the peace, or inferior courts, in lieu of same, in cities and incorporated towns having more than 1,500 inhabitants. Section 168, Constitution of 1901. The Legislature, recognizing its constitutional right to do so, has in several instances taken from justices of the peace all criminal jurisdiction, and has since the adoption of the present Constitution established inferior courts in lieu of justices of the peace in certain cities and towns with more than 1,500 inhabitants. Consequently the present Code was compiled, rewritten in part, and adopted at a time when we had what may be termed two separate and distinct classes of justices of the peace—one class with civil jurisdiction only, and the other with both civil and criminal jurisdiction. So, too, is it a matter of judicial knowledge that the acts previous to the present Constitution contained local laws conferring different jurisdiction and fees upon justices of the peace in the various counties of the state, thus in effect destroying all uniformity as to jurisdiction or compensation. Therefore the framers of the present Constitution, recognizing this condition, attempted to obviate such an inharmonious state of affairs by inserting in the Constitution of 1901 subdivision 21 of section 104, prohibiting the increase of the jurisdiction or fees of justices of the peace by any local law. And it is a reasonable assumption, that the code commissioner prepared and inserted section 6733 for the purpose of defining and making uniform the jurisdiction of the justices of the peace then exercising criminal jurisdiction, and intended to repeal the various local laws conferring different jurisdiction in many localities, but did not intend to give criminal jurisdiction where none existed. We are of opinion that the act of 1901, withdrawing criminal jurisdiction from justices of the peace in Mobile, was not repealed by section 6733, as there is no conflict; and, as the petitioner was committed by an officer who had no jurisdiction to do so, the circuit judge correctly ordered his discharge, and his order in so doing is affirmed.

Affirmed.

TYSON, C. J., and DOWDELL, SIMPSON, DENSON, and MAYFIELD, JJ., concur.

(160 Ala. 128)

STATE ex rel. MILLER v. HERRMANN.

(Supreme Court of Alabama. Feb. 9, 1909.)

**PROHIBITION (§ 9*)—GROUNDS FOR ISSUANCE—
MERE APPREHENSION.**

Though a justice of the peace has no criminal jurisdiction, he will not be restrained, at the instance of a constable, from issuing warrants for arrest on the mere apprehension of petitioner that the justice may issue a warrant and then punish him if he refuses to obey such process.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 35; Dec. Dig. § 9.*]

Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge.

Petition, on the relation of Albert C. Miller, for an order restraining F. W. Herrmann. From an order dismissing the petition, petitioner appeals. Affirmed.

F. K. Hale, Jr., for appellant. B. B. Cobbs, for appellee.

DOWDELL, C. J. This is a petition by Albert C. Miller, a duly qualified and acting constable in ward No. 2 of the city of Mobile, seeking to restrain the respondent, a duly qualified and acting justice of the peace of said ward, in said city, from exercising criminal jurisdiction and issuing warrants on affidavits for the arrest of persons charged with the violation of the criminal laws of the state. The petition is based on the alleged want of jurisdiction and authority in said respondent, as a justice of the peace, under the law, to take affidavits and issue warrants of arrest in criminal cases.

There is no pretense of any proceeding against the petitioner for a refusal by him to execute the warrants of arrest so issued; but it is only averred that the petitioner has an apprehension that he might be punished in the event he should refuse to obey such process. In the case of *State v. William Spurlock* (decided at the present term of this court) 48 South. 849, it was held that the act approved February 23, 1899 (Acts 1898-99, p. 1626), taking away the criminal jurisdiction of justices of the peace in the city of Mobile, was not repealed by the general statute in the present Code (Code 1907, § 6733) fixing the criminal jurisdiction of justices of the peace; and for a discussion of the principle involved we refer to the mentioned case. Under the authority of that case, it follows that the justice of the peace in the present case is without criminal jurisdiction.

It does not follow, however, that in the dismissal of the petition by the court below (from which said order the present appeal is prosecuted) error was committed. Conceding that the justice of the peace is without criminal jurisdiction, this of itself would not justify this court in granting a restraining order against the justice, on the mere apprehension of the petitioner that the justice

might issue a warrant, and then punish the petitioner if he should refuse to obey the mandate of the process. If the petitioner was being proceeded against for a refusal to obey such process, then the court applied to for a restraining order would have a real case to deal with, and not an imaginary one; and the authorities cited by petitioner—*Ex parte Rucker*, 108 Ala. 249, 19 South. 814, and *Bryan v. Duffie*, 52 Ala. 4—would then be applicable. There being no proceeding against the petitioner in any way affecting his rights in the premises, we think the court properly dismissed the petition.

Affirmed.

ANDERSON, McCLELLAN, and MAYFIELD, JJ., concur.

(159 Ala. 134)

BURT v. STATE.

(Supreme Court of Alabama. Feb. 4, 1909.)

**1. INDICTMENT AND INFORMATION (§ 147*)—
MISJOINDER OF MISDEMEANORS—DEMURRER.**
Objection for misjoinder of misdemeanors cannot be taken by demurrer.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 493; Dec. Dig. § 147.*]

**2. INDICTMENT AND INFORMATION (§ 130*)—
JOINDER OF MISDEMEANORS.**

That misdemeanors may be joined in an indictment, it is not necessary that the offenses belong to the same family of crimes, as in case of felonies.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 419, 420; Dec. Dig. § 130.*]

3. CRIMINAL LAW (§ 878*)—DOUBLE CONVICTION FOR SINGLE ACT VIOLATING TWO STATUTES.

For a single act, though it violates more than one penal statute, there can be but one conviction; so that the indictment charging both a violation of the abusive language statute and of the anti-boycott act by threats, and it appearing that by the same act of making threats defendant used abusive language, a judgment of conviction of both offenses, on a verdict of "guilty as charged in the indictment, and further find defendant to be fined \$137," is erroneous, as under the verdict the fine must be referred to both offenses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2099; Dec. Dig. § 878.*]

4. CRIMINAL LAW (§ 783*)—PROSECUTION FOR ACT CONSTITUTING TWO OFFENSES—INSTRUCTIONS—VERDICT.

Where a prosecution is for a single act, charged by the indictment to have violated two statutes, the jury should be charged that, if convinced of defendant's guilt of one or both of the offenses, the verdict should be guilty of one of the offenses.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 783.*]

**5. INDICTMENT AND INFORMATION (§ 132*)—
ELECTION.**

An election by the state may not be required, where there is but one criminal act, though the counts of the indictment charge, or the proof shows, the violation of two or more statutes thereby; the purpose of an election

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

being to protect defendant from prosecution for two or more like offenses under one count.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 425-447; Dec. Dig. § 132.*]

6. INDICTMENT AND INFORMATION (§ 110*)—FOLLOWING LANGUAGE OF STATUTE.

An indictment which, except that it omits the words "at any place he or she sees fit," follows the language of Anti-Boycott Act (Act Sept. 26, 1903; Laws 1903, p. 282), § 4, declaring guilty of a misdemeanor one who uses force, threats, or other means of intimidation to prevent any person from engaging in any lawful occupation at any place he or she sees fit, is sufficient; the omitted words being surplusage.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 110.*]

7. CONSPIRACY (§ 30*)—BOYCOTT—OCCUPATION.

To authorize a conviction under Anti-Boycott Act (Act Sept. 26, 1903; Laws 1903, p. 282), § 4, declaring guilty of a misdemeanor one who uses force, threats, or other means of intimidation to prevent any person from engaging in any lawful occupation, it must be shown that the person against whom the acts or conduct complained of were directed was engaged in a lawful occupation, or purposed such an engagement, and that such acts or conduct had reference to the prevention of such an engagement or pursuit of a lawful occupation.

[Ed. Note.—For other cases, see Conspiracy, Dec. Dig. § 30.*]

Appeal from City Court of Mobile; O. J. Semmes, Judge.

Lawrence Burt was convicted under an indictment charging the use of insulting, etc., language in the presence of females, and violation of the anti-boycott act (Laws 1903, p. 281), and appeals. Reversed and remanded.

The first count in the indictment charges the use of insulting, etc., language in the presence of females. The other counts are as follows (omitting the formal charging part): (2) Lawrence Burt used threats to prevent Lilly Le Beau from engaging in a lawful occupation. (3) Lawrence Burt used threats to prevent Lilly Le Beau from engaging in the lawful occupation of teaching pupils to use the keyboard of a linotype machine. (4) Lawrence Burt used threats to prevent Lilly Le Beau from engaging in the lawful occupation of teaching pupils to use the keyboard of the linotype machine—said threats consisting and stating that he or the Typographical Union would boycott her; that he would see that everybody that belonged to any union would work against her, and that they would ruin her business inside of a month; that the union was strong, and would crush her, no matter what town or city she should move to; that they would follow her and keep her down.

Demurrers were interposed: (1) Because there was a misjoinder of offenses in the indictment, the demurrers specifying the offenses therein charged. (2) Because said count does not state in what said alleged

threats consisted. It does not state the nature of the lawful occupation mentioned. It does not allege that said Lilly Le Beau was prevented from engaging in a lawful occupation by reason or virtue of said alleged threats. Said count does not allege that said Lilly Le Beau saw fit to engage in any lawful occupation at any place. It does not allege at what place said Lilly Le Beau saw fit to engage in a lawful occupation. Because section 4 of the act of Legislature of Alabama, approved September 26, 1903 (Gen. Acts 1903, p. 282) is unconstitutional, in that the subject of section 4 in said act is not clearly expressed in the title, and count 2 of the indictment is drawn under said section. The same is unconstitutional in that it contains more than one subject. The same demurrers were interposed to count 3. Demurrers to count 4 were interposed as follows: The said count is ambiguous, in that it does not allege with certainty whether said alleged threats consisted in stating that he, the defendant, would boycott her, or whether the Typographical Union would boycott her. It is not alleged that the defendant made the statement or statements set forth in said count. Because the statement or statements set forth in count 4 do not constitute a threat or threats, within the meaning of section 4 of said act—together with the other grounds of demurrer interposed to the other counts.

Boyles & Kohn, for appellant. Alexander M. Garber, Atty. Gen., for the State.

McOLELLAN, J. In *Wooster v. State*, 55 Ala. 217, it was ruled that objection for misjoinder of offenses constituting misdemeanors could not be taken by demurrer. In felonies, an essential element, among others, to justify joinder in different counts, is that the offenses belong to the same family of crimes. That rule does not prevail with respect to misdemeanors. *Wooster's Case*, supra.

The indictment contained one count charging the use of abusive, etc., language in the presence of a female (Code 1896, § 4306), and three counts purporting to charge a violation of what is commonly called the "Anti-Boycott Act," in that the defendant interfered by threats with the occupation of Miss Le Beau. From the bill it appears that the testimony for the state tended to show that the defendant, in threatening Miss Le Beau with the hostility of labor unions and the destruction of her business or occupation, wherever she was, if she taught persons the art of operating Mergenthaler linotype machines, used language forbidden by the cited statute. The principle has been long settled in this state that for a single act, though it violates one or more penal statutes, there can be but one conviction of the offender. *Hurst v. State*, 86 Ala. 604, 6 South. 120, 11 Am. St. Rep. 79; *Walkley v. State*, 133 Ala. 183, 31 South. 854;

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Jackson v. State, 136 Ala. 96, 33 South. 888; Gunter v. State, 111 Ala. 23, 20 South. 632, 56 Am. St. Rep. 17; O'Brien v. State, 91 Ala. 23, 8 South. 559. Untreinor v. State, 146 Ala. 133, 41 South. 170, and Scrutchings v. State, 151 Ala. 1, 43 South. 962, are not in conflict with the principle stated, since the effect of a single act was not involved therein, nor considered. We interpret the testimony, if credited with disfavor to the defendant, who denies its truth, as making a case within the principle above stated.

The judgment adjudges the guilt of the defendant of both a violation of the abusive, etc., language statute and the "anti-boycott act" in the respect indicated, and this consequent upon the finding of the jury that the defendant was "guilty as charged in the indictment, and further find the defendant to be fined \$137." As clearly appears, the verdict is referred by the jury to both charges; and the amount of the fine assessed must be likewise referred to the conclusion of guilt under both charges. It results, on this phase of the case, that the judgment is erroneous, and a reversal must be entered.

In such cases as this the jury should be instructed, if they are convinced to the requisite degree of the defendant's guilt of one or more of the offenses resulting from the single act of the defendant, to mold their verdict so as to declare their conclusion of his guilt of one of the offenses with which he is charged. In such cases, if this be not done, and a general verdict of guilty as charged in the indictment is rendered, necessarily a defendant, the judgment following the verdict, would suffer two punishments for one single criminal act.

But the right to require an election by the state, in cases where, as here, the single act may have violated two or more statutes, does not exist, for the reason that the purpose to be conserved by an election for which offense the state will seek a conviction is to protect the defendant from his prosecution for two or more like offenses (misdemeanors) under one count of an indictment. Where the criminal act is single, and the counts of the indictment charge the violation of two or more statutes by that single act, or where the proof discovers that condition, the office of election is not present. Scrutchings v. State, 151 Ala. 1, 43 South. 962.

Since a reversal results, we premit decision of the questions raised as to the constitutionality of the "anti-boycott law." However, for the purposes of another trial, we will pass upon the sufficiency of counts 2, 3, and 4 as against the demurrers to them on that score only. The second count is, in our opinion, sufficient. That count follows the language of section 4 of the "anti-boycott act" (Gen. Acts 1903, p. 282), except it omits the words "at any place he or she sees fit."

The demurrer takes this point. We think the quoted words are pure surplusage, since the offense is fully described by the language employed in the section preceding the quoted words, and the quoted words neither expand nor contract the description anteceding them. We apprehend, however, that as a matter of proof, in order to justify a conviction under this section, some evidence of a legal character must be adduced tending to establish that the party against whom the "force, threats or other means of intimidation" were directed, to prevent such person from engaging in any lawful occupation, was either engaged in a lawful occupation or purposed to enter thereupon. If one threatened, etc., as the section defines, was not then engaged in a lawful occupation, and purposed no engagement in an occupation of any kind, the intent of this section, consistent as it is with the general intent of the whole act, would not be met, because the section undoubtedly contemplates only the protection of a person in the pursuit of any lawful occupation, whether already actually entered upon or not, and does not contemplate the creation of an offense by the mere act or conduct embraced in the "force, threats or other means of intimidation" described in the section. The elements must, of course, be present in the premises to constitute the offense; but the additional elements must be also present, viz.: First, that the person against whom the acts or conduct are directed must be engaged in a lawful occupation, or purpose such an engagement, though not actually entered upon; and, second, the acts or conduct employed against such a person must have reference to the prevention of such an engagement or pursuit of a lawful occupation.

From these considerations it results that counts 2, 3, and 4 are not subject to the grounds of demurrer attacking them for insufficiency.

The judgment is reversed, and the cause is remanded.

TYSON, C. J., and SIMPSON, ANDERSON, and MAYFIELD, JJ., concur.

(159 Ala. 289)

COHN & GOLDBERG LUMBER CO. v. ROBBINS.

(Supreme Court of Alabama. Feb. 18, 1909.)

1. EVIDENCE (§ 273*)—DECLARATION OF PERSON IN POSSESSION AS TO TITLE.

The declaration of the driver of a team, made after an accident, as to ownership of the team, is not admissible in an action for injuries resulting from such accident; the object of the declaration not being to explain the witness' possession, nor the accident, but solely for the purpose of proving that the property belonged to defendant, and no notice of such declaration having been given to defendant.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1117; Dec. Dig. § 273.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. EVIDENCE (§ 121*)—RELEVANCY—RES GESTÆ—DECLARATIONS.

A declaration, made while declarant is in the actual possession and control of personal property, and explanatory thereof, is admissible in evidence as a part of the res gestæ of such possession.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 316, 1117; Dec. Dig. § 121.*]

3. HIGHWAYS (§ 184*)—USE FOR TRAVEL—ACTIONS—ADMISSIBILITY OF EVIDENCE.

In an action to recover for injuries from a collision between a team of oxen and wagon and a horse and buggy, evidence of a witness of the accident that a woman who was driving the horse at the time was "so anxious that she got the impression on her part that she was in danger" was irrelevant and immaterial.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 184.*]

4. EVIDENCE (§ 474*)—OPINION EVIDENCE—MENTAL STATE.

In an action to recover for injuries from a collision between an ox team and wagon and a horse and buggy, testimony of a witness of the accident that a woman who was driving the horse was "so anxious that she got the impression on her part that she was in danger" was inadmissible; the witness not being competent to testify as to the woman's mental states.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2221; Dec. Dig. § 474.*]

5. TRIAL (§ 76*)—RECEPTION OF EVIDENCE—TIME FOR OBJECTIONS.

An objection to a question, made after a witness answers, comes too late, although the court, in overruling the objection, states that the evidence is competent.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 76.*]

6. EVIDENCE (§ 514*)—EXPERT TESTIMONY—ANSWERS BASED ON EVIDENCE INTRODUCED.

In an action for injuries resulting from a collision between an ox team and wagon and a horse and buggy, there was evidence that the driver of the ox team was an experienced driver, and also evidence how he was managing the team at the time of the accident. *Held*, that it was competent for an experienced driver of ox teams to give his opinion whether the manner in which the team was driven at the time was proper.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2321; Dec. Dig. § 514.*]

7. HIGHWAYS (§ 184*)—USE FOR TRAVEL—NEGLIGENCE—INSTRUCTIONS.

In an action for injuries to a horse and buggy from a collision with a team of oxen and wagon, an instruction that if the jury believed "that, immediately prior to or at the time of the collision," the driver of the oxen did all that a prudent and careful driver could have done to prevent a collision, they could not find for the plaintiff, was properly refused, as it would have justified a finding for defendant, although the driver might have done nothing "immediately prior" to the collision to prevent the same.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 474; Dec. Dig. § 184.*]

8. HIGHWAYS (§ 184*)—USE FOR TRAVEL—NEGLIGENCE—INSTRUCTIONS.

In an action for injuries to a horse and buggy in a collision with a team of oxen and wagon, an instruction that, if the jury believed that defendant's driver "was a prudent driver of steers and that he used every means in his power to prevent a collision," they must find for defendant, was properly refused, as

the driver might have been a prudent driver, and yet not competent to manage a team of the character of the one in question.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 474; Dec. Dig. § 184.*]

9. HIGHWAYS (§ 184*)—USE FOR TRAVEL—NEGLIGENCE—INSTRUCTIONS.

In an action for injuries to a horse and buggy in a collision with a team of oxen and a wagon, instructions that if at the time of the accident the oxen "became suddenly frightened," and the driver did all that a skillful and prudent driver could have done under the circumstances to prevent the accident, the jury should find for defendant, and if they believed that the injury was occasioned by "the sudden fright" on the part of the oxen, and that the driver did all that a reasonably prudent and careful driver could do to prevent the accident, they should find for defendant, were properly refused, as pretermittting the absence of fault on the part of the driver in the sudden frightening of the oxen.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 474; Dec. Dig. § 184.*]

10. HIGHWAYS (§ 184*)—USE FOR TRAVEL—NEGLIGENCE—INSTRUCTIONS.

In an action for injuries to a horse and buggy from a collision with an ox team and wagon, an instruction that if the driver of the oxen did all that was possible to be done "at the time of the accident to prevent the same," and he was a competent driver, the jury could not find for the plaintiff, is properly refused, as limiting all preventive efforts to avoid the injury to the time of the accident.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 474; Dec. Dig. § 184.*]

11. TRIAL (§ 252*)—USE FOR TRAVEL—NEGLIGENCE—INSTRUCTIONS.

In an action against the C. & G. Lumber Company for damages to a horse and buggy in a collision with an ox team and wagon, an instruction that, unless the jury believed from the evidence that the oxen were the property of C. & G. at the time of the accident, they must find for defendant, was properly refused; there being no evidence that the team was the property of C. & G., but the evidence showing that it was the property of the C. & G. Lumber Company.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

12. TRIAL (§ 240*)—USE FOR TRAVEL—ACTION FOR INJURIES—ARGUMENTATIVE INSTRUCTIONS.

An instruction, in an action for damages to a horse and buggy from a collision with a team of oxen and wagon on a public bridge, that public bridges are for the use of oxen and drays as much as for horses and buggies was properly refused as argumentative.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 561; Dec. Dig. § 240.*]

13. PRINCIPAL AND AGENT (§ 22*)—DECLARATIONS OF AGENT TO PROVE AGENCY.

The fact of agency cannot be proved by the declarations of the agent.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 240; Dec. Dig. § 22.*]

14. EVIDENCE (§ 241*)—ADMISSIONS BY AGENT—TIME OF MAKING.

Declarations of an agent may be admitted, if made in conducting a transaction within the scope of the agency, for the purpose of throwing light upon the transaction itself.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 887; Dec. Dig. § 241.*]

Dowdell, C. J., and McClellan, J., dissenting.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Circuit Court, Elmore County; W. W. Pearson, Judge.

Action by W. O. Robbins, Jr., against the Cohn & Goldberg Lumber Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The cause of action is based upon the injury done to the horse and buggy of plaintiff by being run into by a team of oxen and wagon belonging to the defendant and at the time under the control and management of one L. F. Hood, a servant of the defendant. While Robbins was being examined as a witness, and had testified that Mrs. Lancaster was in the buggy and was driving, meeting the team of oxen, he was asked by his counsel: "Did you hear Mrs. Lancaster say anything?" Objection being overruled to this question, the plaintiff put it in the following form: "Now, then, did you hear Mrs. Lancaster say anything to the driver?" And the witness answered: "I could see that Mrs. Lancaster was anxious." And counsel asked the witness the following question: "So anxious that she got the impression on her part that she was in danger?" And the witness answered: "Yes, sir." Then the bill of exceptions shows that the defendant objected to the question and answer because it called for irrelevant testimony, and because the evidence sought was hearsay, and the court remarked: "I don't think so, and I overrule the objections." L. F. Hood was called as a witness for plaintiff, and testified that after the accident he called Mr. Robbins, and "he asked me whose team it was," and plaintiff's attorney then asked the witness: "Whose property did you tell him it was?" Objection was interposed and overruled, and the witness answered: "I told him it was Mr. Goldberg's and Mr. Cohn's, and Mr. Norris', I suppose." This is the evidence referred to in the opinion.

The following charges were requested by, and refused to, the defendant:

"(2) If you believe from the evidence that L. F. Hood was the agent of the Cohn & Goldberg Lumber Company, and that the team of steers which collided with the horse and buggy of Robbins belonged to the Cohn & Goldberg Lumber Company, and that, immediately prior to or at the time of the collision between said team and the buggy of said Robbins, said Hood did all that a prudent and careful driver could have done to prevent a collision, then you cannot find for the plaintiff in this case.

"(3) If you believe from the evidence in this case that L. F. Hood, the driver of said team, was a prudent driver of steers, and that he used every means in his power to prevent a collision between the dray and the steers in his charge and the buggy and horse in the charge of W. O. Robbins, Jr., then you must find for the defendant.

"(4) If you believe from the evidence in this case that the said steers and wagon

were under the control of an ordinarily skillful and prudent driver, no matter whether said driver was in the employ of the Cohn & Goldberg Lumber Company or J. E. Wamble, and that at the time of the accident the steers became suddenly frightened, and that the driver did all that a skillful and prudent driver of steers could have done under the circumstances to prevent the accident, then you cannot find a verdict for the plaintiff in this case.

"(5) If you believe from the evidence in this case that the injury to the horse and buggy of W. O. Robbins, caused by the steers and team colliding with same, was occasioned by a sudden fright on the part of the steers, and that the driver in charge of the same did all that a reasonably prudent and careful driver could do to prevent the accident, then plaintiff cannot recover in this case.

"(6) If you believe that L. F. Hood, who, it is shown by the undisputed evidence, was in charge of the steers and wagon causing the injury to the plaintiff, did all that was possible to be done at the time of the accident to prevent the same, and that he was an ordinarily prudent and careful driver of steers, and accustomed to drive same, then you cannot find for the plaintiff in this case.

"(7) The court charges the jury that, unless they believe from the evidence that the steers were the property of Cohn & Goldberg at the time of the accident or damage complained of, then you must find for the defendant."

"(12) Public bridges are for the use of steers and drays, as much as for horses and buggies."

Frank W. Lull and Gunter & Gunter, for appellant. Phares Coleman and Holly & McMorris, for appellee.

DOWDELL, C. J. The general rule is that the declaration of one made while in the actual possession and control of personal property, and explanatory thereof, is admissible in evidence, and this upon the idea that it is a part of the *res gestæ* of such possession. Mayfield's Digest, vol. 3, p. 453, § 355. We think, however, when, as in the present case, the person whose declaration is sought to be proven is himself the witness testifying, and not being sought for purpose of impeachment, such evidence would be of little probative force, since the sworn testimony of the witness as to the facts would be better evidence than his unsworn declaration. The majority of the court are of the opinion, and so hold, that under the facts of this case the declaration of Hood, admitted in evidence, as to the ownership of the team, made by him while in the possession and control of the same as a driver, does not come within the principle above stated as to declarations, made by one in possession of property, explanatory of such possession, and that in the admission of this

evidence the court committed reversible error. The writer, with whom McCLELLAN, J., concurs on this point, is of the opinion that if the declaration of one in possession, explanatory of such possession, be admissible in evidence upon the theory of *res gestæ* of the possession, which seems to be the universal rule, such declaration explanatory of possession would not be rendered incompetent because it might tend to show ownership of the property in a third party.

The plaintiff was permitted to prove by his witness Robbins, against the objection of the defendant, that a Mrs. Lancaster, whom witness passed in a buggy on the bridge just preceding the collision between the ox team and the plaintiff's buggy, "was so anxious that she got the impression on her part that she was in danger." In the admission of this evidence against the defendant's objection the court was in error. The anxiety of Mrs. Lancaster was wholly irrelevant and immaterial, and, besides, the witness was not competent to testify as to the mental status of Mrs. Lancaster. The majority of the court, however, are of the opinion that, since it appears from the bill of exceptions that the objection was not made to the question until after the witness answered, the objection came too late, and that the action of the court in overruling the objection and admitting the evidence should not, for this reason, be revised, notwithstanding the court, in overruling the objection, expressed the opinion that the evidence was competent. The writer of the opinion thinks that, since the court evidently based its ruling upon the competency of the evidence, and not upon the ground that the objection came too late, which latter ground is one addressed to the discretion of the court, the question is one proper for revision by this court.

There was evidence tending to show that the driver of the ox team was an experienced driver, and also evidence showing how he was managing the team at the time of the accident. On this evidence it was competent for the witness Norris, who was shown to be an experienced and expert driver of ox teams, to give his opinion as to whether the manner in which the team was driven was proper.

Charge 2, requested by the defendant, was rendered bad in the use of the disjunctive conjunction "or," and for this reason, if no other, was properly refused. By this charge the jury were instructed to find for the defendant, although the driver of the ox team might have done nothing "immediately prior" to the collision to prevent the same.

The third charge asked by the defendant is subject to the criticism that it pretermits the competency of the driver of the ox team. He might have been a prudent driver, and yet not competent to manage a team of the character of the one in question, and, if not, the defendant would be liable for an injury

done another caused by the incompetency of the driver.

The fourth and fifth charges are each faulty in pretermitting an absence of fault on the part of the driver in the "sudden fright" of the oxen, and for this reason, if no other, these charges were properly refused.

The sixth charge limits all preventive efforts to avoid the injury to the time of the accident, when it might have been avoided by taking precautionary measures before the time of the accident.

There was no evidence that the team was the property of Cohn & Goldberg, but the property of Cohn & Goldberg Lumber Company, and hence charge 7 was properly refused.

The twelfth charge requested by defendant was argumentative, and there was no error in refusing it.

In accordance with the holding of the majority of the court, for the error committed in the admission of the evidence of the witness Hood, indicated above, the judgment must be reversed, and the cause remanded.

Reversed and remanded.

SIMPSON, J. In behalf of the majority of the court, holding that the witness Hood should not have been allowed to testify that he had said, shortly after the accident, that the wagon and team belonged to the defendants, I desire to say: First. That the remark was not made at the time of the accident, but after the witness and the team had crossed the bridge and proceeded into the town of Wetumpka. *Williams v. State*, 130 Ala. 109, 117, 30 South. 484. Second. The object of this testimony was not to explain his possession, nor was it sought as a part of the *res gestæ* to explain the accident, but for the purpose of proving that the property belonged to the defendant. It may also be said, upon the general proposition referred to by our Brother who writes the opinion, that the rules of evidence must be construed as an entire body of laws, and that the fact that, under certain circumstances, given testimony is admissible, does not mean that it should be admitted when its purpose and effect is to override other fundamental principles of law. The facts that, under certain circumstances and conditions, the declarations of a party in possession may be admitted, to explain his possession, and that matters which are a part of the *res gestæ* may be admitted, do not mean that such testimony is admissible against a third party, when it is a violation of the fundamental principles in regard to hearsay testimony to admit it.

It is a settled principle in the law of agency that, while the declarations of an agent, who is admitted or proved to be such, may be admitted, if made in conducting a transaction within the scope of his agency, for the purpose of throwing light upon the transaction itself, it is equally true that the fact

of agency cannot be proved by the declarations of the agent. 1 Elliott on Ex. § 252; 2 Elliott on Ex. §§ 1631 (note 21), 1636; Whiting & Co. v. Lake, 91 Pa. 349; First Nat. Bank of Tuscaloosa v. Leland, 122 Ala. 289, 295, 296, 25 South. 195; Owensboro Wagon Co. v. Bliss et al., 132 Ala. 254, 260, 31 South. 81, 90 Am. St. Rep. 907; Mobile & Montgomery R. v. Ashcraft, 48 Ala. 15, 30. While the acts and declarations of one in possession are admissible to explain his possession, yet they are not admissible to prove ownership of or with another, unless notice thereof is brought home to the other. Central, etc., Co. v. Smith, 76 Ala. 572, 578, 579, 52 Am. Rep. 353; Humes v. O'Bryan & Washington, 74 Ala. 64, 78-80. In the case just cited, the court held that the declarations of the partner were admissible, if at all, only because made against his interest, and because he "possessed competent knowledge of the facts, and is deceased at the time the declarations are proposed to be proved," but that even then "they cannot be said to be evidence against the defendant, Humes, of the existence of the partnership in question, unless some notice of them was brought to his knowledge." It is true, as intimated in that and in other cases, that where a partnership is sought to be proved by circumstantial acts, among which are continuous transactions by the partners, there may be cases where the declarations of one, acting continuously and openly in the partnership name, may be admissible as a circumstance, but that does not militate against the general principle.

In the case now before the court, the witness whose declarations were sought to be introduced was on the stand; and even if he possessed any competent knowledge of the ownership, it should have been proved by his testimony under oath, and not by his stating what he had said before. The cases in which expressions have been used which, taken from their context, may seem to be in conflict with the foregoing cases, are easily explainable on other principles. For instance, the case of Daffron v. Crump, 69 Ala. 77, was a trial of the right of property in a yoke of oxen which had been levied on as the property of said Daffron; and a claim was interposed by his wife, setting up that the property was hers. There was no question about the fact that said defendant, Daffron, had bought the oxen and paid for them; the question to be solved being whether he bought them for himself or for his wife. Whether Daffron had paid for the oxen with his own money, or with that of his wife, was a matter not made clear by the evidence. Hence it became a matter to be proved, by circumstances, whether he was claiming them as his own or as the property of his wife. The case was reversed on another point, to wit, that a party who knows can testify as to the ownership of personal property (in such a case, which in-

volved no question of the construction of a contract); and the court went on to make some remarks, for the guidance of the court below in trying the case again, to the effect that "in trials of the right of property, declarations or admissions by the defendant in execution, made in the absence of the claimant, are, as a rule, not admissible. They come under the class of hearsay evidence. But parties in possession of *such property* may make declarations explanatory of their possession, and either claim or disclaim ownership of the property, and such declarations may be given in evidence, in an issue of disputed ownership, no matter who may be the parties to the suit." (*Italics ours.*) In other words, in this particular class of cases, there may be such a state of circumstances that it becomes necessary to prove, as a circumstance, whether the husband is claiming the property as his own or as his wife's, in order to determine what his intentions were in buying it. In the case of Kirkland v. Trott, 66 Ala. 417, Kirkland disclaimed possession in an action of ejectment, and the declarations of one Hogan, who was in possession, to the effect that he had taken possession for Kirkland, were admitted; but it was proved "that Hogan had been defendant's agent or clerk before that time, or had been in business with him," and also that a written demand had been made on Kirkland for possession, and that he had refused to deliver possession, saying nothing about Hogan's being in possession. In the case of Brazier & Co. v. Burt, 18 Ala. 201, the plaintiffs had levied on certain cotton as the property of John M. Mack, and the declarations admitted were really directions by Mack to his son to have the cotton ginned and packed and delivered to the claimant; an instrument of writing having already been in evidence, by which Mack had conveyed the property to the claimant, and this evidence was to show that the conveyance was not simulated, but that Mack had in fact delivered it to the claimant, in accordance with the contract. It would be too tedious to notice particularly all the cases on this subject, but those discussed are probably the strongest that can be cited having any tendency to show the admissibility of this evidence.

Another fact may be noticed, to wit, that in all the cases where this testimony was admitted the point at issue was whether the party making the declaration was claiming the property himself, or, disclaiming any ownership, acknowledged that he held for another. In none of them was a party, who was acknowledged by both parties to have no interest in the property, allowed, by his mere declarations, to show that the title to the property was in either one or the other, simply because he had been employed to transport it from one point to another. The fact is that a servant is not in the possession of personal property intrusted to him, but that

his possession is the possession of his master. "A servant's declarations regarding the rights or liabilities of the master are incompetent, in the absence of some proof of express agency and evidence that the statements were within the line of the declarant's duty and made while he was in good faith seeking to discharge it." 16 Cyc. 1030. It is inconceivable that any court should declare that a mere servant, employed to drive a team, could, by his mere declarations as to the ownership of the team, fix a liability on the master, and that, too, when the servant is present, and can be examined under oath, and made to show whether he knows anything about it.

ANDERSON, DENSON, and MAYFIELD, JJ., concur in the views of Justice SIMPSON. McCLELLAN, J., is of the opinion that there is no error in the record, and hence that an affirmance should be entered.

(159 Ala. 14)

ANDREWS v. STATE.

(Supreme Court of Alabama. Feb. 4, 1909.)

1. CRIMINAL LAW (§ 1086*)—JURISDICTION—CITY COURT OF BESSEMER—TRANSFER FROM CRIMINAL COURT OF JEFFERSON COUNTY.

Act Feb. 28, 1901 (Loc. Acts 1900-01, p. 1854; Weakley's Loc. Laws Jefferson County, p. 115) § 16, provides that cases then or thereafter pending in the criminal court of Jefferson county may by consent be transferred to the city court of Bessemer. A transcript from the criminal court of Jefferson county in the record showed that on motion of defendant an order was entered transferring his case to the city court of Bessemer on a stated date, and an order to transmit all papers in the case to the city court, together with a transcript of the minutes showing the organization of the criminal court of Jefferson county and of the grand jury. Held, that it sufficiently appeared from the record that the case had been transferred on the specified date.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1086.*]

2. CRIMINAL LAW (§ 1086*)—REVIEW—RECORD—ORGANIZATION OF TRIAL COURT.

A transcript on certiorari, showing that a person who was judge of the city court of Bessemer was presiding at the trial, and in connection with the certificate of the clerk at the end of the transcript showing that an order then made was by the city court of Bessemer, sufficiently showed the organization of the trial court, though the name of the court was not stated at the head of the minute entry as to the arraignment of accused and the fixing of the day for his trial.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1086.*]

3. JURY (§ 75*)—IMPANELING—EXCUSING JURORS FOR CAUSE—DISCRETION OF COURT.

In impaneling regular jurors at the organization of the court, the court may in its discretion excuse certain persons summoned as jurors, for good cause shown.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 384-385; Dec. Dig. § 75.*]

4. JURY (§ 47*)—QUALIFICATIONS OF JURORS—RESIDENCE.

Under Act Feb. 28, 1901 (Loc. Laws 1900-01, p. 1870) § 33, creating the city court of Bessemer and providing that petit jurors in criminal cases shall be drawn and summoned from the district over which the court has jurisdiction, it was error to place on a jury a person who lived outside the district.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 47.*]

5. JURY (§ 47*)—QUALIFICATIONS OF JURORS—RESIDENCE.

Under Act Feb. 28, 1901 (Loc. Laws 1900-01, p. 1870) § 33, creating the city court of Bessemer and providing that, in completing the jury for trial of a capital case, the judge shall draw the names of persons subject to jury duty residing within two miles of the place where the court is held in the city of Bessemer, it was error to place on the jury a person living more than two miles from Bessemer, though he lived within two miles of the county courthouse at Birmingham.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 47.*]

6. JURY (§ 58*)—IMPANELING.

As the requirements of the Code regarding the selecting of jurors are, under the express provisions of Code 1907, § 7256, merely directory, so that no objection can be taken to a venire facias for a petit jury, except for fraud in drawing or summoning the jurors, the exclusion of testimony as to the manner in which a petit jury was drawn was not error.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 266; Dec. Dig. § 58.*]

7. WITNESSES (§ 414*)—CONTRADICTION—CORROBORATION.

Where a witness in a murder case, in relating the res gestæ, had been allowed without objection to testify as to wounds he had received during the difficulty, and accused sought to discredit his testimony by showing, from the position of the wound, that he was facing accused, with his pistol in his hand pointed at accused, it was not error to permit witness to show his wounds.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 414.*]

8. CRIMINAL LAW (§ 404*)—MURDER—EVIDENCE—DECEDENT'S CLOTHING.

In a murder case, the clothing which was worn by decedent was properly introduced in evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 891; Dec. Dig. § 404.*]

9. WITNESSES (§ 274*)—CROSS-EXAMINATION—CHARACTER WITNESSES.

While the character of a witness or of accused cannot be proved by particular acts, and the evidence of his good character cannot be rebutted by proof of particular acts, yet to test the credibility or accuracy of the character witness he may be asked on cross-examination whether or not he has heard of particular acts; and hence witnesses, having testified to accused's good character, could be asked how many fights they recalled that accused had had, or as to whether he had not been regarded by the citizens of the community as a desperate character.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 965, 966; Dec. Dig. § 274.*]

10. CRIMINAL LAW (§ 1170½*)—APPEAL—REVIEW—HARMLESS ERROR—ADMISSION OF TESTIMONY.

The overruling of an objection to a question asked a witness as to whether a ball entering clothing would make a hole about the size of a bullet was not prejudicial to defendant,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

where he answered, "It might, and it might not."

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1170½.*]

11. CRIMINAL LAW (§ 1168*) — APPEAL — HARMLESS ERROR—RECALLING WITNESS.

Where the recalling of a witness by the state, and the refusal to permit him to restate on redirect examination what he had just stated on cross-examination, caused no injury to accused, he could not complain thereof.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1168.*]

12. WITNESSES (§ 406*)—EVIDENCE.

In a murder case, where a witness testified that he was at the place of the killing, and that another person who had testified that he was there was in fact not there, it was error to exclude witness' testimony as to whether he could have seen the other person, had that person been there.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1276-1279; Dec. Dig. § 406.*]

13. CRIMINAL LAW (§ 377*) — EVIDENCE — CHARACTER OF ACCUSED.

In a murder case, where a witness had testified that he had known accused 16 or 17 years, knew his general character, and that it was good, and on being asked on what he based his opinion stated that accused had worked for him a good while, had had access to all his valuables, but that he had never missed anything, and accused was always exceedingly polite and obliging, but that he did not base his opinion on that alone, as he had never had any occasion to think his character was bad, it was error to exclude the entire testimony, since the statement of the further facts was not sufficient to take from the jury the testimony that he knew accused's general character, and that it was good.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 836, 837, 840; Dec. Dig. § 377.*]

14. CRIMINAL LAW (§ 377*) — EVIDENCE — CHARACTER OF ACCUSED.

In a murder case, testimony as to accused's good general character was properly excluded, where based on the general observation of accused by witness, who did not testify to a knowledge of his general character.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 836, 837, 840; Dec. Dig. § 377.*]

15. WITNESSES (§ 240*)—EXAMINATION—LEADING QUESTION.

A question asked a witness, "Tell the jury if you saw the pistol balls near the watering tub," was objectionable as being leading.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 837-839, 841-845, 849-851; Dec. Dig. § 240.*]

16. WITNESSES (§ 237*)—EXAMINATION—QUESTIONS ASSUMING FACTS.

The question was objectionable as assuming the fact that the pistol balls were near the tub.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 829-832; Dec. Dig. § 237.*]

17. CRIMINAL LAW (§ 339*)—MURDER—EVIDENCE—IDENTIFICATION OF WEAPONS.

In a murder case, evidence was admissible to prove the character and condition of pistols introduced on the preliminary trial, that the jury might determine whether they were the same pistols and in the same condition as when introduced on the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 767-772; Dec. Dig. § 339.*]

18. HOMICIDE (§ 174*)—MURDER—EVIDENCE—ADMISSIBILITY.

In a murder case, testimony of a witness as to statements made by accused, shortly after the shooting, that he did not know who did the shooting, was admissible; the statements not being in the nature of a confession.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 3; Dec. Dig. § 174.*]

19. CRIMINAL LAW (§ 762*)—TRIAL—INSTRUCTION—DUTY OF JUDGE.

In charging the jury it is the duty of the judge to give the law applicable to all theories presented by the testimony, and if he recapitulates the evidence on one side, to recapitulate it also on the other side, and not to indicate by the matter or manner of the charge what his own views are as to the effect of the testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1750, 1754, 1758; Dec. Dig. § 762.*]

20. CRIMINAL LAW (§ 763*)—INSTRUCTIONS—PROVINCE OF JURY.

In a murder case, a statement in the charge that "the evidence on the part of the state goes to show that this defendant fired all three of those shots" goes beyond the rule that the judge may state the tendency of the evidence on both sides, and invades the province of the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1748, 1752, 1768, 1770; Dec. Dig. § 763; Homicide, Cent. Dig. §§ 579, 603, 631-648.]

21. CRIMINAL LAW (§ 814*) — MURDER — INSTRUCTIONS.

The state's evidence tending to show that decedent's pistol was fired once, the charge was erroneous, as not supported by the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1979-1985; Dec. Dig. § 814.*]

22. HOMICIDE (§ 300*)—INSTRUCTIONS—IGNORING DEFENSE.

Where accused's evidence tended to show self-defense, a charge that, if the jury found that accused killed decedent, then accused was guilty, and the next thing to do was to fix the degree of punishment, was erroneous, as ignoring self-defense.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 300.*]

23. HOMICIDE (§ 11*)—MURDER—ELEMENTS—MALICE.

If there is a reasonable doubt as to whether a killing was done with malice, accused cannot be convicted of murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 15, 16; Dec. Dig. § 11.*]

24. CRIMINAL LAW (§ 766*)—MURDER—INSTRUCTIONS—ELEMENTS OF OFFENSE.

A charge that the state must show beyond a reasonable doubt all the constituents of the crime charged before accused is called upon to explain any circumstances connected therewith or to make any defense was properly refused, since what are elements of the offense is a question of law for the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1794-1797; Dec. Dig. § 766.*]

25. CRIMINAL LAW (§ 795*) — MURDER — INSTRUCTIONS.

The charge was also erroneous because, even though the evidence might not show the constituents of the crime charged, it might show the commission of a lesser degree of crime, covered by the indictment.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 795.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

26. HOMICIDE (§ 300*)—MURDER—SELF-DEFENSE—RETREAT—INSTRUCTIONS.

In a murder case, a requested charge that, if accused was attacked in his livery stable by decedent with a deadly weapon, accused was under no duty to retreat from his antagonist, was properly refused as misleading.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

27. HOMICIDE (§ 300*)—MURDER—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

In a murder case, charges that one feloniously assaulted in his own place of business is not bound to retreat, even though by so doing he might secure his safety, but may stand his ground and take his assailant's life if it becomes necessary, and the homicide is justified; that homicide is justifiable when committed by one into whose place of business decedent was endeavoring in a violent manner to force himself, with the intention of unlawfully assaulting the owner thereof; and that the evidence which shows the killing of one person by another with a deadly weapon may rebut the presumption of malice arising from the use of such weapon—were properly refused as misleading.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

28. CRIMINAL LAW (§ 807*)—ARGUMENTATIVE INSTRUCTIONS.

The charges were also properly refused as argumentative.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1805, 1959, 1960; Dec. Dig. § 807.*]

29. HOMICIDE (§ 300*)—MURDER—INSTRUCTIONS—DUTY TO RETREAT.

In a murder case, a requested charge that where one without fault is attacked by another, and he kills his assailant, if the circumstances furnish reasonable ground for apprehending a design to take his life or do him some great bodily harm, and for believing the danger imminent and that such design will be accomplished, the homicide is justifiable, though it may turn out that the appearance was false, and that there was in fact no such design, nor any danger of its being accomplished, was properly refused, as it failed to hypothesize accused's belief that he was in imminent peril, or to mention either the matter of retreat or domicile.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

30. CRIMINAL LAW (§ 789*)—MURDER—INSTRUCTIONS—INVOLVED AND UNCERTAIN INSTRUCTIONS.

In a murder case, a charge that the law demands that the minds of the jurors be so satisfied by evidence that no reasonable doubt exists in them but that their finding is correct, and accused guilty of the charge, and that if they are not satisfied they should not convict, was properly refused as involved and uncertain.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 789.*]

31. HOMICIDE (§ 118*)—SELF-DEFENSE—APPREHENSION OF IMMINENT DANGER.

If one, who is free from fault in bringing on a difficulty, is attacked by another, in his own house or place of business, in such a manner as would raise in a reasonable mind the belief that he is in imminent danger of great bodily harm, and he is so impressed, he is under no obligation to retreat, but will be justified in taking the assailant's life.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 168-171; Dec. Dig. § 118.*]

32. HOMICIDE (§ 151*)—KILLING IN DEFENSE OF PERSON—BURDEN OF PROOF.

The burden of proof, in a prosecution for such a homicide, would be on the state to prove

that accused was in fault in bringing on the difficulty, and not on accused to show that he was free from fault.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 278; Dec. Dig. § 151.*]

Appeal from City Court of Bessemer; William Jackson, Judge.

John Andrews was convicted of murder, and he appeals. Reversed and remanded.

The record shows the organization of the criminal court of Jefferson county, the drawing of the grand jury for that term, and the organization of the city court of Bessemer. It is further shown by the certiorari that the city court of Birmingham was organized and the grand jury ordered to turn in report of May 14, 1906. It further shows that on the 17th day of September, 1907, an order was entered in the criminal court of Birmingham, transferring said cause from the criminal court of Jefferson county to the city court of Bessemer, and an order to transmit all papers in the cause to the city court of Bessemer, together with a transcript of the minutes showing the organization of the criminal court of Jefferson county and of the grand jury. Another order is shown, made on December 9, 1907, in the city court of Bessemer, for drawing jurors to try capital cases in the city court of Bessemer, beginning on the 6th day of January, 1908. The indictment appears to have been preferred and filed on the 21st day of April, 1906, and a bond made by the defendant for his appearance at the next term of the criminal court of Jefferson county, and from term to term, etc., approved November 24, 1906. The certificate of the clerk of the criminal court of Jefferson county transferring the cause, and the minutes, are dated May 5, 1908.

It was shown that the juror Lynn did not live within the district over which the city court of Bessemer had jurisdiction. In impaneling the regular jurors for the week in which the trial of this cause was set, for good cause shown, the court excused Brown and Betts, who had been summoned as jurors. The defendant entered a motion to quash a venire, and in that connection offered to show by Capt. Crook that the jurors were drawn from the box before any were selected for grand or petit jurors, and that the grand jurors were then selected and placed upon the grand jury venire, and the names remaining were placed upon and made to constitute the venire for the petit jury.

The record shows that Lawrence Lipscomb was next called by the defendant, and stated that he was engaged as clerk at the ice factory, and had been living in Bessemer 18 or 20 years, and knew the defendant's general character to be good. On cross-examination he stated that he based this opinion on his general observation of defendant, and on mo-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion of the state this evidence was excluded. This same witness was asked as to the character and condition of the pistols which were introduced in evidence on the preliminary trial as the pistols used by the different parties to the shooting; but on objection by the state the questions and answers were excluded. On the cross-examination of the defendant, he was asked by the state concerning various difficulties he had been in, and in that connection was asked the question which is set out in the opinion, to which objection was made and overruled.

The following charges were refused to the defendant:

"(1) If there is a reasonable doubt as to whether the killing was done with malice, the defendant cannot be convicted of murder at all.

"(2) The court charges that the state must show by the evidence beyond a reasonable doubt all the constituents of the crime charged before the defendant is called upon to explain any circumstances connected therewith, or to make any defense.

"(3) If the defendant was attacked in his livery stable by the deceased with a deadly weapon, the defendant was under no duty to retreat from his antagonist.

"(4) The court instructs the jury that one feloniously assaulted in his own place of business is not bound to retreat, even though by so doing he might secure his safety; but he may stand his ground, and take his assailant's life, if it becomes necessary, and the homicide is justified.

"(5) The court instructs the jury that homicide is justifiable when committed by one into whose place of business deceased was endeavoring in a violent manner to force himself, with the intention of unlawfully assaulting the owner thereof.

"(6) The evidence which shows the killing of one person by another with a deadly weapon may rebut the presumption of malice arising from the use of such weapon.

"(7) The court instructs the jury that where one without fault is attacked by another, and he kills his assailant, if the circumstances furnish reasonable ground for apprehending a design to take his life or do him some great bodily harm, and for believing the danger imminent, and that such design will be accomplished, the homicide is justifiable, though it may turn out that the appearance was false, and that there was in fact no such design, nor any danger of its being accomplished.

"(8) The law demands that your minds be so satisfied by evidence that no reasonable doubt exists in you but that your finding is correct, and the defendant guilty of that charge; and if you are not satisfied in this way you should not convict."

The other charges requested were on self-defense, and need not be specially set out.

Allen & Bell and Thomas T. Huey, for appellant. Alexander M. Garber, Atty. Gen., for the State.

SIMPSON, J. The appellant was convicted of the crime of murder, and his punishment fixed at death.

The city court of Bessemer was created by the act approved February 28, 1901 (Loc. Acts 1900-01, p. 1854; Loc. Laws Jefferson Co. [by Weakley] p. 115). Section 16 of that act provides that cases then or thereafter pending in the criminal court of Jefferson county "may be, by consent of the parties thereto, transferred to said city court of Bessemer"; and section 25 provides that in all cases where a party is arrested on an indictment, "for an offense arising or committed by him in said district, * * * if said warrant or capias or other process is returnable to the criminal court of Jefferson county, and the defendant makes bond for his appearance, his case shall be removed to said city court of Bessemer, and the papers shall thereupon become returnable to said city court of Bessemer, and the case triable there." Section 26 provides that, in all cases where the defendant fails or refuses to make bond at the time of his arrest for an offense committed in said district, he shall be confined in the county jail at Birmingham, and his case stand for trial in the criminal court of Jefferson county, provided that "if any person who is confined in said jail for an offense committed in said district, within the jurisdiction of said city court, shall make a good and sufficient bond for his appearance at the said city court, to answer the charge preferred against him, it shall be the duty of the sheriff to immediately return said bond to the clerk of the criminal court of Jefferson county, and the case shall thereupon stand removed to the city court," and it shall be the duty of the clerk to transmit papers, etc.

It is first insisted by appellant that the record shows that the indictment in this case was found in said criminal court of Jefferson county, in April, 1906, and, as shown by the transcript, was not certified to the city court of Bessemer until the 14th day of February, 1908, after this case had been tried, and the defendant convicted, on the 6th day of January, 1908, and that consequently, at the time of trial, the city court of Bessemer was without jurisdiction to try this case. The transcript from the criminal court of Jefferson county, in the record, shows that, on the motion of the defendant, his case was transferred to the city court of Bessemer on September 17, 1907. We think it sufficiently appears that this case was transferred to said city court before the trial of the same, and the indictment was in court. *Dudley v. Birmingham, etc., Co.*, 139 Ala. 453, 461, 36 South. 700. The court had jurisdiction. In the case of *Rose v. State*, 117 Ala. 77, 79, 23 South. 638, 639.

the record failed to show "anything touching the transfer of this cause."

The organization of the trial court sufficiently appears from the transcript brought up by certiorari. While it is true that the name of the court is not stated at the head of the minute entry as to the arraignment of the defendant and the fixing of the day for his trial, yet it shows that Hon. Wm. Jackson was presiding, and in connection with the certificate of the clerk at the end of the transcript it sufficiently shows that the order then made was by the city court of Bessemer.

The return to the certiorari shows also that the special jurors were drawn according to law. *Loc. Acts Jefferson Co.* (Act Feb. 11, 1901) 705. It appears from the record that the excusing of the jurors Brown and Betts by the court was upon the impaneling of the juries at the organization of the court, which was within the discretion of the court, and not error.

Section 33 of the act creating said city court of Bessemer provides that the petit jurors "shall be drawn and summoned from said district." Consequently it was error to place the juror Lynn on said jury, who was shown to live outside said district.

The act provides (section 33) that, "in completing the juries for the trial of any capital case, the judge of said city court shall draw, under the provisions of this act, the names of persons subject to jury duty, residing within two miles of the place where said court is held in the city of Bessemer." Consequently there was no error in placing upon the jury Lon Tyler, who lived more than two miles from the courthouse at Birmingham, but within two miles of Bessemer; but there was error in placing upon the panel Bob Vance, who resided within two miles of the courthouse at Birmingham, but not within two miles of Bessemer.

But there was no error in sustaining the objections to the questions propounded by defendant to the witness Capt. Crook as to the manner of drawing the juries, as the provisions of law in regard to the selection of jurors are merely directory, and no objection can be made, except for fraud. *Code 1896, § 4997; Code 1907, § 7256; Baker v. State, 122 Ala. 1, 26 South. 194; Thompson v. State, 122 Ala. 12, 26 South. 141; Childress v. State, 122 Ala. 21, 26 South. 162.*

The witness Milstead, in relating the *res gestæ*, had been allowed without objection to testify as to the wound he received in his thumb and side during the difficulty, and it was sought by the defendant to discredit his testimony, by showing, from the position of the wound, that he was facing the defendant, with his pistol in his hand, pointed at defendant. It was not error to allow him to show the wounds received by him. It is true the defendant was not on trial for shooting him; but the course of the examination,

just preceding, by the state and defendant, made this testimony pertinent.

There was no error in allowing the clothing which was worn by the deceased to be introduced in evidence. *Holley v. State, 75 Ala. 14.*

There was no error in overruling the motion by the defendant to exclude the testimony of the witness Stallings. No objection was made to the questions, and no reason is assigned for excluding the testimony.

On cross-examination the state asked the witness Dr. Carter, who had testified to the good character of the defendant, "How many fights do you recall that he has had?" and he answered that he had heard of but two. The defendant objected to the question, and moved to exclude the answer, both of which were overruled. While the character of a witness or of the defendant cannot be proved by particular acts, nor can the evidence of his good character be rebutted by proof of particular acts, yet, for the purpose of testing the credibility or accuracy of the character witness, he may be asked, on cross-examination, whether or not he has heard of particular acts. *De Arman v. State, 71 Ala. 351, 361; Jones v. State, 76 Ala. 9, 15, 16; Jackson v. State, 78 Ala. 471, 472; Moulton v. State, 88 Ala. 116, 119-20, 6 South. 740, 16 Am. St. Rep. 52; King v. State, 89 Ala. 146, 7 South. 750; Lowery v. State, 98 Ala. 45, 49, 13 South. 498; Thompson v. State, 100 Ala. 70, 71, 14 South. 878; Goodwin v. State, 102 Ala. 88, 98, 15 South. 571; Smith v. State, 103 Ala. 57, 70, 15 South. 866; Terry v. State, 118 Ala. 80, 86, 23 South. 776; Carson v. State, 123 Ala. 58, 60, 29 South. 608; Williams v. State, 144 Ala. 14, 18, 40 South. 405.* There was no error in overruling the objections to this question, and the three following ones, of the same tenor. The following question, also, as to whether the defendant had not been regarded by the citizens of the community as a desperate character, was proper, on cross-examination.

As the answer to the question to the witness Dr. Winters, whether a ball entering clothing would make a hole about the size of a bullet, was, "It might, and it might not," the overruling of the objection to that question was immaterial. The question as to whether the hole showed he was shot from behind was not answered, except by showing that the witness could not tell anything about it. Hence there was no error, injurious to defendant, in overruling the objection to the same.

The recalling of Dr. Winters by the state did not result in any injury to the defendant; hence he cannot complain. Nor was there any injury to him in the refusal to permit the witness to state over, on redirect examination, what he had just stated on cross-examination.

The witness Hannon stated that he was in a stall in the stable, and that Babe Justice was not there. He was asked by the

defendant, "You could have seen him?" The state objected, and the court sustained the objection. This was error. The evidence shows that "Babe Justice" was another name for Tom Justice, who had testified, and it was proper to ask the witness whether he could have seen him, if he had been there. *Tesney v. State*, 77 Ala. 33.

The witness Moody, on behalf of the defendant, stated that he had lived in Bessemer 18 or 19 years, had known the defendant 16 or 17 years, knew his general character, and that it was good. He also made other statements about the defendant's honesty, politeness, etc., about having business dealings with him, and testified that witness was a real estate man and talked with a great many people, etc. On being asked on what he based his opinion of his character, he stated that "the defendant had worked for him a good while, had had access to all his valuables," but that "he had never missed anything, and defendant was always exceedingly polite and obliging." The state asked him, "Is that what you base your opinion on?" and he replied, "Not altogether; I never had any occasion to think his character was bad." The state moved to exclude the testimony; and the court said, "Gentlemen, you are not to consider the testimony of this witness." This was error. The statement of the further facts was not sufficient to take from the jury the testimony of the witness that he knew the general character of the defendant, and it was good. The statement of the court excluded all of the testimony of the witness from the jury.

There was no error in excluding that part of Lipscomb's testimony preceding the exception, as he did not testify to a knowledge of the defendant's general character, but stated that he based his opinion on his general observation of him.

The question to the witness Huey, "Tell the jury if you saw the pistol balls near the watering tub," was objectionable, as being a leading question, and also as assuming the fact that the pistol balls were there. Consequently there was no error in sustaining the objection to it.

Upon another trial the defendant should be permitted to prove the character and condition of the pistols which were introduced on the preliminary trial, in order that the jury may determine whether they were the same pistols and in the same condition as when introduced in this trial.

There was no error in asking the witness Huey, on cross-examination, whether he had known of the defendant's having been in other troubles. See authorities *supra*.

The court erred in overruling the objection to the question by the state, "And you jumped on an old man by the name of Price down there?" See cases *supra*.

There was no error in overruling the objections to the question to the witness Patton

as to statements made by the defendant, shortly after the shooting, that he did not know who did the shooting. This was not in the nature of a confession; and, if the intention was to contradict the witness, no predicate was laid.

In charging the jury, it is the duty of the judge to give the law applicable to all theories presented by the testimony, and, if he recapitulates the evidence on one side, to recapitulate it also on the other side, and not to indicate, by the matter or manner of the charge, what his own views are as to the effect of the testimony. 1 *Blashfield on Instructions to Jurors*, p. 139, § 56; 12 *Cyc.* 612, 613; *Banks v. State*, 89 Ga. 75, 14 S. E. 927; *State v. Gilmer*, 97 N. C. 429, 1 S. E. 491; *Aaron Co. v. Hirschfeld*, 89 Ill. App. 205; *Wright et al. v. Central R. R. & B. Co.*, 16 Ga. 38; *State v. Moses*, 13 N. C. 452; *Smith v. State*, 68 Ala. 425, 432. We cannot say whether the oral charge in this case was liable to the objection that it summed up the evidence on one side, and not on the other, as the entire oral charge is not set out in the bill of exceptions; but we are disposed to think that the manner of stating the evidence indicated pretty clearly to the jury the judge's own impressions of the weight and effect of the testimony, and that it was an invasion of the province of the jury. However, the statement that "the evidence on the part of the state goes to show that this defendant fired all three of those shots" goes beyond the rule laid down by our courts, to the effect that the judge may state the tendency of the evidence on both sides (*White v. State*, 111 Ala. 92, 97, 21 South. 330); and it is also erroneous because some of the evidence produced by the state tends to show that the pistol of the deceased was fired once. It was erroneous, also, to charge (in the oral charge) about the shooting of Minstead, as the defendant was not on trial for shooting him. This court has also condemned "an argument by the court against the defendant on the evidence." *McIntosh v. State*, 140 Ala. 137, 141, 37 South. 223. Without passing upon that phase of the oral charge, we merely cite these authorities for the future guidance of the court.

The court erred in charging, "If you find this defendant killed Taylor Johnson, then this defendant is guilty. The next thing for you to do is to fix the degree of punishment." This ignored entirely the defense of self-defense, which the evidence for the defendant tended to sustain.

The court erred in refusing to give charge 1, requested by the defendant.

There was no error in refusing to give charge 2, requested by the defendant. "What are elements of the offense is a question of law for the court." *Whatley v. State*, 144 Ala. 69, 30 South. 1014, 11th h. n. Moreover, although the evidence might not show "the constituents of the crime charged," yet it

might show the commission of a lesser degree of crime, covered by the indictment.

Charge 3, refused to the defendant, was properly refused, as it was misleading. The same is true of charges 4, 5, and 6; and these are argumentative as well.

There was no error in the refusal to give charge 7. It failed to hypothesize the belief of the defendant that he was in imminent peril, and also failed to mention either the matter of retreat or domicile.

Charge 8 is involved and uncertain in its meaning, and was properly refused.

Without noticing specifically each of the other charges which were requested by the defendant and refused by the court, it is sufficient to say that if one who is free from fault in bringing on the difficulty is attacked by another, in his own house or place of business, in such a manner as would raise in a reasonable mind the belief that he is in imminent danger of great bodily harm, and he is so impressed, he is not under any obligation to retreat, but may take the life of his assailant, and be justified under the law. While he must be without fault, yet the burden is not on him to show freedom from fault, but on the state to show that he was not free from fault.

The judgment of the court is reversed, and the cause remanded.

Reversed and remanded.

TYSON, O. J., and DENSON and MAYFIELD, JJ., concur.

(159 Ala. 71)

MARKS v. STATE

(Supreme Court of Alabama. Feb. 18, 1909.)

1. INTOXICATING LIQUORS (§ 134*)—STATUTES—CONSTRUCTION.

Gen. Acts Sp. Sess. 1907, p. 71, § 1, makes it unlawful to sell any alcoholic, spirituous, vinous, or malt liquors, intoxicating bitters or beverages, or other liquors or beverages, by whatsoever name called, "which, if drunk to excess, will produce intoxication." Held, that the clause quoted did not qualify and relate to each and all of the liquors or beverages which preceded it, but qualified and referred only to the clause "or other liquors or beverages, by whatsoever name called," and hence that the statute did not prohibit the sale of such other beverages or liquors, unless they contained sufficient alcohol to produce intoxication, if drunk to excess.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 134.*]

2. CRIMINAL LAW (§ 304*)—EVIDENCE—JUDICIAL NOTICE.

The Supreme Court cannot take judicial notice that mead or metheglin is an alcoholic, spirituous, vinous, malt, or intoxicating liquor or beverage, or that, if drunk to excess, it will produce intoxication.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 716; Dec. Dig. § 304.*]

3. INTOXICATING LIQUORS (§ 238*)—CONTENTS—QUANTITY OF ALCOHOL—QUESTION FOR JURY.

Whether a beverage containing 1.46 per cent. alcohol by weight and 1.88 per cent. by volume, and 1.20 per cent. maltose, making about 2½ teaspoonfuls of alcohol to the pint, is an alcoholic, spirituous, vinous, malt, or intoxicating liquor, or whether, if drunk to excess, it will produce intoxication, is a question of fact for the jury.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 326; Dec. Dig. § 238.*]

4. INTOXICATING LIQUORS (§ 134*)—PROHIBITION—STATUTES—PROPERTIES OF LIQUORS.

Where a prohibition statute names, designates, or enumerates classes or species of beverages or liquors against which its provisions are directed, and it clearly appears that a given article is within the scope of the forbidden enumeration, and is intoxicating, its properties become immaterial, in a prosecution for wrongful sale thereof.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 142-144; Dec. Dig. § 134.*]

5. INTOXICATING LIQUORS (§ 6*)—STATUTES—LEGISLATIVE POWER.

Legislatures may absolutely prohibit the sale of intoxicating beverages, and say what are intoxicating, what are prohibited, and what are not, and designate them by general or special terms.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 4; Dec. Dig. § 6.*]

6. CRIMINAL LAW (§ 304*)—"SPIRITUOUS LIQUOR."

"Spirituous liquor" is that which is in whole or in part composed of alcohol, extracted by distillation, such as whisky, brandy, or rum; these being regarded as spirituous and intoxicating liquors, without the necessity of proof.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 304.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6610-6615.]

7. INTOXICATING LIQUORS (§ 134*)—"VINOUS LIQUOR."

"Vinous liquor" means liquor made from the juice of grapes, and it may also include wines made from fruits or berries by process of fermentation, by addition of sugar and alcohol.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 142-144; Dec. Dig. § 134.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7325, 7326.]

8. INTOXICATING LIQUORS (§ 134*)—"MALT LIQUORS."

"Malt liquors" are the product of a process by which grain is steeped in water to the point of germination, the starch being thus converted into saccharine matter, which is kiln dried, then mixed with hops, and by a further process of brewing made into a beverage; porter, ale, beer, etc., being embraced within the expression.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 142-144; Dec. Dig. § 134.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4314, 4315.]

9. INTOXICATING LIQUORS (§ 134*)—DEFINITION.

"Intoxicating liquors" are any liquors intended for use as a beverage, or capable of being

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

so used, which contain alcohol, regardless of how obtained, in such per cent. that they will produce intoxication when imbibed in such quantities as may practically be drunk; but the term, however, is not synonymous with "spirituous liquors," since, while all spirituous liquors are intoxicating, all intoxicating liquors are not spirituous.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 142-144; Dec. Dig. § 134.*

For other definitions, see *Words and Phrases*, vol. 4, pp. 3736-3746; vol. 8, p. 7692.]

10. INTOXICATING LIQUORS (§ 134*)—"INTOXICATING BITTERS."

"Intoxicating bitters" include those bitters, beverages, or decoctions in which the distinctive character and effect of intoxicating liquors are present, so that it may be used as a beverage, notwithstanding the other ingredients it may contain; and if it can be used as a beverage, though the other ingredients are medicinal and predominate, and alcohol is used to preserve these medicinal ingredients and serve as a vehicle therefor, then it may or may not be included, depending on the evidence in each particular case—it being without the province of any court to declare as a matter of law that a particular bitters or beverage is or is not intoxicating, unless the statute or law so declares, or it be one the effect of which every one is presumed to know.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 142-144; Dec. Dig. § 134.*

For other definitions, see *Words and Phrases*, vol. 4, p. 3736.]

11. INTOXICATING LIQUORS (§ 134*)—"ALCOHOLIC."

"Alcoholic" means containing or pertaining to alcohol, which is a volatile organic body, a limpid colorless liquid, hot and pungent to the taste, having a slight, but not offensive, scent. It has but one source, namely, fermentation, and is extracted from its by-products by distillation; its purity and strength depending on the degree of perfection or completeness of distillation. While it is the intoxicating principle of all intoxicating drinks, within the meaning of ordinary prohibition statutes, it is rarely in its pure state used as a beverage.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 142-144; Dec. Dig. § 134.*

For other definitions, see *Words and Phrases*, vol. 1, p. 295.]

12. INTOXICATING LIQUORS (§ 134*)—"WHISKY."

"Whisky" is alcohol, diluted with water and mixed with other elements or ingredients.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 142-144; Dec. Dig. § 134.*

For other definitions, see *Words and Phrases*, vol. 8, p. 7445.]

13. INTOXICATING LIQUORS (§ 134*)—"LIQUOR OR LIQUORS."

The term "liquor or liquors" includes all kinds of intoxicating decoctions, whether spirituous, vinous, malt, or alcoholic.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 142-144; Dec. Dig. § 134.*

For other definitions, see *Words and Phrases*, vol. 5, pp. 4180-4182.]

14. INTOXICATING LIQUORS (§ 134*)—"SPIRITUOUS AND INTOXICATING" LIQUORS.

Pure alcohol is within the term "spirituous and intoxicating" liquors.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 142-144; Dec. Dig. § 134.*]

15. INTOXICATING LIQUORS (§ 134*)—"ALCOHOLIC OR SPIRITUOUS LIQUORS."

The phrase "alcoholic or spirituous liquors" necessarily means intoxicating liquors.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 142-144; Dec. Dig. § 134.*

For other definitions, see *Words and Phrases*, vol. 1, p. 296.]

16. INTOXICATING LIQUORS (§ 208*)—WRONGFUL SALE—COMPLAINT—TIME.

Where an affidavit for an alleged wrongful sale of intoxicating liquors only attempted to charge an offense in J. county under the prohibitory law (Gen. Acts Sp. Sess. 1907, p. 71, § 1), which went into effect in J. county on January 1, 1908, and the complaint was made on May 1st of that year, time was a material ingredient of the offense, and the complaint was fatally defective for failure to allege that the offense was committed after the act took effect.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 208.*]

Appeal from Criminal Court, Jefferson County; A. C. Howze, Judge.

Julius Marks was convicted of selling spirituous liquors or mead, and he appeals. Reversed and remanded.

John T. Glover, for appellant. Alexander M. Garber, Atty. Gen., and Thomas W. Martin, Asst. Atty. Gen., for the State.

MAYFIELD, J. This appeal involves questions which require a construction of the general prohibition laws of this state, not necessarily as to the constitutionality of such laws, but as to the meaning, interpretation, and effect of certain provisions contained therein. The prosecution was commenced by, and was based solely upon, an affidavit containing three counts. The first attempted to charge that defendant aided, abetted, or procured an unlawful sale, purchase, or other unlawful disposition of spirituous, vinous, or malt liquors, etc.; second, that defendant acted as agent or assisting friend of the seller or purchaser in procuring an unlawful sale or purchase of such liquors, etc.; third, that defendant sold spirituous, vinous, or malt liquors, or mead, which, if drunk to excess, will produce intoxication. The defendant demurred to the affidavit or complaint, and assigned many grounds therefor, too numerous to mention.

The court overruled the demurrer, and trial was had upon the general issue. The court, at the request of the state, gave the general affirmative charge for the state as to the third count, refused a like charge to the defendant as to each count separately, and refused a great number of other charges requested by the defendant. The jury,

after being out for an hour or more, returned to the court for further instruction. The foreman inquired of the court if the jury had to find that mead would intoxicate. The court replied that the giving of the general affirmative charge relieved them of that; that this charge meant that if the jury believed the evidence beyond a reasonable doubt they must convict the defendant, which action of the court was excepted to by defendant.

Many questions are reserved as to rulings of the trial court touching the evidence. The trial resulted in a conviction under the third count only, and a fine of \$50 was imposed.

The first two counts each attempted to charge an offense under section 7363 of the Code of 1907, which section is codified from the act of March 12, 1907 (Acts 1907, p. 366). The third count evidently attempted to charge an offense under the general statutory prohibition law known as the "Carmichael Bill," passed at the extraordinary session, and approved November 23, 1907 (Gen. Acts Sp. Sess. 1907, pp. 71-76).

The verdict and judgment eliminated all questions as to the first two counts, and render unnecessary a decision or construction of section 7363 of the Code of 1907, but require a construction of section 1 of the act of November 23, 1907 (above referred to), reading as follows: "Section 1. Be it enacted by the Legislature of Alabama, that it shall be unlawful for any person, firm, corporation, or association, within this state to manufacture, sell, barter, exchange, give away to induce trade, furnish at public places or otherwise dispose of any alcoholic, spirituous, vinous or malt liquors, intoxicating bitters or beverages or other liquors or beverages by whatsoever name called, which if drunk to excess will produce intoxication, except as hereinafter provided." This section has never been codified, having been passed after the adoption of the Code, and hence is not controlled by any Code provisions or prior statutes, though some of the Code provisions are applicable to prosecutions under it, and it may be construed in pari materia with other provisions of our laws.

It was admitted that defendant sold one bottle of a beverage known as "mead" (a beverage sometimes called "metheglin," made of water and honey), since the 1st day of January, 1908, when the prohibition law went into effect as to Jefferson county. This was the only disposition of any liquor or beverage by the defendant which was attempted to be proven. The state introduced in proof a chemical analysis of another bottle of the beverage known as "mead," and some evidence tending to show it was a malt and intoxicating liquor; while the defendant's evidence tended to show that it was not an intoxicating or malt liquor. It was conceded, however, that it contained

maltose and alcohol; but it was contended by the defendant that it did not contain either in such quantities, or in such form, or under such conditions as to come within the meaning of the statute.

The trial court instructed the jury that if they believed the evidence beyond a reasonable doubt they must find the defendant guilty under the third count. This charge can be supported or justified only upon the theory that mead is either an "alcoholic," "spirituous," "vinous," "malt," or "intoxicating" liquor or beverage, within the meaning of the statute. If the statute inhibits the sale of all liquor or beverage which contains any alcohol or malt, then the charge of the court was correct; otherwise, it was erroneous. Whether or not this beverage was an intoxicant was evidently considered immaterial by the trial court. Upon no other theory can this action of the trial court be justified. In this we think the trial court was in error.

This court does not judicially know that mead or metheglin is an alcoholic, spirituous, vinous, malt, or intoxicating liquor or beverage, or that, if it is drunk to excess, it will produce intoxication. Nor do we think that the fact that it contains 1.46 per cent. of alcohol by weight, and 1.88 per cent. by volume, and 1.20 per cent. maltose, making about $2\frac{1}{2}$ teaspoonfuls of alcohol to the pint, makes it as a matter of law within the inhibition of the statute. We are therefore clearly of the opinion that it was a question for the jury, under the evidence, to say whether or not mead was alcoholic, spirituous, vinous, malt, or intoxicating, or whether it was a liquor or beverage which, if drunk to excess, will produce intoxication. In other words, was the liquor or beverage sold within the inhibition of the statute? That was clearly a question of fact under the evidence, and not one of law.

If the statute had prohibited the sale of mead, or declared that it was an alcoholic, spirituous, vinous, malt, or intoxicating liquor or beverage, or if the court judicially knew that it was within any one of these classes, then under the evidence in this case the court could probably have given the affirmative charge; but it clearly appears that, if mead is within the inhibition of the statute, it is clearly under the last clause of the first section of the statute, which inhibits the sale, etc., of "other liquors or beverages by whatsoever name called, which if drunk to excess will produce intoxication," and the evidence was in dispute as to whether or not it would produce intoxication, if drunk to excess. One witness, shown to be a highly educated physician, testified in substance that a man's stomach would not contain enough of the beverage to produce intoxication; that enough might be taken in the stomach to produce a thrill, but nothing more. Another witness testified that he had

drunk a great deal of mead—as much as four bottles in an hour—and that it would not intoxicate. True, there was some evidence to show it would intoxicate if drunk to excess, and, while we can no more pass upon the weight or sufficiency of the evidence than could the trial court, yet we do say there was ample evidence to require the submission of this fact to the jury.

While we agree in part with counsel for appellant, we cannot concur with them in the contention (so forcefully and ably insisted upon) to the effect that the clause, "which if drunk to excess will produce intoxication," qualifies and relates to each and all of the liquors or beverages which precede it—that is, to alcoholic, spirituous, vinous, or malt drinks. We are inclined to the opinion that this phrase qualifies or refers only to the clause, "or other liquors or beverages by whatsoever name called," which immediately precedes it, and which two phrases, taken together, constitute one of the six classes of liquor and beverage the sale of which is prohibited. We are led to this conclusion, not alone by the composition and grammatical construction of this section of the act, but also by a reference to the history of such legislation in this and other states, and the judicial construction put upon the terms "spirituous," "vinous," "malt," and "intoxicating" liquors and beverages by this and other courts. These terms each had a well defined and accepted judicial construction by the courts, when used in such statutes; and it does not appear that there was any intention to change that well accepted judicial construction. They were severally treated as being well known and defined; but the phrase, "or other liquors or beverages by whatsoever name called," is clearly shown not to refer to every well known or defined class, but is intended to include any and all other classes or kinds, not embraced in the foregoing five classes named, "which if drunk to excess will produce intoxication."

It is said by counsel that the punctuation of the section shows that this phrase refers to all the preceding classes. Punctuation may be looked to, for the purpose of aiding in ascertaining the meaning. It is intended to make the meaning apparent and more readily ascertainable than it would otherwise be; but it can never control or destroy a meaning which is otherwise apparent and certain. When a prohibition statute names, designates, or enumerates the kinds, classes, or species of beverages or liquors against which its provisions are directed, then there is no room for further inquiry into the scope of such statute. When it clearly appears that a given article, liquor, or beverage comes within the scope of the forbidden enumeration, and is intoxicating, its properties become immaterial to courts and juries, because fixed by the lawmaking power of the state.

The courts have uniformly upheld the power of the Legislature to declare certain drinks and beverages intoxicating, when in truth and in fact they may not be so, though it is not conceded that this power is without limit. The Legislature might go to such an extent that the courts would hold it to be an unreasonable exercise of the police power—far-reaching and comprehensive as it is. The courts would probably not uphold a statute which prohibited the use or sale of a necessary commodity, such as sugar or molasses, corn or barley, under the guise of a prohibition law, which denominated them intoxicants, because they were capable of being converted into alcohol or spirituous liquors. But as to this question we do not decide, nor do we hereby mean to intimate an opinion, but only refer to it to demonstrate the correctness of the construction which we place upon this section of the statute.

Legislatures have the undoubted right to prohibit absolutely the sale of intoxicating beverages, and to say what are intoxicating, what are prohibited, and what are not—to designate them by general or special terms, and to so frame and word the law as to prevent evasion of its provisions (which is known to be often attempted); and courts will not put such construction on the law as would render it void if dependent upon only one of these legislative powers, when it would be perfectly valid if referred to the other or both legislative powers or functions. *Black on Intoxicating Liquors*, § 43; *Felbelman v. State*, 130 Ala. 122, 30 South. 384; *Wadsworth v. Dunnam*, 98 Ala. 610, 13 South. 597. When, however, the statute uses merely general terms, such as "alcoholic," "spirituous," "vinous," "malt," and "intoxicating" liquors or beverages, then it is a question for the courts or juries to determine, according to the facts in each particular case, whether a given liquor, beverage, or fluid is within the inhibition of the statute. Sometimes it is then a question of law for the court, and sometimes a question of fact for the jury.

Most of the terms used in this statute have been frequently construed by this court, and there is no conflict in the decisions on this subject as to those which have been construed. It is therefore only necessary to enumerate them, and cite the cases.

"Spirituous liquor" is that which is in whole or in part composed of alcohol extracted by distillation. Whisky, brandy, and rum are examples. That these are spirituous or intoxicating is known to courts and juries, and proof thereof is not necessary. *Tinker v. State*, 90 Ala. 638, 8 South. 814; *Allred's Case*, 89 Ala. 113, 8 South. 56.

"Vinous liquor," *ex vi termini*, means liquor made from the juice of the grape; but it may include wines made from fruits or berries by a like process of fermentation, when sugar and alcohol are added. *Allred's Case*, 89 Ala. 112, 8 South. 56; *Adler's Case*, 55

Ala. 24; *Hinton v. State*, 132 Ala. 29, 31 South. 563.

"Malt liquors" are the product of a process by which grain is steeped in water to the point of germination, the starch of the grain being thus converted into saccharine matter, which is kiln dried, then mixed with hops, and, by a further process of brewing, made into a beverage. The term embraces porter, ale, beer, and the like. *Allred v. State*, 89 Ala. 112, 8 South. 56; 1 *Mayfield's Dig.* 463; *Tinker's Case*, 90 Ala. 647, 8 South. 814.

"Intoxicating liquors" are any liquors intended for use as a beverage, or capable of being so used, which contain alcohol (no matter how obtained) in such per cent. that they will produce intoxication when imbibed in such quantities as may practically be drunk. The term is not, however, synonymous with "spirituous liquors." All spirituous liquors are intoxicating, but all intoxicating liquors are not spirituous. *Black on Intox. Lq.* § 2; *Allred's Case*, 89 Ala. 112, 8 South. 56.

"Intoxicating bitters." This term has been held to include those bitters, beverages, or decoctions in which the distinctive character and effect of intoxicating liquors are present, so that it may be used as a beverage, notwithstanding the other ingredients it may contain. If, however, it can be so used as a beverage, though the other ingredients are medicinal and predominate, and alcohol is used to preserve these medicinal ingredients, and serve as a vehicle for them, then it may or may not be included, depending upon the evidence in each particular case. It is not within the power or province of any court to declare, as a matter of law, that any particular bitters or beverage is or is not intoxicating, unless the statute or other law so declares, or it be one the effect of which every one is presumed to know—if such there be. *Carl's Case*, 87 Ala. 17, 6 South. 118, 4 L. R. A. 380; *Id.*, 89 Ala. 97, 8 South. 156. See, also, 23 *Cyc.* 58, 206; *Black on Intox. Liquors*, § 9.

The foregoing terms used to designate the intoxicants inhibited by this statute are all well defined in this state; but the term "alcoholic liquors" is comparatively a new term. If not new, it is not of such common use, and has not been judicially construed so often, as those indicated above.

"Alcoholic," *ex vi termini*, means "containing or pertaining to alcohol." "Alcohol" has been frequently defined by courts, in construing prohibition and kindred statutes relating to intoxicating liquors. It is defined as a volatile organic body, a limpid colorless liquid, hot and pungent to the taste, having a slight, but not offensive, scent. It has but one source, fermentation, and is extracted from its by-products by distillation; its purity and strength depending upon the degree of perfection or completeness of distillation. While it is the intoxicating principle, the basis of all intoxicating drinks—certainly so within the meaning of ordinary prohibition

statutes—yet pure alcohol is rarely used as a beverage.

Whisky is alcohol diluted with water and mixed with other elements or ingredients. *Intoxicating Liquor Cases*, 25 Kan. 751, 37 Am. Rep. 284; *Com. v. Morgan*, 149 Mass. 314, 21 N. E. 369; *State v. Giersch*, 98 N. C. 720, 4 S. E. 193.

The term "liquor" or "liquors" commonly includes all kinds of intoxicating decoctions, liquids, or beverages, whether spirituous, vinous, malt, or alcoholic. *People v. Crilley*, 20 Barb. (N. Y.) 248; *State v. Brittain*, 89 N. C. 576.

Whether pure alcohol comes within the phrases "spirituous" or "intoxicating" liquors is a question not well settled—some courts holding that it depends upon the language of the particular statute and the facts of each particular case, whether it was sold or purchased purely for medicinal or mechanical purposes, or to be used as an intoxicating beverage; but the weight of the authorities seems to be to the effect that, unless otherwise made by the language or provisions of the statute, it will be included in the terms "spirituous" and "intoxicating" liquors. *Snider v. State*, 81 Ga. 753, 7 S. E. 631, 12 Am. St. Rep. 350; *Rabe v. State*, 39 Ark. 204; *State v. Martin*, 34 Ark. 340; *Bennett v. State*, 30 Ill. 389; *Black on Intox. Lq.* § 11.

The Supreme Court of Mississippi has held that wine is within the phrase "alcoholic or vinous liquors." *Reyfelt v. State*, 73 Miss. 415, 18 South. 925. The Court of Appeals of Georgia has recently construed the Georgia prohibition law, of which our statute is in part a copy, and, while we have seen nothing except what purports to be a manuscript copy of the opinion, that court seems to have construed this term "alcoholic liquors" in accordance with the writer's view of the meaning of that phrase as it appears in our statute. The decoction sold or kept in that case was called "Green or Pale Beer." Samples of it were analyzed, and one found to contain 4.2 per cent., and another 3.8 per cent., of alcohol. The trial court in that case held, as we presume it did in the case at bar, that the Georgia statute, which as to this question is nearly identical with our own, includes any liquid which has an appreciable quantity of alcohol therein. The Court of Appeals of Georgia reversed the case upon this question, and held that the statute included only those liquors or beverages which contain a sufficient quantity of alcohol to produce intoxication when drunk to excess. That the phrase "alcoholic or spirituous liquors" necessarily means intoxicating liquors is sustained, in the case last referred to, by citation of two Georgia cases. *Bell v. State*, 91 Ga. 227, 18 S. E. 288, and *McDuffie v. State*, 87 Ga. 687, 13 S. E. 596.

After a careful study of the general prohibition law of this state, the one in question in this case, and comparing it with numerous

others which have been construed by this and other courts, giving due weight to the fact that it was enacted with this known construction placed upon several or nearly all of the six classes or species of drinks or beverages named therein, we do not think that the statute embraces every liquor or beverage which contains a trace of alcohol or maltose, or even that contains one or both in appreciable quantities, if incapable of being used as an intoxicating beverage. Such interpretation would be unreasonable, if not absurd. Where a statute has been construed, and is subsequently re-enacted, the previous construction becomes a part of the statute itself. *Southern Railway Co. v. Moore*, 128 Ala. 450, 29 South. 659.

The statute under consideration is but the extension of kindred prohibition statutes to the entire state which were theretofore local. True, it contains provisions not heretofore embodied in local statutes, which new provisions must yet be construed. The objects and purposes of those statutes had been defined by the courts; and, being incorporated and re-enacted in the general law, they bring with them such judicial constructions. The main object and purpose of all is the same. Some may be restricted, and some more extensive and exclusive than others; but the main object and purpose of all, as said by Justice Somerville, in *Carl's Case*, 87 Ala. 17, 6 South. 118, 4 L. R. A. 380, is "to promote temperance and prevent drunkenness. The mode adopted to accomplish this end is the prevention of the sale, the giving away, or other disposition of intoxicating liquors. The evil to be remedied is the use of intoxicating liquors as a beverage, rather than as an ingredient of medicines and articles of toilet, or for culinary purposes, and the object of the law in this particular must not be lost sight of in its interpretation."

However, if the article sold or disposed of is clearly within the inhibition of the statute, the fact that it was sold for medicine, etc., or that the dispenser did not know it contained ingredients which brought it within the statute, would be no defense, unless it was so expressly excepted or provided by the statute. This court in *Carson's Case*, 69 Ala. 241, which is quoted in *Carl's Case*, 87 Ala. 20, 21, 6 South. 118, 4 L. R. A. 380, says: "We are not to be supposed as intimating that physicians or druggists would be prohibited, under a statute such as the one in question, from the bona fide use of spirituous liquors in the necessary compounding of medicines manufactured, mixed, or sold by them. This would not be within the evils intended to be remedied by such prohibitory enactment, nor within the strict letter of the statute." And in *Wall's Case*, which is also quoted in *Carl's Case*, it was said: "There may be cases, perhaps, where the bona fide use of a moderate quantity of spirituous liquors in a medical

tonic would not alone bring a beverage (or decoction) within the statute." 78 Ala. 417.

The famous "Kansas prohibition law" (Laws 1881, p. 239, c. 128, § 10) prohibited "all liquors and mixtures by whatsoever name called that will produce intoxication." This law was construed by Justice Brewer, and has probably become the leading decision of the United States in construing such laws, and has been time and time again quoted by this court and others in construing prohibition laws, and by the text-book writers on the subject, as announcing the fundamental principles which should control in construing these laws. Nearly as much might be said of *Carl's Case*. Both of these cases announce and affirm the doctrine that "the mere presence of alcohol does not bring an article within the prohibition." The influence of the alcohol may be counteracted by other ingredients, and the compound be strictly and fairly only a medicine, or a toilet or culinary article, unfit for use as an intoxicating beverage, against which the statute or law is leveled; yet, if the intoxicant prohibited remains in the compound as a distinctive force, and the compound is reasonably liable to be used as a beverage, it is then within the statute, though it may still be very beneficial as a medicine, or toilet, culinary, or mechanical article. That is to say, it was not the intention of the lawmakers to render a person guilty of violating a prohibition law who disposes of a medicine, or toilet or culinary article, because the purchaser misuses it and becomes intoxicated; but, on the other hand, they have so framed the laws, and they are so intended, that they cannot be evaded by selling articles or compounds as medicines, or toilet or culinary articles, or soft drinks or beverages, as nonintoxicating, which are as a matter of fact and truth intoxicating beverages. Selling wine or beer, called or labeled "vinegar," or "lemon syrup," would be as much within the statute as selling them by their real names. Yet selling Blue Lick or Stafford's Springs water would not be an offense, though labeled "Cream of Kentucky," "Three Feathers," "Whisky," etc. Nor is the sale of camphor, paregoric, or bay rum within the statute, though containing alcohol in large quantities; yet any compound which contains alcohol—the almost universal and sole intoxicating ingredient of all beverages—and is capable of being, or as a matter of fact is, used as an intoxicating beverage, may be within the statute, though not compounded as such beverage, and though used for other legitimate purposes.

As said before in this opinion, when the law names, enumerates, or defines certain articles, compounds, decoctions, beverages, or liquors as intoxicants, and prohibits their use, this may be conclusive upon the courts and juries; but when the law uses general terms only, such as "spirituous," "alcoholic,"

"vinous," or "malt" and intoxicating liquors and beverages, and fails to define these, then it is for the courts and juries to determine what articles are within and what are without the statute. When the article is one which everybody knows falls within one of the particular classes, such as whisky, brandy, wine, rum, ale, lager beer, etc., then the courts and the juries know this as well as the public, and no proof is required to show that it is within the statute; but if it is "hop jack," "synconic bitters," mead (meth-e-glin), cider, near beer, pale beer, etc., then it requires proof to show that it is within one or the other of these general terms, unless the law itself enumerates or names it as being prohibited. The mere fact that one of these last articles named is a compound, and contains one or more ingredients which enter into or form a part of articles which are clearly prohibited, does not make such compound or article within the prohibited class; that is, every article that contains alcohol is not prohibited, because whisky contains alcohol and it is prohibited, or because it contains malt and lager beer contains malt, and is prohibited. But if it contains elements and ingredients in such proportion or in such form as to bring it within one of the general clauses named in the law, then it is prohibited; otherwise, not. In other words, the term "alcoholic liquors," as used in the law, does not necessarily include every article or compound which contains alcohol. On the other hand, it does embrace all articles which contain alcohol or malt in such proportions or form or state, which are or may be used as an intoxicating beverage, no matter what it is called, or what else it contains, or for what other purpose it was intended or is used, or for which it may be used, and although the vendor or disposer did not know it contained such ingredients or could be so used as an intoxicating beverage, unless the law expressly so excepts such article or such disposition. *Carl's Case*, 87 Ala. 17, 6 South. 118, 4 L. R. A. 380; *Wall's Case*, 78 Ala. 417; *Carson's Case*, 69 Ala. 236; *Ryall's Case*, 78 Ala. 410; *Allred's Case*, 89 Ala. 112, 8 South. 56; *Adler's Case*, 55 Ala. 16; *Tinker v. State*, 90 Ala. 648, 8 South. 814; *Watson's Case*, 55 Ala. 159; *Knowles' Case*, 80 Ala. 9; *Compton's Case*, 95 Ala. 25, 11 South. 69; *Wadsworth v. Dunnam*, 98 Ala. 610, 13 South. 597; *Frelberg v. State*, 94 Ala. 92, 10 South. 703; *Hinton v. State*, 132 Ala. 29, 31 South. 563; *Felbelman v. State*, 130 Ala. 122, 30 South. 384; *Costello v. State*, 130 Ala. 143, 30 South. 376; *Kansas Liquor Cases*, 25 Kan. 751, 37 Am. Rep. 284; *Black, Intox. Liq.* §§ 1-18; 23 Cyc. pp. 57-63; 17 Am. & Eng. Ency. Law (2d Ed.) pp. 197-206.

The third count of the affidavit or complaint under which this conviction was had

is bad, and the demurrer thereto should have been sustained. It is conceded that it attempted to charge, and could only charge, an offense under the prohibition law, which went into effect as to Jefferson county on the 1st day of January, 1908. The affidavit was made on the 1st day of May, 1908. It should have showed that the alleged offense was committed after the 1st day of January, 1908. This was necessary to charge an offense. If the sale had been prior to that date, and within a year, as alleged, it would have been necessary to allege that the sale was "without a license and contrary to law," to be sufficient under the law as it existed at that time. This much was necessary to show that any offense was committed. While the statute in this state dispenses with allegations as to a particular time, unless time is a material ingredient of the offense (Code 1907, § 7139), yet in the case at bar time is a material ingredient—that is, to the extent of showing that it was committed after January 1, 1908. *Bibb v. State*, 83 Ala. 84, 3 South. 711; *Dentler's Case*, 112 Ala. 70, 20 South. 592; *McIntyre's Case*, 55 Ala. 167; *Glenn's Case* (Ala.) 48 South. 505.

As the case must be reversed, it is unnecessary to discuss or pass upon the other assignments of error, for the reason that they may not arise upon another trial; but we feel impelled to say that many of them appear to be well taken. It is proper, however, to say here that we do not mean to imply that it shows any lack of consideration, fairness, or capacity on the part of the trial court, but that the errors, if errors they be, were almost all as to questions which depended upon the construction of the statute, and the court was not without authority and reason for the construction he placed upon it, notwithstanding it was not the correct one.

The judgment must be reversed, and the cause remanded.

Reversed and remanded. All the Justices concur.

(159 Ala. 570)

SULLIVAN TIMBER CO. et al. v. BLACK.
(Supreme Court of Alabama. Feb. 11, 1909.)

1. CORPORATIONS (§ 621*)—RECEIVER—APPOINTMENT—GROUNDS.

In a proceeding for the appointment of a receiver of a dissolved corporation, where the bill did not allege that the corporation was insolvent, or that the trustees were incompetent, or that any fraud was attempted to be perpetrated upon the corporation, the stockholders, or any one else, but only that a sale or lease of the corporation property was contemplated, which was not the best sale or lease that could be made, there was no ground stated for the appointment of a receiver.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 621.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. CORPORATIONS (§ 691*)—FOREIGN CORPORATIONS—DISSOLUTION—CONTINUANCE OF CORPORATION FOR PURPOSE OF WINDING UP—POWERS OF TRUSTEES.

Rev. St. Fla. 1892, § 2155, provides that a corporation dissolved shall be continued as a body corporate for three years to enable it to dispose of its property. The statutes also provide that the directors of the corporation shall be trustees to wind it up. *Held* that, where a Florida corporation was dissolved by decree of the Florida court, the directors, as trustees, had full power to sell or lease the corporate property in Alabama, in the absence of any Alabama law to the contrary.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2676; Dec. Dig. § 691.*]

3. CORPORATIONS (§ 619*)—DISSOLUTION—DIRECTORS—AUTHORITY.

The directors or trustees of a business corporation being the managing agents of the corporation, and in the absence of restrictions in the charter or by-laws, or of statutory or constitutional inhibition, having all the authority of the corporation itself in the conduct of its ordinary business, including the right to convey its property, the statutes fixing the authority of the directors as trustees to wind up the business of a corporation and a decree dissolving it would not deprive them of their powers as agents of the corporation, and a subsequent order of court would not be necessary to authorize a sale of corporate property by them.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2460; Dec. Dig. § 619.*]

4. CORPORATIONS (§ 308*)—OFFICERS—COMPENSATION—EFFECT OF DISSOLUTION.

Where a corporation was dissolved at the instance of stockholders, and placed in the hands of trustees, the office of president was terminated, and the incumbent, subsequently appointed receiver, was not entitled to receive a salary as president in addition to his compensation as receiver.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1345; Dec. Dig. § 308.*]

5. CORPORATIONS (§ 308*)—OFFICERS—COMPENSATION—RECOVERY.

Even if he were entitled to compensation, his remedy would be at law, and not in equity.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 308.*]

6. COSTS (§ 56*)—COSTS AT LAW AND IN CHANCERY.

The statutes and rules regulating costs at law and in equity are entirely different; in courts of law, under the express provisions of Code 1907, § 3662, the successful party in civil actions being entitled to full costs, except as otherwise provided, while in chancery, under the express provisions of section 3222, costs may be apportioned at the discretion of the chancellor.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 56.*]

7. COSTS (§ 13*)—IN EQUITY—DISCRETION OF COURT.

While costs in equity are in the discretion of the court, the discretion is a legal one, to be exercised in accordance with general rules and precedents, and the court cannot arbitrarily give or withhold costs at pleasure.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 21, 25; Dec. Dig. § 13.*]

8. APPEAL AND ERROR (§ 955*)—DISCRETION OF TRIAL COURT—COMPENSATION OF RECEIVER.

In the absence of a statute regulating the compensation of a receiver, the amount, as well as the prior question whether anything should be allowed, rests within the sound discretion of

the chancellor, which will not be disturbed on appeal, in the absence of manifest abuse.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3822; Dec. Dig. § 955.*]

9. RECEIVERS (§ 81*)—NATURE OF OFFICE.

A receiver is the arm of the court, to hold possession of property and manage it for the benefit of the persons ultimately entitled to it, his possession being the possession of the court; and he is not the representative of the corporation whose property he holds.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 150; Dec. Dig. § 81.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5993-5997; vol. 8, pp. 7780, 7781.]

10. RECEIVERS (§ 163*)—MANAGEMENT OF PROPERTY—PAYMENT OF MONEY—AUTHORITY OF COURT.

A receiver being an arm of the court, he ordinarily cannot pay out any money in his hands by virtue of his office without an order of court, general or special.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 312; Dec. Dig. § 163.*]

11. RECEIVERS (§ 199*)—COMPENSATION—METHOD OF PAYMENT—DISCRETION OF COURT.

A receiver's compensation may be allowed in periodical payments, or in a gross sum, or in the form of commission on receipts and disbursements, in the discretion of the court; but, if commissions are allowed, they are generally regulated with reference to the amount allowed by statute to personal representatives, guardians, etc.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 199.*]

12. RECEIVERS (§ 196*)—COMPENSATION—RECEIVER IMPROPERLY APPOINTED.

Compensation should not be denied a receiver because the court had no power to appoint him, if he was in fact appointed in a legal manner and in good faith discharged his duties; but he should be paid out of the estate for his reasonable services, notwithstanding the order of appointment is subsequently reversed, and the bill under which he was appointed is dismissed.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 196.*]

13. APPEAL AND ERROR (§ 955*)—DISCRETION OF COURT—RECEIVER'S COMPENSATION.

Where a receiver has been improperly appointed, the taxation of the costs of his compensation, together with the costs of the suit necessary upon the administration of the estate while the receivership is pending, rests in the sound discretion of the chancellor, subject to review only in case of abuse, or where his act is clearly arbitrary, and not in the proper exercise of the authority vested in him by the statutes and decisions of the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 955.*]

14. RECEIVERS (§ 218*)—BONDS—ACTION FOR DAMAGES.

Complainant in a bill for a receiver being compelled to give a bond conditioned that, if the appointment be vacated, he will pay all damages which any person may sustain by the appointment, persons damaged have a right of action on the bond, regardless of whom the costs in the chancery suit vacating the appointment are taxed against.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 218.*]

15. RECEIVERS (§ 220*)—RECOVERY OF DAMAGES FROM WRONGFUL APPOINTMENT.

The amount of damages suffered by reason of the wrongful appointment of a receiver can-

not be determined in a suit vacating his appointment, nor in any suit in the chancery court.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 220.*]

16. RECEIVERS (§ 219*)—WRONGFUL RECEIVERSHIP—LIABILITY—UNAUTHORIZED PAYMENT OF DEBTS—CONFIRMATION.

Though the chancellor have no right to confirm unauthorized payments by a receiver of debts of the company, his confirmation thereof worked no injury to parties to a suit contesting the receivership, where the company was solvent, and neither the justice nor the amount of the debts was disputed.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 219.*]

17. RECEIVERS (§ 99*)—EXPENDITURES—EMPLOYMENT OF COUNSEL—REIMBURSEMENT.

Where a receiver employs counsel, the court will determine the amount to be allowed for services to the receiver; and, though courts may not allow a receiver for a payment made to counsel for services, where the employment was unauthorized, the court may ratify the receiver's act in passing upon the account, though it was not allowed in the first instance.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 99.*]

18. RECEIVERS (§ 99*)—EXPENSES OF ADMINISTRATION—PREMIUM ON RECEIVER'S BOND.

The premium on a receiver's bond is a proper charge for the expense of administration of the receivership, and the receiver is properly credited therewith, if compensation be allowed the receiver at all.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 99.*]

19. RECEIVERS (§ 99*)—EXPENSES OF ADMINISTRATION—OUTLAY BY AGREEMENT OF PARTIES.

Where a receiver, under an agreement with counsel in a suit over the receivership, hired a stenographer, the expense to be paid out of trust funds in his hands, which should be subject to whatever taxation of costs should be decreed in the case, the agreement left the matter to the decree of the chancellor, and the expense could not be said to be improperly allowed because it could not be taxed as costs.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 99.*]

Appeal from Chancery Court, Mobile County; Thomas H. Smith, Chancellor,

Bill by John W. Black against the Sullivan Timber Company and others. Decree of dismissal, and both parties appeal; defendants being termed appellants. Affirmed on both appeals.

Blount & Blount, and Stephens & Lyon, for appellants. L. H. & E. W. Faith, for appellee.

MAYFIELD, J. The original bill in this case was filed by the appellee and cross-appellant, John W. Black, against the Sullivan Timber Company and other individuals, who were trustees of the Sullivan Timber Company, at that time a dissolved corporation under the laws of Florida. The bill was subsequently amended by adding as respondents certain stockholders of the Sullivan Timber Company. The Sullivan Timber Company, a corporation, was dissolved by a decree

rendered by the circuit court of Escambia county, Fla., at the suit of the stockholders, one of whom was the complainant, Black. The original respondents to the bill, in connection with the complainant, Black, were directors of the corporation prior to its dissolution, and by virtue of the statutes of Florida and the decree of the circuit court dissolving the corporation the directors became the trustees of the corporation, charged with the duty of winding up the affairs, and were proceeding so to do at the time the bill was filed by the complainant, Black, who was appointed a receiver of the corporation by the register of the chancery court of Mobile, in which the bill was filed without notice. From this appointment an appeal was taken under the statute to the chancellor, who vacated and annulled the appointment, and from this decree of the chancellor an appeal was prosecuted by the complainant to this court, which decree was affirmed. See *Black v. Sullivan Timber Co.*, 147 Ala. 327, 40 South. 667.

At the time of taking the first appeal to this court the chancellor made an order continuing the receiver in the possession of the property of the corporation pending the appeal, which provided that he should merely hold and protect the property. It was nearly a year from the time the appeal was taken until decided by this court. During this time the receiver continued to administer the affairs of the corporation. Soon after the affirmation by this court on the former appeal, the receiver filed his accounting, and a reference was duly ordered to be held. Soon thereafter the complainant, who was the receiver, with leave of the court amended his bill, by filing what is called by the counsel for appellants a "substituted bill," which not only detailed the facts stated in the original bill, but also contained additional matter occurring since the bill was filed. This substituted bill sought, among other things, to have the chancery court to take jurisdiction of the affairs of the corporation and administer the same through the five statutory trustees, who were made such by the statutes and the decrees of the courts of Florida at the time of the dissolution of the corporation. The receiver had filed an account showing the receipts and disbursements of nearly \$80,000. A reference was ordered, and held, to pass upon this account, and numerous exceptions were filed by the receiver to the register's report, many of which were sustained by the chancellor. The chancellor, however, restated the account, which constituted a part of the register's report. After this report a reference was ordered for the purpose of ascertaining the compensation to be allowed the receiver. The register reported an amount aggregating nearly \$3,000. To this report exceptions were filed, which were overruled by the chancellor. Subsequent to this time the respond-

ents filed a motion to dismiss the bill as amended for want of equity; and among other grounds was one that the bill was a departure from the original bill, and a demurrer was also interposed upon this ground. Upon the hearing of this motion the chancellor granted the motion and dismissed the bill, but taxed the entire costs of the case against the trust or fund in the hands of the receiver, and directed that the receiver pay over to the trustees of the corporation the funds remaining in his hands after the allowance of his own compensation and the costs of the case. This order was complied with by the receiver's paying over the money to himself as one of the trustees, and executing his receipt, by himself as trustee, to himself as receiver, and depositing the amount in the bank through which the corporation appears to have carried on its business. The respondents then sued out this appeal, and assign various errors as to all the rulings of the register and the chancellor upon the receiver's account adverse to the corporation, or to the respondents, and to the allowance of compensation to the receiver, and to the taxing of costs against the corporation or trust fund. The complainant also sued out a cross-appeal, and assigns as error the dismissal of the amended bill and the refusal of the chancellor to allow the complainant, who was the receiver, a credit for salary as president of the corporation, which office he had filled for a long time, and held at the time of the dissolution of the corporation.

It is unnecessary on this appeal to decide whether or not the original bill contained equity, or whether or not it would justify the appointment of a receiver as originally filed, for the reason that it was decided on a former appeal by this court, in a learned and able opinion by Justice Haralson, that the averments and proof under the former bill did not make out a case for the appointment of a receiver. Much stress is laid by counsel for appellants and appellee, in their briefs, upon an expression of Justice Haralson in the former opinion, as follows: "It may be, without more, that the facts stated in the bill would be sufficient on which to appoint a receiver in this case; but the answer under oath denies the material averments of the bill on which this contention rests." It clearly appears that this statement by Justice Haralson was dictum at most. It could not now affect the rights or remedies of any of the parties to this suit on this appeal to determine whether or not the original bill contained equity, or whether it justified the appointment of a receiver, for the reason that the court decided on a former appeal that the receiver was improperly appointed, and the chancellor has decided, and with him we concur, that there was no equity in the amended bill, though the chancellor seems to base his opinion upon the ground that there was a variance in the original. As to this it is not necessary for us

to decide. Suffice it to say that the bill as amended was without equity, and properly dismissed. We are unable to see how the chancery court, or this court, could better administer the affairs of the corporation through the five trustees than the trustees themselves could administer it, in the absence of a showing of incompetency, insolvency, or fraud on the part of the trustees. There is no allegation in either the original or the amended bill that the corporation is insolvent, or that the trustees are incompetent, or that any fraud was attempted to be perpetrated upon the corporation, the stockholders, or any one else. The most that does appear, either from the allegations or the proof, is that the parties were about to make a sale or a lease of the property, which was not the best sale or the best lease that could be made. That the receiver, who was one of the trustees, and complainant, was a man of large experience in the affairs of corporations, having been president of defendant for a number of years, and being such at the time of its dissolution, and that he was a man of great capacity for work of this kind, and that he could manage and had managed the affairs of the corporation better than they were being managed and would be managed by the five trustees named, or a majority thereof, were matters conceded.

We see no reason why the trustees of the corporation, under the statutes of Florida set out in this case and under the decree of the circuit court of Escambia county, Fla., dissolving the corporation and directing that its affairs be wound up by the trustees, did not have sufficient power to sell or lease the property of the corporation, whether it be land or personal property. If they had no such power under the statutes and under the decree of the circuit court of Escambia county, Fla., it is difficult to see how the chancery court of this state could give them any greater powers of disposition. These trustees were the original directors of the corporation. The statutes of Florida above referred to provided that these same officers of the corporation should be the trustees. These statutes provide that the settlement of the affairs of the corporation so dissolved shall be managed as prescribed in cases of voluntary dissolution. This section, among other things, provides that the trustees shall have full power to settle its affairs, collect its outstanding debts, and divide the money and other property among the stockholders. Neither these statutes nor the decree of the court of Florida contemplates that the trustees need the aid of any other court to dispose of the property. There is no distinction made between the real and the personal property of the corporation, and it is difficult to see how they could wind up the affairs of the corporation and divide and distribute the proceeds without a sale. Section 2155 of the Revised Statutes of Florida of 1892, among other things, provides that the

corporation dissolved shall be continued as a body corporate for three years after dissolution to enable it to dispose of and convey its property. We do not think that there can be any doubt as to the power and authority of these trustees to dispose of this property, unless there be some laws in Alabama to the contrary. We know of no law in this state to the contrary, nor do we see that such statutes of Florida or the decree of the court based thereon dissolving the corporation contravenes the policy of any laws of this state or of public policy. In this state, at the time of this dissolution, we had kindred statutes, as was decided by Justice Haralson in the former case. See sections 1291-1301 of the Code of 1896. Our statute authorized a dissolution of the corporation in the chancery court in the same manner that these statutes of Florida authorized a dissolution in the circuit court. There is quite a similarity between the statutes of Florida and those of this state above referred to, and the statutes and the proceedings in the court would be useless if they did not authorize the trustees to sell the property for the purpose of winding up the affairs of the corporation.

In business corporations the managing board is usually called the board of directors, though sometimes called trustees, and these directors are the general or managing agents of the corporation; and these directors, in the absence of restrictions in the charter or by-laws, or of statutory or constitutional inhibition, have all the authority of the corporation itself in the conduct of its ordinary business. Hence, without the statute of Florida or without the decree of the court dissolving, these are the parties who would have the right to convey the property of the corporation, and certainly it cannot be said that these statutes or the decree of the court dissolving the corporation had the effect to take from these individuals the power of disposing of the property. It may be said that the capacity in which they dispose of it is changed by the statute and by the decree, and that they must thereafter dispose of it as trustees, instead of as directors. See Thompson on Corporations, vol. 3, § 3967 et seq. Consequently the claim that there was equity in the amended bill, for the reason that it was necessary to authorize a sale of the property of the corporation, is without merit.

We do not think there is any merit in the claim of the receiver that, in addition to his compensation as receiver, he is entitled in this action (or in any other action, for that matter) to compensation or salary as president of the corporation after dissolution. This claim clearly has no standing in a court of law or equity. In the first place, the corporation was dissolved at the suit of the stockholders, chief among whom was the receiver, and it was there that the corporation was placed in the hands of a board of trus-

tees, of which body he was one. The fact of this decree of dissolution certainly terminated the office of president of the corporation. It certainly had the effect to discharge him as president from the performance of the duties of president of the corporation, and to enjoin upon him the performance of other duties as one of the trustees for winding up the affairs of the corporation, instead of the services of president. It would certainly be an anomalous proceeding to allow the complainant to file his bill in the court of Florida, asking a dissolution of the corporation of which he was the president, a stockholder, and a creditor, and its commitment to the hands of a board of trustees (he being one of those trustees), with instructions and directions under the law to wind up the affairs of the corporation, and then continue thereafter to allow him a salary for services which he could not perform; but, if it should be conceded that he was entitled to compensation as president of the corporation, it is not matter for adjudication or allowance in this suit, filed by him as complainant, under which he has acted as receiver of the corporation appointed by the court. If he has any right or remedy, it is in a court of law, and not in this court; and he having filed this bill of complaint in the chancery court of Mobile county, and having had himself appointed receiver, and as such receiver, under the directions of the court, having continued to manage the affairs of the corporation exclusively, and having been allowed compensation therefor, it would certainly be unjust and inequitable, after such exclusive control by him as receiver, to allow him additional compensation as president of the dissolved corporation, which was dissolved at his instance and request. It therefore follows that the cross-appellant has no cause for complaint as to the errors assigned on his cross-appeal.

It must be conceded that this is an anomalous case in many respects. The bill filed was chiefly for the appointment of a receiver of the dissolved corporation, for the purpose of winding up the affairs of the corporation through the court under the direction of the receiver. By a former decision of this court, and by the decision on this appeal, it conclusively appears that the bill was improperly filed, and that the receiver was improperly appointed, that the receiver was properly discharged, and that the original and amended bills were properly dismissed; and yet it appears that the complainant has not been and should not be taxed with the costs of the proceeding, further than his interest in the trust fund may appear. While the original bill and the amended bill were properly dismissed for want of equity, and the receiver was properly discharged, notwithstanding this, it follows that the learned chancellor in the court below was of the opinion that the trust estate had been benefited by the services of the receiver as such, and that loss or

deterioration of the trust estate had been prevented by the filing of the bill, the appointment of the receiver, and by his management of the estate upon the litigation. It is true, as stated by counsel for appellant in their brief, that this was a question which was not litigated, and as to which the decree of the lower court does not adjudicate. Yet it remains that it does have influence in allotting and awarding costs of the litigation, as to the compensation to which the receiver is entitled, and as to making the costs of the proceeding a charge against the funds of the estate, under the statutes and practice regulating proceedings in courts of chancery in this state.

Whatever may be the law of England, or of other states, it is the settled law of this state that the statutes and rules regulating costs in courts of law and in courts of equity are entirely different. In courts of law, by statute (section 1325 of the Code of 1896, now section 3662 of the present Code), the successful party in civil actions is entitled to full costs, except in cases otherwise directed by law; whereas, in chancery, the rule is entirely different, and made so by statute (section 851 of the Code of 1896, now section 3222 of the present Code), by which it is provided that costs may be apportioned at the discretion of the chancellor. So it follows that, by statute, in courts of law the successful party recovers full costs, as to which the trial court has no discretion, except in cases otherwise provided by law; whereas, in courts of chancery, the costs are apportioned at the discretion of the chancellor. This might be true without the statute referred to, though as to this we do not decide; but it is certainly true with the existing statutes. The statute providing that costs in equity shall be paid by either party, at the discretion of the court, first appeared by an act of the territorial Legislature of Mississippi in 1807. See section 26, p. 350, Clay's Dig. It appeared as section 3007 of the Code of 1852, which is, as codified, in accordance with another previous statute to authorize execution against security for costs. This section has reappeared in all succeeding Codes without any material change. The statute was first construed in the case of *Gray v. Gray*, 15 Ala. 786, as it then appeared in Clay's Digest. Chilton, J., referring to the statute, says: "As to the matter of costs, we have felt some hesitation. The statute declares 'that costs in chancery shall be paid by either party, at the discretion of the court.' Clay's Dig. p. 350, § 26. This statute but affirms a general principal, which obtained as the law before its passage. But, although the court has a discretion with respect to costs, it is not to be understood that it should give or withhold costs at pleasure, but may, it is said, exercise a legal discretion, in accordance with general rules and former precedents." There were several previous decisions of the court, to wit, the cases of *Hunt*

v. Lewin, 4 Stew. & P. 138, and *Randolph v. Rosser*, 7 Port. 249, which announce the same rule, declared in the statute, but without any direct reference to the statute, though the statute was existing at that time.

Stone, J., in the case of *Allen v. Lewis*, 74 Ala. 381, says: "As a general rule costs in equity may be decreed against either party, or may be apportioned in the discretion of the chancellor; and the error in this regard, if there be nothing more in the case, is no ground for the reversal." But, continuing, the learned judge adds: "We have rulings which slightly modify this rule, and hold that, if a substantial question be presented on appeal, the decree may be varied as to costs, although affirmed in every other material point." He further adds: "We need not say whether we approve this doctrine or not, as it does not arise in this case. The rule we have announced is certainly a sound and just one. It enables the chancellor to impose the burden of the litigation where he finds the fault to lie, or to apportion the burden where there has been mutual fault; but, to call this discretion into exercise, the cause either in whole or in part must have been submitted to him for decision and decree. The judicial mind must have acted on some question of merit in the case before there can be a subject or a predicate on which to exercise the discretion."

Somerville, J., in the case of *Falkner v. Campbell Printing Press Co.*, in concluding the opinion in that case (74 Ala. 364), says: "The taxation of costs was a matter of discretion, and they could be properly taxed and made payable out of any moneys in the custody of the court which belonged to any of the parties litigant and subject to the lien of the mortgages sought to be foreclosed." The same justice, in the case of *Mahan v. Smitherman*, 71 Ala. 563, in concluding the opinion of the court, says: "The taxing of the costs was a matter within the wise and just discretion of the chancellor, and is a matter not revisable in the appellate court"—citing section 3900 of the Code of 1876 (1 Brickell's Dig. p. 733, § 1374).

Simpson, J., in the recent case of *Francis v. White*, 142 Ala. 590, 39 South. 174, referring to the authorities above, says, in concluding the opinion: "The matter of the payment of costs rests within the discretion of the court." So it follows, by statute and the unbroken line of decisions of this court for nearly 100 years, that costs in chancery cases may be apportioned at the discretion of the chancellor, or may be decreed against either party, and that an error in this regard, if there be nothing more, is no ground for a reversal, but that if, in addition to this question, there be a substantial question presented for the appeal, the decree of the chancellor in a particular case may be varied as to costs, although affirmed in other material points, though this discretion accorded the chancery court is a legal discretion, in ac-

cordance with the general rules and former precedents, and does not authorize the chancery court to arbitrarily give or withhold costs at pleasure.

As to the compensation allowed receivers by courts of equity, by which they have been appointed and discharged, the rule seems to be that, in the absence of a statute regulating the amount of the receiver's compensation, the amount, as well as the prior question of whether or not anything should be allowed, rests within the sound discretion of the chancellor, and that the appellate court will not disturb the action of the chancellor, unless it manifestly appears that this discretion has been abused. *Stuart v. Boulware*, 133 U. S. 78, 10 Sup. Ct. 242, 33 L. Ed. 568; *Hinckley v. Gilman*, 100 U. S. 153, 25 L. Ed. 591. Certain rules have been announced by the various courts of the United States for the direction of the courts in allowing and fixing the compensation of receivers. Some of these rules are to the effect that the court should have regard to the amount of work to be done by the receiver, the kind, character, and extent of services to be rendered, the value, nature, and kind or character of the property intrusted to the receiver's care and management, as well as of the benefits and advantages, accumulations, or losses received from or the result of the efforts, labor, attention, or want of the same, on the part of the receiver. *Henry v. Henry*, 103 Ala. 582, 15 South. 916.

A receiver derives his authority as receiver from the act of the court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his appointment is to put the property from that time into his custody as an officer of the court for the benefit of the party ultimately proved to be entitled, and not to change the title to, or even the right of possession in, the property. *Union Nat. Bank v. Kansas City Bank*, 136 U. S. 223, 10 Sup. Ct. 1013, 34 L. Ed. 341. The receiver is thus said to be a mere arm of the court, to hold possession of the property, take care of it, preserve it, and use it, pending the litigation, and that while it is in his custody as such receiver it is not in his custody as a trustee, but as an officer of the court; that his possession is therefore the possession of the court; that while he continues to hold it as a receiver of the court the property is in custodia legis, and consequently the court will not permit a receiver appointed by its authority, and who is therefore its officer, to be interfered with or dispossessed of the property intrusted to his custody as an arm of the court, although the order appointing such receiver may be erroneous. A receiver may be said to represent the court which appointed him, and is sometimes said to be the hand of such court. *Brown v. Warner*, 78 Tex. 543, 14 S. W. 1032, 11 L. R. A. 394, 26 Am. St. Rep. 67.

Hence, where a receiver is appointed for a corporation, he is not the representative of the corporation, but is the representative of the court, which is for the time, at least, administering the affairs of the corporation. A receiver, therefore, cannot appeal from an allowance made by the court in favor of the claimant against funds in his hands. The receiver, as stated above, is a mere arm or hand of the court. *Lehigh Coal Co. v. Central Railroad Company*, 35 N. J. Eq. 428. It therefore follows as a general proposition that a receiver cannot pay out any money which has come into his hands by virtue of his office, without being authorized thereto by the order of the court, general or special. In all cases he should have, in order to justify the payment, either expressed or implied authority from his creator and ruler, which is the court appointing him.

A receiver should not be allowed compensation for his services in different capacities. If he receives compensation as a receiver, it should be in lieu of compensation in other capacities. *Battaille v. Fisher*, 36 Miss. 321; *Holcombe v. Holcombe*, 13 N. J. Eq. 417. The compensation may be allowed in the form of periodical payments, of an annual or monthly salary, or of a gross sum, or in the form of a commission on receipts and disbursements. This is left to the sound discretion of the chancellor or court appointing him and allowing compensation; but, if commissions are allowed, they are generally regulated or determined with reference to the amount allowed by statute to personal representatives, trustees, guardians, etc. *Magee v. Cowperthwaite*, 10 Ala. 906.

Compensation should not be denied a receiver because the court had no power to appoint, if he was in fact appointed in a legal manner and has in good faith discharged the duties of such receiver. The court will protect him while acting under the orders of the court, and may award compensation out of the estate or property intrusted to him for his reasonable services, notwithstanding the order of appointment is subsequently reversed and the bill under which he is appointed is dismissed. But it has been held that, if the appointment of a receiver was wholly unauthorized and unwarranted, compensation may be denied. The courts of the various states are at variance upon this question. Justice Tyson, in the case of *Wills Valley Co. v. Galloway*, 139 Ala. 280, 35 South. 850, speaking of this question, says: "But the cases are by no means unanimous on this point—some of the cases holding that the receiver must get his compensation, if at all, out of the fund; others, that the complainants are liable for it." In one line of cases it is held that fees paid by the receiver to his attorney for professional services and other legitimate expenses incurred by him as such receiver are a part of the costs of the administration, and are therefore not admissible as costs in the litigation against the

losing party. Another line of cases, cited and referred to by Justice Tyson, is to the effect that courts may reduce the amount of the compensation of the receiver and order a part to be charged against the funds, and another to be adjudged against the losing party; and it was said by the learned justice, now Chief Justice of this court, on page 281 of 139 Ala., and page 850 of 35 South., that these two lines of cases show that all expense incurred by the receiver in the administration of the affairs committed to him, as well as his compensation, is not as matter of course taxable as costs against the complainant.

Whether the complainant should be held liable depends, not alone upon the fact that the receiver was improperly appointed, but also upon the character of the demand, and the learned Chief Justice concludes by saying that he wishes to be understood as not intimating which of the two lines of cases should be followed, because they were not then before the court. The question is now, for the first time, before this court as to whether or not the compensation of a receiver improperly appointed, together with the costs of the suit necessary upon the administration of the estate while the receivership is pending, should be paid out of the funds of the estate administered, whether they should be taxed against the losing party, or whether the whole matter, both as to costs proper and compensation to the receiver, should be left to the sound discretion of the chancellor or court appointing, directing, and discharging the receiver. After a full examination of all the authorities, including text-books, and the decisions of this court and of the courts of other states, and in the light of the aid afforded by the splendid briefs of counsel for the respective parties upon this question, we conclude that it is more just and equitable to leave the whole matter in the sound discretion of the chancellor, subject to be revised by the appellate court only in case of abuse of the discretion, or where the act of the chancellor is clearly arbitrary, and not in the proper exercise of the authority vested in him by the statutes and the decisions of this court. What is said on this subject in the last report of the case of *Wills Valley, etc., Co. v. Galloway*, 47 South. 141, was correct, when applied to the facts of that case; but the facts of this case readily distinguish it from the *Galloway Case*.

It is strongly insisted by the learned counsel for appellant in this cause, and the argument is not without reason, that as the bill was improperly filed and the receiver improperly appointed, as judicially determined by this court, and the complainant and the receiver is the identical person, the costs incurred in this litigation, including the compensation and expenditures allowed the receiver, are necessarily wrongfully taxed against the trust estate, and that they are

losses which should be borne by the parties at whose instance they were incurred. We confess that this argument is very persuasive; but we cannot yield to it without disregarding the express language of the statute, as well as a long line of decisions of this court extending over a period of nearly 100 years. It may be said that a sufficient answer to this argument is that, before the complainant could have himself appointed receiver under the laws of this state, he was required to execute a bond, conditioned that he would pay all damages which any person might sustain by his appointment as such receiver, should the appointment be vacated. As such appointment has been vacated, the respondents, as well as all other persons, have a remedy by action upon that bond to recover all such damages as they may have sustained. The chancery court is not the proper tribunal, nor is the present action the proper one, in which to determine the amount of damages, if any, which the respondents or others may have sustained by the wrongful appointment of the receiver. So, if the respondents have suffered damages by reason of the wrongful or unauthorized act of the complainant in having the receiver appointed, they are not without remedy, whatever may be the decree of the chancery court or of this court in allowing or apportioning the costs in the chancery court. It may be that it would be better for all of these matters to be determined by the same tribunal and in the same action, yet such is not the law nor the practice in this state. What we have said above, of course, is not intended to control in any action that may be brought in a court of law upon the receiver's bond, but is only intended as an answer to the persuasive arguments of the learned counsel against the decree of the chancellor which is in most things affirmed by this court.

It is contended by counsel for appellant in their brief that, although the receiver was without authority to pay the debts of the company, yet the chancellor had a right to confirm such demands, and consequently, after such ratification by the chancellor, appellants do not insist upon charging the receiver with the \$34,104.45 which he used in paying the admitted debts of the company. In this we concur with counsel for appellant, and, if it could be said to be error on the part of the chancellor (which we do not hold), it would be error without injury; for it appears that the corporation was solvent, and that neither the justice, nor the amount, of the debts paid by the company, was disputed, and consequently it could be of no injury to any party to this suit to have paid these just debts. But it is insisted by counsel for appellant that the compensation allowed the receiver of \$2,980 should not have been taxed against the funds of the corporation, or, if allowed, that should have been taxed against the complainant. It is also insisted by counsel for appellant that many items entered as

elements in fixing this amount of compensation were unjust, and that the compensation was also excessive for this reason. We agree with the chancellor as to all of his findings and rulings, in passing upon the accounts filed by the receiver, upon the register's report thereon, and upon exceptions thereto filed by the appellant. We also agree with him in the finding that the amount allowed the receiver was not excessive, and that it was within the sound discretion of the chancellor, and not an abuse of the discretion, nor an arbitrary act upon his part, to make this a charge upon the trust fund then being administered, for the reason that it clearly appears, and is not denied, that the estate to be administered was considerable, that it required capacity, experience, and attention to faithfully and efficiently discharge the trust as receiver, and that the complainant had the capacity and experience in managing the affairs of this corporation, and that he was both vigilant and faithful to preserve the property and to prevent a loss to the beneficiaries of the trust. While we do not decide that as receiver he managed the property to a better advantage than would have been done by the trustees, of whom he was one, we are not prepared to say that there was revisable error, or even injury to the beneficiaries of the trust fund, consequent to his appointment or management as the receiver; nor can we say that it was unjust or inequitable to allow him compensation for his services as such receiver, nor that the amount allowed was excessive, nor that it was improperly charged against the trust fund. The reason assigned by the learned chancellor, who seems to have devoted considerable study and learning to this case, is that John W. Black was properly appointed receiver by the register on a showing made before him, that pending the former appeal to this court he was continued as receiver and had charge of the property and funds, and that during this time, and until the property could be turned over under an order of the court discharging the receiver, compensation was allowed him, and that he should be compensated as such receiver out of the funds of the corporation; that he had administered the property to the interest of the corporation, and had preserved and managed it to the interest of the creditors and stockholders; that he had given his time, ability, and attention to it, and that it was proper that he should be reasonably compensated therefor.

After reviewing carefully the whole record and all matters of fact and law set forth in briefs of counsel, we are persuaded that the chancellor was correct in fixing the amount of compensation and in allowing it to be

charged against the funds of the corporation. For the same reason we do not think that there was error in the chancellor's allowing the receiver compensation to be reimbursed for the amount paid his attorneys. It is not shown that the services of these attorneys were unnecessary, or that the amount was unreasonable. It is the settled law of this state, and other states, that where a receiver employs counsel the court will determine the amount to be allowed for services to the receiver, though it has been held that courts will not allow a receiver payment made to counsel for services when the employment of counsel was not authorized; but the same rule applies to this as applies to the payment of debts by a receiver due from the corporation. If the court did not allow it in the first instance, it ratified the acts of the receiver by allowing it in passing upon the account. This is also true as to the amount of compensation allowed counsel for the receiver, and the allowance of counsel fees in this behalf is an allowance made in form to the receiver and not to the counsel. The receiver is an officer of the court, and is entitled to apply to the court for instructions and advice in respect of counsel.

Neither do we think there was any revisable error in allowing the receiver compensation for the premium paid on his receiver's bond. It was a proper and reasonable charge for the expense of the administration of the receivership, if compensation were allowable at all. We think there was no error in allowing the receiver compensation for the amount paid Hoffman as stenographer. This amount was paid by the receiver under an agreement of counsel, and it was agreed that it should be paid out of funds of the company then in his hands as receiver, the same to be subject to whatever taxation of costs may be decreed in said cause. The same having been allowed the receiver by the chancellor, it cannot be said that it was improperly allowed because it could not be taxed as costs. The effect of the agreement was evidently to leave it to the decree of the chancellor, and consequently the decree as to this account cannot be disturbed.

We find no error in any of the allowances made by the chancellor. They all appear reasonable and proper. It therefore follows that this cause must be affirmed on both the direct and the cross-appeal, and the costs of the appeal in each case will be taxed equally against both parties thereto.

Affirmed.

DOWDELL, C. J., and ANDERSON and McCLELLAN, JJ., concur.

(123 La. 174)

No. 17,412.

**NATALBANY LUMBER CO., Limited, v.
TAX COLLECTOR OF PARISH
OF ST. HELENA et al.**

(Supreme Court of Louisiana. March 1, 1909.)

1. LIST FOR TAXATION.

Due return had been made by the tax assessor. It was sworn to by the owner, and accepted as correct by the assessor and by the board of reviewers.

2. ASSESSMENT INCREASED.

An order was issued to the assessor, in accordance with the direction of the state board of equalization, to increase the amount of the assessment.

3. CLASSIFICATION OF LANDS.

Upon this order the assessor undertook to change plaintiff's assessment by taking lands assessed in classes B and C and placing them in class A. The land in each class had a separate value.

4. LANDS OF DIFFERENT VALUE.

The assessor did not examine the land before making the change and satisfy himself that, in thus assessing them, classes B and C were of equal value with the land in class A. In fact, they were not.

5. ASSESSMENT OF LANDS.

The testimony shows that the lands were properly assessed at the first. There was no possibility of assessing them in the manner attempted when the change was made.

6. TAXATION (§ 450*)—EQUALIZATION OF ASSESSMENTS—INCREASE OF VALUATION.

In order to comply with the statute, it is necessary to preserve the principle of separate rate for each class of property.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 450.*]

7. FAILURE TO APPEAL.

An order of appeal was entered in the name of the board of equalization, of which the board did not avail itself.

(Syllabus by the Court.)

Appeal from Twenty-Fifth Judicial District Court, Parish of St. Helena; Clay Elliott, Judge.

Mandamus by the Natalbany Lumber Company, Limited, against the Tax Collector and Tax Assessor of the Parish of St. Helena and the State Board of Equalization. Judgment for plaintiff, and defendants appeal. Affirmed.

Robert Stephen Ellis and William Hutchinson McClendon, for appellants. Kemp & Spiller, for appellee.

BREAUX, C. J. Plaintiff sought by mandamus to compel the assessor of the parish of St. Helena to cancel and erase from the assessment rolls for the year 1908 the assessment standing against it.

Plaintiff prayed for the reinstatement of the assessment made on the written list which it filed with the assessor.

It asked that the proceedings be conducted contradictorily with the state board of equalization and the tax collector, as well as the assessor. All are parties to the suit.

The facts are that as owner of pine timber

land it furnished the assessor a classified list for assessment for the year 1908. The amount of its assessment as per this list was \$483,396.35.

It was accepted by the assessor as correct in description and amount, and it was used by him in making the assessment.

The police jury, acting as board of reviewers, passed upon this assessment without objection.

The board of equalization ordered the assessors to increase the amount of the assessment made, as just stated.

The notice of the board of equalization to change and increase the amount of the assessment was given over 15 days after the law's requirement to file the assessment roll in the office of the sheriff and tax collector.

The notice required the assessor to increase the total amount of the assessment of the parish to \$400,000.

The assessor attempted to act in accordance with the order of the board of equalization.

Lands classed as B and C on the assessment roll were classified in class A, of a higher grade as to value.

The lands originally were assessed as follows:

11,000 acres, class A, at \$17 per acre	\$187,000
18,000 acres " B, " \$12 " "	216,000
16,000 acres, " C, " \$ 5 " "	80,000

By listing the land in class A, taken from classes B and C, and by the change made after the assessment had been closed, the assessment of plaintiff was increased by \$178,704.

There was no partiality shown by the assessing officer. A similar change was made in all assessments, in the determination to comply with the instructions of the board of equalization. But all of this was office work. There was no attempt made to go over the lands and ascertain their value.

There was no notice given to the owners of the change made.

The assessor had in the first place complied with section 9 of Act No. 182, p. 334, of 1906.

We have seen that the property had been assessed in three different classes. No change could be made in the manner proposed. It was not possible under the law to do away with the different classes and assess the property indiscriminately. This had the appearance of arbitrariness, and is not characteristic of that system which should be observed in assessing property.

The testimony is that the first classification of the land was properly made, and that the relative value of each class was about as stated on the roll before the change was attempted.

To leave this point, we will state that the assessor cannot arbitrarily take a number of acres from classes B and C and place them

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in class A for assessment. This is not the method authorized by law for the increase, if the case is one in which an increase is necessary to equalize the different assessments.

The statute provides that the assessment shall be equalized by adding to the aggregate assessed value such rate per cent. as will raise it to its proper proportionate value, and, on the other hand, by deducting from the aggregate assessed value thereof, in parishes in which the board of reviewers believes the valuation to be too high, such rate per cent. as is necessary to equalization.

That was not the method followed in this case; but the assessor, in his desire to comply with the orders of the board as he understood them, made a change so that the assessment was made without regard to the different grades, A, B, and C.

The statute makes it the duty of the state board of reviewers to maintain the several classes of property.

The principle of "separate rates for each class must be maintained." Section 11, Act No. 182, p. 335, of 1906.

The assessor did not follow the principle of separate rates. It results that the change attempted must be considered as not having been made, and the assessment remains as it was originally returned by the assessor.

Nothing is added to or taken from the assessment roll as made by the officer.

For reasons assigned, the judgment of the district court is affirmed.

PROVOSTY, J., takes no part, not having heard the argument.

(123 La. 179)

No. 17,413.

AMOS KENT LUMBER & BRICK CO., Limited, v. TAX ASSESSOR OF PARISH OF ST. HELENA et al.

(Supreme Court of Louisiana. March 1, 1909.)
COLLECTION OF TAXES.

The facts and the law applying are similar to those in *Natalbany Lumber Co., Limited, v. Same Defendants*, 48 South. 879.

(Syllabus by the Court.)

Appeal from Twenty-Fifth Judicial District Court, Parish of St. Helena; Clay Elliott, Judge.

Action by the Amos Kent Lumber & Brick Company, Limited, against the Tax Assessor of the Parish of St. Helena and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Robert Stephen Ellis and William Hutchinson McClendon, for appellants. Kemp & Spiller, for appellee.

BREAUX, C. J. The issues in this case are similar to those in the case of the Natal-

bany Lumber Company against the same defendants. 48 South. 879.

In this case, also, the defendants did not appear on appeal to urge error in the judgment of the district court.

It only remains for us to affirm the judgment of the district court.

It is affirmed.

PROVOSTY, J., takes no part, not having heard the argument.

(123 La. 179)

No. 17,479.

STATE v. RICHARD.

In re RICHARD.

(Supreme Court of Louisiana. March 15, 1909.)

CRIMINAL LAW (§ 147*)—PRESCRIPTION—SALE OF LIQUORS.

Under the amendment to section 910 of the Revised Statutes through Act No. 66, p. 93, of 1902, the offenses covered by that section were taken out of the class of offenses punishable by a fine alone, making them punishable by fine and imprisonment, and, quoad matters of prescription, governed by the provisions of section 986, Rev. St.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 271; Dec. Dig. § 147.*]

(Syllabus by the Court.)

Honore Richard was convicted of an illegal sale of intoxicating liquors, and applies for writs of certiorari and prohibition. Denied.

Taylor & Gremillion, for relator. Respondent Judge, pro se. John Joseph Robira, Dist. Atty., for respondent.

NICHOLLS, J. The relator, Honore Richard, was tried before the district court for Acadia parish upon an information which charged him with having, on or about the 1st day of February, 1908, sold spirituous and intoxicating liquors, to wit, whisky, without a license. He was found guilty, and sentenced to pay a fine of \$100 and all costs of prosecution, and to be incarcerated in the parish jail of Acadia parish for the space of 15 days, and in default of the payment of said fine and the costs that he be incarcerated in the parish jail of Acadia parish for 4 months. The information on which defendant was tried, convicted, and sentenced was filed on January 28, 1909, more than 6 months after the act charged was alleged to have been committed. Just before the trial was entered upon the defendant moved to quash the information, upon the ground that more than 6 months had elapsed, as provided by section 986 of the Revised Statutes, since the offense was charged to have been committed February 1, 1908, and the prosecution was barred by the prescription of 6 months, which prescription he specially pleaded. The motion was overruled, and the defendant filed

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

a bill of exception. The trial of the case was proceeded with, with the result above stated. Thereafter he moved in arrest of judgment upon the same ground that he had moved to quash the information. That motion was also overruled.

The information recited that:

"The said offense was not made known to any officer with authority to prosecute within the year, but had just been made known."

The case not being appealable, relator has had recourse to our supervisory jurisdiction, applying for relief through writs of certiorari and prohibition. He urges before the court that the prosecution is absolutely barred by the prescription of six months, and is not saved by the recital that the commission of the offense was not made known to any officer authorized to prosecute within one year from its commission, but had just come to the knowledge of the state authorities. He relies, evidently, upon *State ex rel. Teague v. Edwards*, Judge, 107 La. 49, 31 South. 381, where that doctrine was announced by this court.

The legislation of the state has, however, been changed in the meantime. Relator in that case was prosecuted under section 910 of the Revised Statutes, prior to the amendment made to section 910 by Act No. 66, p. 93, of 1902, which from that time made the offense punishable, not only by a fine, but by a fine and imprisonment, and placing them under the general law relative to the prescription of offenses governed by section 936 of the Revised Statutes. Under this alteration in the statutes, *State ex rel. Teague v. Judge*, 107 La. 49, 31 South. 381, cannot be invoked as a precedent.

For the reasons assigned, it is hereby ordered, adjudged, and decreed that the order heretofore made in this matter be set aside, and relator's demand be rejected, with costs.

(123 La. 181)

No. 17,269.

LAMKIN v. SUCCESSION OF FILHIOL et al.

(Supreme Court of Louisiana. March 1, 1909.)

1. INFANTS (§ 77*)—ACTIONS—TUTOR AD HOC —AUTHORITY TO APPOINT.

There is no law authorizing the appointment of a "tutor ad hoc" to a minor for the purpose as a plaintiff of fixing his status and instituting as plaintiff an action against third persons. Appellant was appointed as such by the district court; but, on his bringing an action under his appointment, defendant excepted to his right to stand in judgment and to the authority of the judge to make the appointment. The court sustained the exceptions, rescinded his order, and dismissed the suit. Plaintiff has appealed.

[Ed. Note.—For other cases, see *Infants*, Dec. Dig. § 77.*]

2. INFANTS (§ 82*)—ACTIONS—TUTOR AD HOC —TERMINATION OF AUTHORITY.

Appellant is in error in referring to the order appointing him a tutor ad hoc as a judgment, and in seeking to apply to it the rules applicable to judgments. It was not a judgment, but a mere temporary conservatory order, which the judge had authority and the right to modify or vacate at his discretion. Appellant was at best an officer of the court. He has no vested right to his position as an officer, holding it by a fixed legal tenure. He held it at the pleasure of the judge. When, in the opinion of the latter, the necessity for his occupying the position ceased, or he became satisfied that the order had been improvidently granted, he had the right to rescind it. Appellant has no legal right to control the judge in that matter, or to question his authority in the premises. He had no legal interest in the subject-matter. He was a mere volunteer, who had tendered his services to the court.

[Ed. Note.—For other cases, see *Infants*, Dec. Dig. § 82.*]

(Syllabus by the Court.)

Appeal from Sixth Judicial District Court, Parish of Ouachita; James Pemberton Madison, Judge.

Suit by E. T. Lamkin, tutor ad hoc of the minors, Aloysius Roland Filhiol and Nancy Ruth Filhiol, against the succession of R. M. Filhiol, deceased, and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Lamkin, Millsaps & Dawkins, for appellant. Stubbs, Russell & Theus, for appellee Filhiol.

Statement of the Case.

NICHOLLS, J. This suit is brought by the plaintiff, styling himself "tutor ad hoc" of the minors, Aloysius Roland Filhiol and Nancy Ruth Filhiol, who are declared to be "the minor children of R. M. Filhiol, late of the parish of Ouachita."

In the petition filed by him he alleges:

"That R. M. Filhiol departed this life in the parish of Ouachita on the 18th of May, 1906, leaving a large succession, which was opened in said parish and was then being administered upon in the district court for Ouachita parish by Inez Schmidt, executrix; that said R. M. Filhiol was 58 years old at the date of his death; that his domicile was in Ouachita parish all his lifetime; that he never married; that at his death he left no surviving ascendants and no children, except the two children herein named, who were baptized and registered as his children at his instance and request in the Church of the Immaculate Conception, on Baronne street, in the city of New Orleans, as shown by the baptismal register of said church, certified and sealed copies of which are hereto annexed and made part hereof; that said R. M. Filhiol repeatedly recognized them as his children; that he treated them as his children, and supported, cared for, and administered unto them as a father, with marked affection and devotion; that H. H. Filhiol, the brother and presumptive heir of R. M. Filhiol, has judicially admitted that said R. M. Filhiol was the father of said children; that said children were recognized, baptized, and registered by said R. M. Filhiol as his children, and as such inherited his estate; that R. M. Filhiol in three letters, written during the last month of his life and ad-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

addressed to the mother of said children, declared his willingness, purpose, and intention to adopt said children by going before a notary public with the mother and executing an act of adoption, and declared that he would perfect this act of adoption in a few weeks; that said Filhiol, at the time of his death and for several weeks prior thereto, was engaged in building an addition to his residence for the avowed and expressed purpose of placing his said children therein and supporting them there; that R. M. Filhiol was one of the parents of said children, and had the consent of their other parent, to whom he expressly agreed and promised that said children should be his forced heirs and have all the rights of adopted children, and consented and agreed to adopt them; that by virtue of said agreement and consent, which is what the law intends to secure, the adoption was completed and made effectual without any further formality or act, and said children are the forced heirs of R. M. Filhiol, and as such are entitled to be put into possession of his estate, its rents and revenues, and decreed to be the owners thereof; that H. H. Filhiol, as brother and presumptive heir of R. M. Filhiol, has taken possession of the plantations of the deceased, situated in the parish of Ouachita, and especially the 'Home Place,' at Logtown, which said decedent frequently declared orally and in writing that he wished his son Aloysius to have and inherit. But in the event the court should hold that said children are not entitled to the rights of adopted children, and should reject their rights of heirship as the children of their deceased father, petitioner pleads that all laws or statutes of the state of Louisiana which discriminate against said children or deprive them of the capacity and right to inherit from their deceased father are unconstitutional, null, and void, being in conflict with paragraph 1, § 2, art. 4, and section 1 of amendment 14 of the Constitution of the United States; that said children, as was also their deceased father, are citizens of the United States and of the state of Louisiana, and as such they are entitled to all the fundamental rights, privileges, and immunities which are given to other children by law; and that said rights cannot be abrogated, abridged, or impaired by any law or court of this state. Petitioner further avers, in the alternative, if the court should hold that said children are entitled to inherit nothing from their said father, that they are entitled to alimony as the natural children of R. M. Filhiol, whose estate amounts to the sum of \$400,000; that said children are young and without any means of support and education, which should be in proportion to the value of their father's estate; that said father could have willed one-fourth of his property to the said minor children; that it was his manifest and avowed desire that his children should receive and inherit his property, and they ought, in equity and fairness, to receive alimony to the value of one-fourth of the estate of R. M. Filhiol for their education and support; that said R. M. Filhiol left an olographic will, dated January 16, 1906, in which, after making several special legacies, he made Inez Schmidt, the mother of said children, his universal legatee, thereby evincing his desire that his children should get the benefit of his estate; that said will was probated, homologated, and ordered executed, except as to the universal legacy, which was reduced to 10 per cent.; that said R. M. Filhiol left special legacies to his brother, H. H. Filhiol, and his daughters, which they have received, but no one has been recognized as heir of the property included in the universal legacy, which was set aside, and which petitioner is hereby claiming for the children of the deceased.

"In view of the premises, petitioner prays that the succession of R. M. Filhiol may be cited, through Inez Schmidt, and that Hardy H. Filhiol be also cited to appear and answer hereto; that on final trial there be judgment de-

creeing the said children, Aloysius Roland Filhiol and Nancy Ruth Filhiol, to be the true and lawful residuary heirs of Roland M. Filhiol, deceased, and as such that they may be decreed to be the owners and inheritors of his entire succession, subject to special legacies of his will, and all legal costs and charges against same, and that they be put in possession of said property, together with all its said rents and revenues since the death of their father.

"In the event that the court should decide that the children are not the legal heirs of R. M. Filhiol, petitioner prays that they be decreed to be entitled to alimony, to be fixed by the court in accordance with the amount of said estate and the necessity of said children, and petitioner prays that this alimony be fixed at one-fourth of the succession of R. M. Filhiol, or its value.

"And, further for all necessary orders and decrees, and for general relief."

The defendant Hardy H. Filhiol, as sole heir at law of R. M. Filhiol, excepted:

"That the order of the court appointing E. T. Lamkin tutor ad hoc for the purpose of bringing and prosecuting this suit was made without warranty or authority in law, and said appointment and the proceedings leading up to same were and are absolute nullities, and said appointment should be recalled and canceled; that the said E. T. Lamkin is without interest, capacity, or authority to prosecute this suit and stand in judgment, and that the suit should therefore be dismissed; that this exception be sustained, and plaintiff's suit dismissed, at his cost."

The district court rendered judgment declaring that:

"By reason of the law being in favor of the exception, it was ordered, adjudged, and decreed that the order appointing the plaintiff, E. T. Lamkin, tutor ad hoc, be and the same is hereby rescinded and annulled; and it is further ordered, adjudged, and decreed that the suit by plaintiff herein be and the same is hereby dismissed as to both defendants. It is further ordered and decreed that the plaintiff pay the costs hereof. Done, read, and signed in open court on this June 16, 1908."

The order of court which was rescinded was given upon a petition addressed to the district court by E. T. Lamkin, in which he alleged that:

"The succession of R. M. Filhiol was opened in the parish of Ouachita, and is now under administration in your honorable court; that said R. M. Filhiol lived and died in your said parish of Ouachita; that he left two minor children, Aloysius and Nancy Ruth, who have claims against his succession; that no one has qualified as tutor to said minors; that petitioner is willing to represent said minors as tutor ad hoc in proceedings for the recognition of their rights against said succession and H. H. Filhiol, brother and heir presumptive of said R. M. Filhiol.

"In view of the premises, petitioner prays that he may be appointed tutor ad hoc of Aloysius Roland Filhiol and Nancy Ruth Filhiol, minor children of R. M. Filhiol, deceased, according to law."

The plaintiff appeals devolutively from the judgment.

Opinion.

The plaintiff is not a relative of the minors whom he claims the right to represent. He does not pretend to occupy a position

towards them of character such as throws upon him the legal duty of guarding and protecting their interests. He appears before the court purely as a volunteer, tendering his services for that purpose to the court. The appointment was not asked at the hands of the court by any party to an existing suit. The court's action from a legal standpoint was substantially *ex proprio motu*. We have been referred to no law authorizing the appointment of a tutor ad hoc to a minor for the purpose of fixing his status and instituting as plaintiff an action against third parties. The only authority in law for the appointment of a tutor ad hoc to a minor of which we ourselves are advised is found in section 2342 of the Revised Statutes, and the facts of this case do not bring it under the provisions of that section. Appellant is in error in referring to the order of court appointing him a "tutor ad hoc" to the minors as a "judgment," and in seeking to apply to it the rules applicable to judgments. What he relies on as a judgment was a mere temporary conservatory order, which the judge had the authority and the right to modify or to vacate at his discretion. Plaintiff was at best an officer of the court. He had no vested right to his position as an "officer" holding by a fixed legal tenure. He held it at the pleasure of the judge. When the necessity for his occupying the position ceased in the opinion of the judge, or when the judge became satisfied that the order appointing him to the position had been improvidently granted, he had the right to vacate it. Plaintiff had no legal right to control the judge in that matter, or to question his authority in the premises. He had no legal interest in the subject-matter. *State ex rel. Mauberret v. Judge*, 45 La. Ann. 240, 11 South. 862. The original action of the judge was not based upon any express authority conferred upon him by law, but under the implied general supervisory power recognized in probate courts over the interests of minors, when falling under their jurisdiction, relative to their personal and property rights. We do not think that plaintiff has a legal interest to appeal. He relies upon the action of this court in *Gates v. Bank of Patterson*, 116 La. 539, 40 South. 891. But the facts of the two cases are widely different, and *Gates v. Bank of Patterson* cannot be invoked as a precedent. The court in the latter case had acted, as in this, in the exercise of the general supervisory power of probate courts for the protection of the personal and property rights of minors falling within their jurisdiction. Upon representations made to the judge of the district court that the tutor and under-

tutor, whom he had appointed to certain minors, had never qualified as such, but by fraud and collusion between them and the Bank of Patterson (which held a special mortgage on their property) the bank had been permitted to seize it under executory process, and through a sale made in such proceedings had deprived the minors of the same without citation and without "due process of law," the judge felt authorized, under certain expressions of this court in the Matter of the Minor Victoria Fortier, reported in 31 La. Ann. 50, and in *Gates v. Bank*, 116 La. 539, 40 South. 891, to appoint a tutor ad hoc to the minors and specially authorize him to bring an action to annul and set aside the sale so made. He accordingly appointed Graves to bring an action for that purpose, and the suit was accordingly brought and (over defendant's objection) carried to judgment. The court annulled and set aside the sale, and, going beyond the sale, dismissed in entirety the executory proceedings. The defendant appealed. This court affirmed the judgment so far as it set aside the sale, but amended it in so far as it dismissed the entire suit. We did not find that there was fraud in the case, but under the evidence it was established beyond doubt that the minors had been deprived of their property without due process of law in proceedings in which they had not been cited or represented. We dealt with the case as we found it.

We did not think the appellant was entitled, under the circumstances in which it invoked relief from the court, that we should exercise its powers to reinstate it in the illegal position towards the minors which it had held. We were of the opinion that we were warranted in leaving matters as we found them quoad the sale, but we held the executory proceedings in court up to the point where illegal proceedings began, and remanded the cause for further proceedings from that point forward.

We wish it understood that we did not intend by our expressions in *Gates v. Bank of Patterson* to recognize the right of the judge to appoint a tutor ad hoc to a minor for the purpose of proceeding as a plaintiff to fix his legal status and to enforce any legal rights which he might be shown to have under that status against third persons, for we do not think that judges have such authority (*Bussy & Co. v. Nelson*, 30 La. Ann. 25). The action of the court, rescinding his order appointing plaintiff as tutor ad hoc of the minors, and in sustaining defendant's exception, was correct.

The judgment appealed from is therefore affirmed.

(123 La. 188)

No. 17,210.

FELIX v. KENNER CANNING & PACKING CO., Limited.

(Supreme Court of Louisiana. March 15, 1909.)

CORPORATIONS (§ 553*)—ACTION BY STOCKHOLDERS—APPOINTMENT OF RECEIVER.

The allegations of neglect, mismanagement, misuse of corporate funds, etc., contained in the petition, being entirely unsupported by proof, and, in fact, disproved, plaintiff, as a stockholder, presents no case for the appointment of a receiver.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2206; Dec. Dig. § 553.*]

(Syllabus by the Court.)

Appeal from Twenty-Eighth Judicial District Court, Parish of Jefferson; Prentice Ellis Edrington, Judge.

Action by Paul Felix against the Kenner Canning & Packing Company, Limited. Judgment for plaintiff, and defendant appeals. Reversed, and suit dismissed.

John Ernest Fleury, for appellant. Louis Hermann Marrero, Jr., for appellee.

Statement of the Case.

MONROE, J. Plaintiff, as a stockholder, proceeded against the defendant company for the appointment of a receiver, and, the district court having made the appointment, defendant has appealed. The petition alleges that the defendant company was organized for the canning of vegetables, and that its factory has been completed for more than a year, but that its officers have not operated it; that the directors have not met "for some time past"; that the stock subscriptions have not been collected, and no effort has been made to collect them; that the company has no funds, and that its funds have been squandered in the payment of salaries to persons who rendered no service; that by reason of the neglect of the officers the property of the company is deteriorating in value; that the company is insolvent; and that it is in the interest of the stockholders and creditors that a receiver should be appointed.

The facts disclosed upon the hearing of the case are as follows: Some time in March, 1907, an association was formed, at Kenner, for the definite purpose of establishing a canning plant, at a cost of \$3,500, on land for which it was to pay \$400; and it appears to have been understood that it should be incorporated, with a capital of \$15,000, divided into 150 shares, of \$100 each, of which \$9,750 was subscribed, mostly in small sums, as we infer, by truck farmers. Of the amount so subscribed, \$3,450 was collected by the contractor, who put up the plant, and who accepted that amount as in full. The owner of the land on which the plant was erected took three shares of stock in part payment of the price, and the president of

the association advanced the remaining \$100 from his own pocket. The members of the association had a meeting and elected a president, a secretary, treasurer, and board of directors. The board of directors met, for the first time, on March 15, 1907, and thereafter on March 17, 20, and 21, April 2, May 8, and June 2, 1907. On February 8, 1908, there was a general meeting of the stockholders, and on May 6, 1908 (after the institution of this suit), there was another meeting of the directors. In the meanwhile, on May 15, 1907, the company was incorporated. At the first meeting of the directors, on March 15, 1907, the secretary was authorized to employ an engineer to inspect the plant, as a preliminary to its acceptance, and a committee was appointed with authority to contract for the boring of a well. At the next meeting provision was made for giving some needed attention to the plant—to stop the leaking of the steam, replace the foundation of the engine, etc., which work was reported on at the next meeting. On March 21st the plant was accepted. On April 2d the secretary was instructed to make inquiries about a "process man." On May 8th there was no quorum. On June 2d it was reported that a "process man" would cost \$125 per month, plus railroad fare, and wanted a contract for six months, and it was decided not to engage him "on account of high prices of tomatoes, due to a short crop." At the stockholders' meeting, on February 9, 1908, most of those present promised to plant from one-half an acre to three acres of different vegetables for the 1908 season. The well had, in the meanwhile, been bored, at a cost of \$850, and the company had contracted further debt, for legal services and insurance premiums, to the amount of \$400, making a total of \$1,250 of indebtedness, as against the value of the plant (including the lot), \$8,900, and the well, \$850, or a total of \$9,750 of assets. No salary has ever been paid to any officer, or agreed to be paid, and, as no money has ever gone into the hands of any officer, none has been squandered. They did not operate the plant, because there was a failure of the vegetable crop, and, as the price of their raw material was too high, they could only have operated at a loss. They did not collect the unpaid balance of the stock subscriptions, because the subscribers were unwilling and unable to pay, and they did not consider it worth while to sue. The people who bored the well, after waiting some six or seven months, brought a suit, asking that a receiver be appointed, and the record in that case was offered in evidence in this. Why they did not sue directly for their money, does not appear. It does appear, however, that but for this suit the president of the defendant company would have borrowed \$1,500 on mortgage and paid all that the com-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

pany owes. It also appears that, in consequence of this suit, the directors have authorized inquiries to be made with a view of finding a purchaser for the plant. It may be stated, in the conclusion, that the plaintiff herein, when placed on the stand, admitted that he knew nothing of any mismanagement or extravagance; the fact being that he had become dissatisfied because the company had been in existence for a year and had done nothing, and he assumed as verity the evil alleged in his petition. It may further be stated that the charter of the company provides for its dissolution, "with the assent of stockholders holding a majority of the outstanding stock," and its liquidation "under the supervision of three stockholders, to be elected," etc.

Opinion.

The allegations of neglect, mismanagement, misuse of corporate funds, etc., contained in the petition, being entirely unsupported by proof and in fact disproved, plaintiff, as a stockholder, presents no case for the appointment of a receiver. *Posner v. Southern Exhaust and Blowpipe Co.*, 109 La. 658, 33 South. 641; *Sheehan v. O'Rourke Iron Works*, 112 La. 461, 36 South. 495; *Saxon v. Southwestern Bench & Tile Mfg. Co.*, 113 La. 638, 37 South. 540; *Von Schlemmer v. Keystone Life Insurance Co.*, 121 La. 987, 46 South. 991.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that this suit be dismissed, at the cost of plaintiff in both courts.

(123 La. 192)

No. 17,020.

NISSEN v. FARQUHAR.

(Supreme Court of Louisiana. March 1, 1909.
Rehearing Denied March 29, 1909.)

APPEAL AND ERROR (§ 1008*) — FINDINGS — CONCLUSIVENESS.

Where the appellate court cannot be positive that the trial court erred in its findings of fact, its judgment based on such findings will be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3955; Dec. Dig. § 1008.*]

Appeal from Civil District Court, Parish of Orleans; Fred Durlevie King, Judge.

Action by Hans C. Nissen against Margaret Farquhar, his wife. From a judgment for plaintiff, and denying defendant's prayer in reconvention for a separation, defendant appeals. Affirmed.

See, also 46 South. 679.

Fernand Fortuné Teissier and William Joseph Formento, for appellant. John Beauregard Fisher, for appellee.

PROVOSTY, J. Plaintiff sues his wife for a separation from bed and board on the ground of excesses and cruel treatment and attempt to take his life. The excesses and cruel treatment are alleged to have consisted in that his wife habitually uses vulgar language, and curses and reviles him, and is subject to violent outbursts of temper, and is frequently under the influence of liquor, neglects her household duties, squanders the money allowed her for household expenses in other ways, keeps the house in a filthy condition, and fails to prepare the meals; that on one occasion she threw herself down in the rear yard, and screamed and yelled, and cursed and abused him, and tore off her clothing, exposing her person to the presence of several spectators, people of the house and neighbors; that on March 30, 1906, she attacked him with a water bucket, and got into a rage and abandoned the matrimonial domicile, taking their one child, a girl aged seven years, with her.

These allegations may be said to be fully proved, if the witnesses are to be believed.

On the other hand, the defendant alleges herself to be a model wife, gentle, loving, dutiful; whereas, her husband is a violent brute, who has, etc.

She, in reconvention, prays for a separation from bed and board.

Her allegations would clearly entitle her to a judgment, if proved, and, like those of the plaintiff, may be said to be fully proved, if her witnesses are to be believed.

The whole case depends upon which set of witnesses are to be believed. They are about equal numerically. The trial judge believed those of plaintiff, and gave plaintiff judgment as prayed, and awarded him the custody of the child. The parties have been living apart since March, 1906, and are unlikely to live again together, even though a legal separation were refused them. We cannot be positive that the trial judge, who saw and heard the witnesses, had erred; hence we find ourselves compelled to affirm his judgment—somewhat reluctantly, we admit. We should have been better satisfied if both demands had been dismissed.

The two attempts at taking life, though testified to by two witnesses are in their circumstances so improbable as to be hardly credible. The rest of the evidence on the side of the plaintiff has verisimilitude, while that in behalf of defendant impresses us a good deal as having been made out of whole cloth.

We repeat, we cannot be positive that there is error in the judgment.

Judgment affirmed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(133 La. 194)

No. 17,274.

GARTNER v. RICHARDSON.(Supreme Court of Louisiana. March 1, 1909.
Rehearing Denied March 29, 1909.)**DAMAGES (§ 78*)—LIQUIDATION—STIPULATIONS FIXING LIABILITY FOR BREACH BY SELLER.**

Where, in a contract for the sale of lumber, it was stipulated that, on failure to fill the orders, the purchaser should buy elsewhere at the cheapest possible prices, and that the seller should refund the difference in the prices, *held*, that such a stipulation is a law between the parties fixing the measure of damages, and the mode of ascertaining their amount, and that the purchaser, not electing to purchase lumber to supply certain shortages in delivery, cannot recover loss of profits.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 159; Dec. Dig. § 73.*]

(Syllabus by the Court.)

Appeal from First Judicial District Court, Parish of Caddo; Thomas Fletcher Bell, Judge.

Action by Oscar Gartner against D. C. Richardson. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Edgar Williamson Sutherland and Alexander & Wilkinson, for appellant. Wise, Randolph & Rendall, for appellee.

LAND, J. The plaintiff sued to recover \$3,390.21 as damages for the alleged failure and refusal of the defendant to deliver certain lumber pursuant to a contract of date September 26, 1904, and for the further sum of \$868.65 for extra expenses of inspectors incurred by reason of defendant's failure to deliver lumber in quantities of 100,000 feet, and for the expense of an inspector for instructing defendant's mill men in getting out lumber for export.

Defendant's answer was a general denial, followed by averments of breach of contract on the part of the plaintiff, and a reconventional demand for \$5,000 damages for the alleged refusal of the plaintiff to take lumber at various times of the grade and quantity called for by the contract.

After a lengthy trial, judgment was rendered in favor of the plaintiff for the sum of \$3,090.21, with legal interest from January 1, 1906, and rejecting defendant's demand in reconvention. Defendant has appealed.

Plaintiff and appellee's answer, praying for an amendment of the judgment, was filed on the day before that fixed for the argument, and comes too late. Such an answer must be filed "at least three days before that fixed for the argument." Code Prac., art. 890.

It appears that prior to September 26, 1904, the plaintiff had given seven different orders for lumber, which had been accepted by the defendant, but had not been filled.

On that date the defendant addressed a communication to the plaintiff, confirming a verbal agreement of the same date made between the parties with regard to said orders. On three of them the time of delivery was extended until November 15, 1904, on three others until December 15, 1904, and on another until March 1, 1905. The agreement contains the following stipulations:

"I herewith undertake to have all of these orders ready for shipment as per orders at the time stated, failing which I agree to refund you any difference in price which you may have to pay in excess of prices as per orders in buying this stock elsewhere. I also agree to advise you 15 days ahead of time as above in case I should not be able to fill all or part of these orders. You will have to use all endeavors in case of my failure to supply as agreed to buy this stock at the cheapest possible prices. The difference thus ascertained between the prices you are paying now and those at which you are buying elsewhere will be paid by me on demand."

Plaintiff testified that the shortage on orders 140, 144 and 152 was 383,565 feet, and that the shortage on orders 104 and 145 was 174,033 feet. Plaintiff filed an exhibit showing that he purchased 383,889 feet of 11-inch and up lumber to fill this shortage at a cost of \$10,072.29, thereby losing \$2,010.61 in the difference in prices. Plaintiff filed another exhibit showing purchases of 128,288 feet of 16 primes at \$2,885.56, thereby losing \$704.60 in the difference in prices.

Plaintiff testified that he had contracted to sell 50,000 feet of 1x4 lumber, and could not comply with his contract by reason of defendant's failure to deliver a like quantity under his contract, thereby sustaining a loss of \$375.

It is an undisputed fact that defendant failed to deliver over 500,000 feet of lumber pursuant to his contract of September 26, 1904. His liability for such failure is covered by the following stipulation of the agreement:

"I agree to refund to you any difference in prices which you may have to pay in excess of prices as per orders in buying this stock elsewhere."

This is the measure of damages fixed by the agreement for defendant's failure to fill the orders on the dates specified, and is the law between the parties. As plaintiff did not purchase any 1x4 lumber to fill the shortage of 50,000 feet, his claim for loss of profits on this item should have been rejected.

The item 383,565 feet of 11-inch and up lumber the petition claims as a shortage on orders 140, 144, and 152. In his exhibit plaintiff assumes that this shortage was on order 152 at \$21 per M. The three orders amounted to 560,000 feet of lumber. According to the petition 176,435 feet was delivered, leaving a shortage of 383,565 feet. The orders called for lumber as follows:

No. 140, 60,000 feet at \$21 per M;
 No. 144, 100,000 feet at \$22 per M; and
 No. 152, 400,000 feet at \$21 per M.

As the petition alleges that the entire shortage was on the three orders, it should be imputed proportionately. The result is that 31,516 feet must be deducted from order No. 144, leaving a shortage of 68,484 feet, and a money difference of \$1 per M, or \$68.48. It is pointed out that plaintiff recovered judgment based on a shortage of 383,889 feet, while his petition alleged a shortage of only 383,565. As plaintiff cannot recover more than he sued for, the difference of \$8.49 should also be deducted.

The main legal contention of the defense is based on the proposition that the plaintiff cannot recover damages because, after the failure of the defendant to fill the orders, the plaintiff insisted on the performance of the contract.

It is true that, after the defendant had failed to deliver the lumber on the dates specified in the contract, the plaintiff continued to demand the delivery of lumber and the defendant continued to promise performance. Assuming that the plaintiff gave the defendant further time to deliver the lumber, we do not think that this extension of the term precluded the plaintiff from purchasing lumber at the expense of the defendant under the terms of their contract.

There were seven orders for lumber, constituting seven different contracts, and the agreement of September 26, 1904, extended the dates of delivery. On every subsequent failure to deliver on time, the plaintiff acquired the right to purchase elsewhere and to charge the defendant with the difference in prices. From the beginning plaintiff notified the defendant that he would exercise this right, and in December, 1904, purchased lumber to fill a shortage in delivery. The defaults in delivery were continuous, and from time to time during the year 1905 plaintiff purchased lumber to partially fill the shortages. At all times there was lumber due the plaintiff over and above the amounts purchased by him, and in January, 1906, when the defendant refused to make further deliveries, there remained over 72,000 feet of lumber not covered by purchases, and due under the contract.

The purchases made by the plaintiff incurred to the benefit of the defendant, as the lumber market was steadily rising. The evidence tends to show that in January, 1906, when defendant refused to deliver any more lumber under his contracts, the market price was much higher than it was during the year 1905.

We agree with the district judge that there is no merit in defendant's reconventional demand for damages based on the plaintiff's alleged breaches of the contract. De-

fendant was in default from the very beginning. He pleaded time after time his inability to deliver the lumber pursuant to his contracts. Plaintiff was anxious to get the lumber, as he needed it for export, and the market was steadily rising. It is not very probable that plaintiff, under the circumstances, refused to receive lumber within the specifications of the contracts. The trial judge decided against the defendant on his reconventional demand, and we see no good reason to reverse his judgment on this point.

It is therefore ordered that the judgment appealed from be amended, by reducing its amount from \$3,090.21 to \$2,638.24; and it is further ordered that, as thus amended, the said judgment be affirmed, costs of appeal to be paid by the plaintiff.

PROVOSTY, J., takes no part, not having heard the argument.

(123 La. 198)

No. 17,301.

LEVY v. NEW ORLEANS RYS. &
 LIGHT CO.

(Supreme Court of Louisiana. March 15, 1909.)

APPEAL AND ERROR (§ 999*)—REVIEW—QUESTIONS OF FACT.

This is a suit by plaintiff to recover damages for injuries received while a passenger on one of defendant's cars. Judgment was rendered in favor of the defendant and plaintiff appealed. As an appellate court we should not reverse the judgment of the district court based on the verdict of a jury, unless we are authorized to declare that it and the verdict of the jury on which it was based are manifestly wrong. This, in this case, we cannot do.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3912-3924; Dec. Dig. § 999.*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Thomas C. W. Ellis, Judge.

Action by Alexander H. Levy against the New Orleans Railways & Light Company. Judgment for defendant, and plaintiff appeals. Affirmed.

E. Howard McCaleb, Jr., for appellant.
 Dart & Kernan, for appellee.

Statement of the Case.

NICHOLLS, J. The plaintiff alleged that the defendant was indebted to him in the sum of \$15,000, with interest, for this, to wit:

That on September 10, 1907, between the hours of 8 and 8:30 p. m., your petitioner boarded a street car operated by defendant, No. 062 of the Dauphine line, at the corner of Bourbon and Canal streets, in this city, and paid his fare of five cents for the purpose of conveying petitioner to his destination downtown. That petitioner took a seat inside of said car, and when said car reached Rampart street, between St. Louis and Conti streets, without any notice or warning, and whilst petitioner was seated inside of said car, he was violently hurled from his seat and precipitated to the floor of said car.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

That he was thereby rendered unconscious, not regaining consciousness until he was brought to the drug store at the corner of St. Louis and Rampart streets, when the Charity Hospital ambulance was telephoned for, and into which said ambulance petitioner was placed by the hospital doctors and carried to the Charity Hospital for attention, where his wounds were dressed. That from the direct effects of said accident petitioner has suffered, and will continue to suffer for the balance of his life, painful and permanent injuries, consisting of a broken arm, broken and fractured at or near the elbow, and lacerations of flesh and wounds of the left forearm and the left index finger. That the place where said accident occurred is, and was to the knowledge of defendant, its agents, and employes a dangerous place, the danger of said place not having been previously known by or notified to petitioner. That on Rampart street, and where said accident occurred, there are two tracks—to the righthand side of the street a single track, where cars move downtown from Canal street; towards the Barracks, and to the left side of said street, a single track, where cars move uptown from the Barracks and Esplanade street towards Canal street. That said tracks are, and have been for more than a year, and particularly at the point where said accident occurred, between St. Louis and Conti streets, and to the knowledge of said defendant, entirely out of line and plumb, unsafe for street cars to pass each other, and in a dangerous condition. That at the time of said accident, and as street car 062 of the Dauphine line, in which said petitioner was seated, and whilst said car was going and moving in the direction of downtown, street car No. 61 of said Dauphine line was coming uptown on the adjacent track, and in the direction towards Canal street. That by reason of the dangerous condition of said tracks and the close proximity of the same, and because of the length and width of said car and the swerving of said cars, caused by said tracks and by the negligent manner in which said cars were handled by defendant's employes and by the defective apparatus of said cars, all of which was specially known by said defendant as above stated, said cars, moving at a high and dangerous rate of speed, collided sideways with terrific force. That from the effects of said collision petitioner was knocked out of his seat and rendered unconscious, and suffered permanent and painful injuries as above detailed. That about one year ago a similar accident took place to another party, whose name is now unknown to petitioner. That defendant then was made aware of the danger, and knew of it; but, notwithstanding said knowledge, it failed to provide against a recurrence of said accident to other parties and especially to petitioner.

Now petitioner avers: That his occupation is that of a traveling salesman on commission on the sale of men's and children's clothing. That according to the custom of the trade in which he is engaged it is necessary for him to carry it on most particularly and especially during the autumn season; that is to say, during the months of September, October, and November of each year, and for the year 1907. That if he is unable to make sales during said time, he thereby loses not only his compensation for his services, but his trade and customers are lost to him and are compelled to purchase their goods from other parties. And petitioner avers that the aforesaid injuries to his arm had confined him to his home, prevented him, and continues to prevent him, from carrying on his business during the busy season, and the months above stated, of this year, thereby causing him great pecuniary loss and the permanent loss of his customers. He further avers that the use of said arm is necessary to the conduct of his said business, and that it will be impossible to use said arm hereafter. That because of the foregoing injuries he has suffered damage in the following amounts:

(1) For physical pain, suffering, mental anguish, and being rendered unconscious by said accident, lacerations, wounds, and broken arm, \$5,000; for permanent injuries to his said arm, \$5,000; for medical attention, physician, medicines, nursing, etc., \$500; for loss of trade and customers, \$2,000; for punitive damages and exemplary damages against defendant for running its cars on the tracks in a dangerous condition, the said defendant well knowing said tracks and the operations of its cars thereon at said place to be dangerous and unsafe, \$2,500—aggregating in all the sum of \$15,000.

Now petitioner avers that said injury and damage were directly caused by the gross, criminal, and willful acts and negligence of said defendant, its agent and employes; that said defendant was grossly and criminally negligent in maintaining said tracks and said cars in a dangerous and unsafe condition, and, were it not for the said negligence of said defendant, the accident herein complained of would never have happened; that said accident occurred through the gross fault and negligence of said defendant, its servants and agents, the defective apparatus of said cars, and the defective appurtenances thereof, and the defective condition and character of said tracks; that petitioner was free from negligence; that he could not have guarded against or avoided said accident; that the acts and doings of defendant aforesaid violated the contract of carriage, and caused petitioner damages as above itemized, and irreparable injury from depriving petitioner of the free use and enjoyment of his arm for the remainder of his life. Amicable demand has been made without avail. In view of the premises, petitioner prays that defendant, the New Orleans Railways & Light Company, through its proper officer, be cited to appear and answer this petition, and after due proceedings had there be judgment in petitioner's favor against defendant for the sum of fifteen thousand (\$15,000) dollars, with legal interest from date of judgment, and all costs; and petitioner prays for trial by jury and for general and equitable relief.

Defendant answered. After pleading a general denial, it averred that it was not responsible for the injuries alleged to have been received by the plaintiff, for the reason that he alone was to blame for the accident, because, at the time of said accident, he had thrust his arm, or some portion thereof, through the bars guarding the said window, placed there for the purpose of preventing passengers from putting their arms out of the window of the car, and that the accident therefore occurred through no fault, negligence, or neglect of the defendant company, its agents or employes.

In view of the premises, respondent prayed that plaintiff's demand be denied and rejected, at his costs, and for all general and equitable relief.

The issues were tried before a jury, which returned a verdict in favor of defendant. The plaintiff moved for a new trial on the grounds:

(1) That said verdict and judgment is contrary to the law and the evidence.

(2) The court erred in charging the jury that, when a passenger is injured, the burden of proof is not upon the defendant carrier to show that the injury or accident was due to inevitable accident beyond its control, and that it was not necessary for defendant to show that it had exercised all care and prudence and foresight in the construction of its tracks, or in keeping them in good order, or that its cars were properly

equipped and safely constructed, and that all obstructions near its tracks, which might endanger the passenger, were removed.

(3) The court erred in charging the jury that when the railroad company had constructed bars or screens for the window of its cars, as protection to the passenger, it was not necessary that said company should use extraordinary care in the arrangement and construction and the utmost skill, so that there would be no possibility of injury to the passenger either by obstructions or passing cars.

(4) The court erred in holding that the plaintiff sustained the burden of proof to show that the accident occurred through the fault and negligence of the defendant, and that the defense of contributory negligence, specially set up by defendant in its answer, admits its negligence, and that plaintiff contributed to the accident by putting his arm outside the window, did not shift the burden of proof upon the defendant.

The court overruled the application, assigning the following written reasons for his ruling:

"The jury were the judges of the fact, and I am not prepared to overrule their finding, or to express an opinion at this time, one way or another, as to the facts.

"No exceptions were reserved to the charge delivered to the jury; but I wish to say that I did not charge the jury in general terms, as stated in the motion, but in accordance with the law as to the duty of carriers of passengers for hire, and as to the duty of passengers so carried while on the car, and as to the liability of the carrier for negligence, and as to the doctrine of contributory negligence as affecting the passenger's right to recover. The charge was delivered orally to the jury in presence of counsel, and there was no request or modification of it, in whole or in part, and no expression of dissatisfaction with it, in any measure. Nor was any bill of exception reserved to it as a whole, or to any part of it. I cannot go into details as to wherein the charges of error, in plaintiff's motion are incorrect, and I regret that counsel, if dissatisfied, did not request modification or explanation, and specially that he did not reserve bills of exception.

"I think the trial a fair one, and as the record is complete, and the appellate court will have all the facts before them, I see no reason why I should express my approval or disapproval of the verdict, nor why a new trial should be granted. Motion dismissed, and a new trial refused."

The court then rendered judgment in conformity with the verdict.

Plaintiff has appealed.

Opinion.

The plaintiff himself does not really know to what cause must be attributed the injury which he received. It took place suddenly, without warning, and he became unconscious simultaneously with receiving the blow upon his elbow which broke his arm. He alleges, as we have seen, that while seated as a passenger on one of the cars operated by the defendant company, proceeding from Rampart street, he was violently hurled from his seat and precipitated to the floor; that the place where the accident occurred was, to the knowledge of defendant, a dangerous place; that there were two lines of cars operating on that street; that the tracks had been for more than a year, at the point where the accident occurred, entirely out of line and unsafe

for street cars to pass each other, and in a dangerous condition; that, when he was so seated in the car, a car passed it going up Rampart street on parallel tracks; that by reason of the dangerous condition of the tracks and the close proximity of the same, and because of the length and width of said car, and the swerving of said cars caused by said tracks, and by the negligent manner in which said cars were handled by defendant's employes, and by the defective apparatus of said cars, all of which was known to defendant, said cars, moving at a high and dangerous rate of speed, collided sideways with terrific force; and that from the effect of said collision he was knocked out of his seat, and rendered unconscious, and suffered permanent and painful injuries. We do not find, as a fact, that the cars were running at a high and dangerous rate of speed, nor do we find that the condition of the tracks was such as plaintiff alleged, and that the accident occurred from such a condition of the tracks. We think the petition, in ignorance of the actual facts, was framed so as to include most of the circumstances under which railway accidents usually occur, so as to take advantage of any situation which the evidence adduced on the trial might develop. Pleadings of that character are usual and to be expected, where the proximate cause of the accident is in doubt. This case comes before us on an appeal from the verdict of a jury, and a judgment of court affirming the same, where the issues involved were questions of fact. No objection was made to the charge of the judge, and no complaint is made either as to proper evidence having been excluded or improper evidence allowed to be introduced. All of the evidence permissible was adduced which each party could bring forward. The note of evidence discloses that a great part of the testimony went before the jury illustrated by the witnesses by gestures which cannot be reproduced in the transcript.

As an appellate court we should not reverse the judgment, unless we be authorized to declare that it, and the verdict of the jury upon which it is based, was manifestly wrong. Appellant comes before the court under adverse circumstances. We ourselves cannot say what caused the injury, unless as suggested below. The defendant was evidently not guilty of negligence in respect to taking precautions against passengers from even carelessly protruding their arms outside of the window, for not only were small iron bars placed in the upper part of the windows, and across them, but at the bottom of the same wire netting was stretched across, which prevented passengers from exposing their arms, unless by assuming positions entirely unusual and unsafe, causing them to protrude above the wire netting.

Rampart street is made up of a middle space, which is known as the "neutral ground," having a street on each side run-

ning parallel to the same. The neutral ground has trees upon it outside of the tracks. The city council, in granting a franchise to the defendant to run a double track along the neutral ground, was necessarily limited as to the distance between the parallel tracks by the width of the neutral ground; and while there was more or less danger from allowing the tracks to be placed as close as they were, that body, in the exercise of its discretion and in the interest of public convenience, thought proper to grant the privilege. The defendant had no control over that matter. It accepted the privilege, and so far as we are advised it has guarded the public safety as well as it could under existing conditions. Passengers owe something to themselves for their own protection, and must yield something for the public good. No good purpose would be subserved by reciting the testimony in this particular case. The court considers the preponderance of testimony as leading to the conclusion that plaintiff permitted his elbow to protrude out of the window above the wire screen to an extent sufficient to have had it struck by something on the outside of the car. Precisely by what it was struck is not directly established, but presumptively it was by the passing car. The accident to the plaintiff is greatly to be regretted, but we have no alternative but to affirm the judgment. It is hereby affirmed.

(123 La. 206)

No. 17,317.

LADNIER v. JAMES C. STEWART & CO.
et al.

(Supreme Court of Louisiana. March 15, 1909.)

MASTER AND SERVANT (§ 256*)—INJURY TO
SERVANT—PETITION—EXCEPTIONS.

Where, from the allegations of the petition, in an action for the recovery of damage for personal injuries sustained by an employé through the alleged negligence of the employer, it appears that the place where the employé was put to work was safe enough, but for the acts of a third party, over whom the employer is not alleged to have had any control, and it does not appear that the employer knew, or was in any better position than the plaintiff to know, that such third party would act as he did, an exception of no cause of action is properly sustained.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 809; Dec. Dig. § 256.*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; John St. Paul, Judge.

Action by Lawrence Ladnier against James C. Stewart & Co. and the Otis Elevator Company in solido. Judgment for defendants, and plaintiff appeals. Affirmed.

Frank Benjamin Davenport and Benjamin Rice Forman, for appellant. Solomon Wolff, for appellees James C. Stewart & Co. Edward

Rightor and James Legendre, for appellees Otis Elevator Co.

Statement of the Case.

MONROE, J. Plaintiff appeals from a judgment maintaining an exception of no cause of action and dismissing his suit as to James C. Stewart & Co. He alleges that James C. Stewart & Co. and the Otis Elevator Company are indebted to him, in solido, for this, to wit:

"That * * * while in the employ of James C. Stewart & Co., and working under the instruction, direction, and observation of the foreman for said James C. Stewart & Co., he was injured under the following circumstances: * * * That said James C. Stewart & Co. are building contractors, and are at present engaged in erecting the building known as the 'Maison Blanche,' * * * and that the Otis Elevator Company are contractors engaged in putting elevators in said building. Your petitioner, under orders from the foreman of said James C. Stewart & Co., was engaged in scraping and cleaning cement and mortar from the window, opening in the brick wall forming part of the elevator shaft in said building, in order to put in the window casing. * * * That while thus engaged, and obeying the instructions of the agent of James C. Stewart & Co., the elevator, the property of the Otis Elevator Company, without warning or notice, and unknown to your petitioner, was caused to ascend, by agents and employes of the Otis Elevator Company, with the result that the large, heavy iron weight, used as a balance on said elevator, descended, striking your petitioner's left leg, causing a compound fracture, and also badly lacerating and bruising his right thigh. That as a result of said injuries your petitioner has suffered, and still suffers, great bodily and mental pain and agony. That he was confined to his bed. * * * That the injuries received by him were caused and occasioned solely and entirely by the fault, omission, lack of skill, carelessness, and gross negligence of James C. Stewart & Co. and the Otis Elevator Company, their officers, agents, and employes. That it was gross negligence, carelessness, and omission of duty by James C. Stewart & Co. to place your petitioner in so dangerous a position to work, without warning him of the peril. That the danger was not open, or apparent, or known to your petitioner. That it was gross carelessness on the part of the said James C. Stewart & Co., its agents and employes, to have placed your petitioner in such a dangerous position without warning the employes of the Otis Elevator Company of the fact, and that it was negligence and carelessness on the part of the agents and employes of James C. Stewart & Co. to allow said elevator to run while your petitioner occupied the dangerous position to which he had been ordered. That it was gross negligence and carelessness on the part of the Otis Elevator Company, its officers, agents, and employes, to have attempted to run the elevator without making sure that the elevator shaft was clear, and that no workmen were in danger of being hurt by reason of said operation. That the careless, negligent, and unskillful manner of running the said elevator was the cause of petitioner's hurt and damage. Had the elevator been run in a careful and prudent manner, the accident would have been averted."

Opinion.

Carefully considering these allegations, we deduce from them that the place where plain-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tiff was put to work by James C. Stewart & Co. was safe enough, but for the acts of the Otis Elevator Company, over which it does not appear that James C. Stewart & Co. had any control. Nor does it appear that James C. Stewart & Co. knew, or was in any better position than plaintiff to know, that the Otis Elevator Company would act as it did.

The judgment appealed from was therefore correct, and is affirmed.

(123 La. 208)

No. 16,631.

STATE v. CROSS LAKE SHOOTING & FISHING CLUB.

(Supreme Court of Louisiana. March 1, 1909.
Rehearing Denied March 29, 1909.)

LEVEES (§ 13½*)—GRANTS TO LEVEE DISTRICT—SALE BY COMMISSIONERS—VALIDITY.

Under Act No. 74, p. 95, of 1892, and Act No. 160, p. 242, of 1900, the grant of lands made by the state to the board of commissioners of the Caddo levee district is not a grant in present, but is intended to vest in the grantee a disposable title only when proper instruments of conveyance, executed by the State Auditor and Register of the State Land Office, are recorded in the parishes where the lands lie. Hence a sale of such lands by the board prior to the registry of such conveyance is void, and the party attempting to purchase is liable to eviction at the suit of the state.

[Ed. Note.—For other cases, see *Levees*, Dec. Dig. § 13½.*]

Provosty, J., dissenting.

(Syllabus by the Court.)

Appeal from First Judicial District Court, Parish of Caddo; Andrew Jackson Murff, Judge.

Action by the State against the Cross Lake Shooting & Fishing Club. Judgment for defendant, and plaintiff appeals. Reversed, and judgment rendered for plaintiff.

James Martin Foster, Dist. Atty., and Walter Gulon, Atty. Gen. (Edgar Williamson Sutherland and William Pike Hall, of counsel), for the State. Farrar, Jonas & Kruttschmitt and Alexander & Wilkinson, for appellee.

Statement of the Case.

MONROE, J. The state, through the Attorney General, brings this suit for the recovery of some 11,000 acres of land, lying in the parish of Caddo and formerly constituting the bed of Cross Lake. The grounds relied on are, substantially, as follows:

(1) That, by Act No. 74, p. 95, of 1892, certain swamp lands and lands acquired by the state for unpaid taxes were granted to the board of commissioners of the Caddo levee district (a public corporation created for drainage and levee purposes), subject to the condition that the title should vest in the board only upon the execution, by the State Auditor and Register of the State Land Office, and the registration, in the parishes

where the lands lie, of deeds of conveyance thereto; that the lands here claimed were not included in the grant, but that the board, assuming that they were so included, undertook to convey them to defendant's authors, and that the attempted conveyance was, and is, of no effect, for the reason that the board was without title and had no authority in the premises.

(2) That, even if it be held that the lands in question were included within the terms of the act of 1892, no title thereto ever vested in said board, for the reason that no deeds of conveyance have ever been executed or recorded as required by said act, and hence defendant can have acquired no title through any conveyance attempted by said board.

(3) That, should the court find that said lands were within the terms of said act and that said board acquired title to the same, the conveyance to defendant's authors was a disguised donation of public property, the price purporting to have been paid having been 10 cents an acre, whereas the lands were worth not less than \$2 an acre, and that defendant's authors are, substantially, the same individuals who now compose the defendant corporation.

(4) That, should the grounds stated not be sustained, the attempted conveyance should be decreed of no effect, because it purports to be a sale for cash, whereas no price whatever has been paid.

(5) That, should none of the grounds thus relied on be found good, the alleged sale should be annulled for lesion beyond moiety.

Defendant, by way of exception, averred that the allegations of the petition are inconsistent, and that they disclose no cause of action, and, further, pleaded *res judicata*; and, the exceptions having been overruled, answered that the lands claimed were included in the grant contained in the act of 1892, that the title was thereby vested in the levee board, and that it (defendant) acquired, through *mesne* conveyances, from said board; that the price paid was sound, that the transaction was a sale, and not a donation, and that the attack made thereon, on the ground of lesion beyond moiety, is barred by the prescription of four years. And defendant further pleaded the prescription of five and ten years, and, alleging that it had been in actual possession of the lands in question since the date of its purchase, to the knowledge and with the consent of plaintiff, and had paid the taxes thereon, pleaded *estoppel*. It further alleged that, the lands having been conveyed by plaintiff to the levee board, and by the board to its authors, this attempt to recover them, if successful, would impair the obligations of a contract, in violation of the state and federal Constitutions. And, finally, it alleged that it had paid \$751.09 in the way of taxes, for which it prays judgment, with interest, in the event of an adverse ruling up-

on the other matters thus set up. It was admitted on the trial, that:

"No deeds of conveyance of the lands in controversy have been executed by the Register of the State Land Office, or Auditor, or either of them, to the board of commissioners of the Caddo levee district, and nothing of the kind has been recorded in the conveyance books in Caddo parish, up to this date."

The facts necessary to an understanding of the case are as follows: The Caddo levee board was created by Act No. 74, p. 95, of 1892, which also created a board of commissioners, and charged it with the administration of the affairs of the district.

Section 9 of that act reads:

"Sec. 9. * * * That, in order to provide additional means to carry out the purpose of this act and to furnish resources to enable the said board to assist in developing, establishing and completing the levee system in the said district, all lands, now belonging, or that may hereafter belong, to the state, and embraced within the limits of the levee district, as herein constituted, shall be, and the same are, hereby, granted, donated, conveyed and delivered into the said board of commissioners of the Caddo levee district, whether the said lands, or parts of lands, were originally granted by the Congress of the United States to the state of Louisiana, or whether the said lands have been, or may hereafter be, forfeited, or bought in, by, or for, or sold to, the state, at tax sale, for non-payment of taxes; where the state has, or may hereafter, become the owner of lands, by, or through tax sales, conveyances thereof shall only be made to the said board * * * after the period of redemption shall have expired; provided, however, any and all former owners of lands which have been forfeited to purchasers by, or sold to, the state, for nonpayment of taxes, may, at any time, within six months, next ensuing after the passage of this act, redeem the said lands, or all of them, upon paying, to the Treasurer of this state, all taxes, costs and penalties due thereon, down to the date of said redemption, but such redemption shall be deemed and shall be taken to be sales of lands, by the state, and all and every sum, or sums, of money, so received, shall be placed to the credit of the Caddo levee district. After the expiration of the said six months, it shall be the duty of the Auditor and Register * * *, on behalf of, and in the name of, the state, to convey to the said board * * *, by proper instruments of conveyance, all lands hereby granted, or intended to be granted and conveyed, to the said board, whenever, from time to time, the said Auditor and Register * * *, or either of them, shall be requested to do so by the said board * * * or by the president thereof, and, thereafter, the said president * * * shall cause the said conveyances to be properly recorded in the conveyance offices of the respective parishes wherein the lands are located, and, when the said conveyances are so recorded, the title to the said lands, with the possession thereof, shall, from thenceforth, vest absolutely, in the said board * * *, its successors or grantees. The said lands shall be exempted from taxes after being conveyed to, and while they remain in the possession or under the control of, the said board. The said board * * * shall have the power and authority to sell, mortgage and pledge, or otherwise dispose of, the said lands, in such quantities and at such times and at such prices as to the board may seem proper. But all proceeds derived therefrom shall be deposited in the state treasury to the credit of the Caddo levee district and shall be drawn only upon the warrants of

the president of the said board, properly attested, as provided in this act."

The lands here claimed constituted the bed of a body of water, near Shreveport, known as "Cross Lake," which, in consequence of the removal of a raft, which for many years obstructed Red river, and the reconstruction of the levees, is drying up, leaving said lands available for farming purposes, the 11,000 acres in controversy being, at the time of the trial in the district court, worth from \$50,000 to \$100,000, though they were not worth that much at the date of the transaction out of which this litigation has arisen. It appears that, in August, 1895, the levee board (meaning the board of commissioners of the Caddo levee district) adopted a resolution authorizing the sale of the lands in question to the "Gun Club" for \$1,100 (or, say, 10 cents an acre for 11,000 acres) cash; and that, there being no such corporate entity as the "Gun Club," the secretary of the board was handed three checks signed by individuals, for amounts aggregating that specified in the resolution. A controversy then arose between the individuals constituting the gun club and others, constituting the rod and gun club, as to which organization was intended by the resolution, and the secretary of the board was instructed not to collect the checks which had been handed to him (and which were, afterwards, returned to the drawers). The board, about that time, however, appears to have executed an instrument conveying the lands to the individuals constituting the gun club, who then incorporated themselves under the name of the "Shreveport Gun Club," and transferred the lands to the corporation so created, the president of the board ratifying the transfer. Shortly afterwards (on September 20, 1895) the board adopted a resolution instructing its attorney to annul the conveyance which had thus been made, and a suit was then instituted by the rod and gun club, or the individuals so styling themselves, to which the gun club and the board were made, or became, parties, and which resulted in a judgment in this court confirming the conveyance in question. *Rod & Gun Club v. Board*, 48 La. Ann. 1081, 20 South. 293. The members of the Shreveport Gun Club then appear to have organized the corporation now before the court as defendant, and to have transferred the land in dispute to it. The transcript does not contain the resolution authorizing the conveyance of the lands, or the act of conveyance, or the act of ratification (by the president of the board), but it does contain a copy of the resolution instructing the attorneys of the board to annul the conveyance, and it also shows that on September 1, 1896, Mr. Jacobs (one of the grantees) appeared before the board and proposed to pay for lake lands sold to the gun club, "provided the money be deposited subject to title being perfected"; that the board instructed its secretary "to make a special deposit of the \$1,100, subject to above condi-

tion"; that on September 2, 1896, Mr. Jacobs, in his capacity as president of the First National Bank of Shreveport, issued a certificate reading:

"The Caddo levee board has deposited in this bank eleven hundred dollars, payable to the order of the Caddo levee board, in current funds, on return of this certificate, properly indorsed, and when the title to the Cross Lake lands, sold by said board to W. B. Jacobs et als., shall be made perfect and cleared of any cloud."

Thereafter, from time to time, Mr. Jacobs appeared before the board and requested that action be taken in the matter of clearing the title, and in December, 1901, he and Levi Cooper made a proposition to pay \$3,500 additional for the lands, which the board accepted, thereupon authorizing its president "to take proper steps to perfect the title." The steps taken were, however, ineffectual, and in 1902 the General Assembly passed an act (Acts 1902, p. 324, No. 171) authorizing the Register of the State Land Office to sell the Cross Lake lands "at, not less than, \$5 an acre, nor, in greater quantities than 320 acres to any one person," preference to be given to bona fide settlers, and further providing:

"Sec. 4. * * * That Act No. 74 * * * of 1892, and Act No. 160, of * * * 1900, be, and the same are, hereby, repealed, in so far as they may, in any way, whatever, affect any of the lands described herein, the same never having been transferred by the Register of the State Land Office and the State Auditor, nor either of them, by any instrument of conveyance from the state, as required by said act, to complete the title of the same."

And thereafter, so far as the defendant now before the court is concerned, the matter remained in statu quo until 1906, when this suit was brought. There was judgment in the district court in favor of defendant, and the state has appealed.

Opinion.

In our opinion, the levee board acquired no title to the lands in dispute under the act of 1892, because no deed of conveyance thereto was ever executed by the Auditor and Register, or either of them, and, of course, no such deed was ever recorded, and as for the same reason, the board acquired no title under Act No. 160, p. 242, of 1900, the argument that the title acquired under that act inured to the benefit of the defendant has nothing to rest on. This conclusion renders it unnecessary to consider the other issues presented by the pleadings, since, even were it conceded that the lands were included within the terms of the act of 1892, if it be true that the title did not vest in the board, and that the execution and registry of the deed of conveyance was necessary to accomplish that result, such concession could not affect the judgment to be herein rendered. And so, if it be true that the board acquired no title to the land, then no judgment rendered in a suit to which it may have been a party, but

to which the owner of the land was not a party, can support a plea of *res judicata* as against the latter; and it is wholly immaterial whether the board attempted to sell the land or to give it away, or whether it received an amount agreed to be paid or received nothing. Our reasons for the conclusion that the board acquired no title, and could therefore convey none, predicated on the admitted fact that no deed of conveyance to the lands in question has ever been executed by the auditor or register, are, briefly, as follows:

Counsel for defendant concede that the statutory provisions upon the subject of the execution and registry of acts of conveyance relate to the lands acquired by the state by reason of the nonpayment of the taxes due on them, but they argue that those provisions have no bearing upon the swamp or other lands embraced within the terms of the statute. This is, at least, an admission that, *quoad* (what, for convenience, we will call) the "tax lands," the grant contained in the statute is not a grant in *presenti*. The question, then, is, does it purport to vest title in *presenti* to any other lands?

The section of the law which we are interpreting begins with a long sentence, granting to the board "all lands, now belonging, or that may hereafter belong, to the state" (and embraced within the district); then using language which is said to confine the grant to swamp and tax lands (as contradistinguished from what are called "sovereignty" lands); then qualifying the grant by saying that tax lands shall be conveyed to the board only after the period of redemption shall have expired, and providing that the former owners may redeem within six months, and that the money so realized shall be paid into the state treasury and placed to the credit of the levee board—and there the sentence ends. The plain, indisputable meaning, so far, therefore, is that the grant of the tax lands, at all events, is not a grant in *presenti*. No language could convey that idea more clearly, and the language used is rounded with a period. Then we have a new sentence which has no more necessary or grammatical connection with tax lands than with swamp lands, and which by its terms deals with both (and with any other lands which might be considered included in the grant). It reads:

"After the expiration of the said six months [referring to the six months within which the former owners of tax lands are allowed to redeem] it shall be the duty of the Auditor and Register, on behalf, and in the name, of the state, to convey to the said board * * *, by proper instruments of conveyance, all lands hereby granted, or intended to be granted and conveyed * * * [whenever those officers shall be so requested], and, thereafter, the said president * * * shall cause the said conveyances to be properly recorded * * *, and, when said conveyances are so recorded, the title to the said lands, with the possession thereof, shall, thenceforth, vest, absolutely, in the said board," etc.

Now, it appears to us that, if the intention had been to distinguish between tax and swamp lands, in the matter of the requirement with respect to the execution of instruments of conveyance and their registry, the lawmakers would have so expressed it. But why, if they intended the grant of the swamp lands to become effective at once, do they make it the duty of the Auditor and Register, only "after the expiration of six months, to convey * * * all lands hereby granted, or intended to be granted, or conveyed," and why do they say, with regard to all such lands, "when such conveyances are so recorded, the title to the said lands, with the possession thereof, shall, thenceforth, vest, absolutely, in the said board"? We are bound to assume that the makers of the law knew the difference between "all lands, granted, or intended to be granted," by them, and any given class or parts of such lands, and we cannot assume that, intending the grant with respect to some of the lands to take effect in present, they would practically have prohibited the Auditor and Register from executing conveyances to any of the lands until after the expiration of six months, and would have said that "thenceforth" (that is to say, after the execution and registry of such conveyances) "the title to the said lands, with the possession thereof," shall "vest" in the grantee. If it had been the intention that the title to all, or to any part, of the lands should be vested in the board merely by virtue of the statute, one would suppose that it would have been made the duty of the Auditor and Register to execute conveyances as soon as the statute was adopted, at least, for so much of the land as was intended to be granted in that way; but the statute, by imposing upon those officers the duty of executing such conveyances "after six months," impliedly prohibited them from doing so within that time. Upon the whole, we are of opinion that the law in question is susceptible of but one interpretation, i. e., that its makers intended that disposable title to all lands granted or intended to be granted by it should vest in the grantee only upon registry, in the parishes where the lands lie, of proper instruments of conveyance executed by the Auditor and Register of the State Land Office. So far as the tax lands are concerned, the reason for thus qualifying the grant is obvious enough. The state held large bodies of land forfeited or bought in for taxes, some of which was subject to redemption and some not, and endless confusion might have arisen if the levee board had been placed in a position to sell such lands indiscriminately.

As to the swamp lands, it may well be that in many instances there were pending unsettled claims and controversies of which the land office was advised, with which the Register alone was qualified to deal, and which rendered it inadvisable that new titles should issue save to the knowledge of that officer.

But whether these views, as to the reasons which inspired the law, be correct or not, the law itself is plain, and it has (in effect) twice received from this court the interpretation which we are now placing on it; once in a case involving lands formerly constituting the bed of a shallow lake, and again in a case involving lands acquired by the state under its tax laws. *McDade v. Levee Board*, 109 La. 625, 33 South. 623; *St. Paul v. Louisiana Cypress Lumber Co.*, 116 La. 585, 40 South. 906. In the case of *Williams v. White Castle Lumber Company*, 114 La. 450, 38 South. 414, the question here presented was not directly at issue, but was referred to without disapproval of the views previously expressed in the *McDade* case.

In conclusion, we may say that no one pretends that the Congress of the United States or the General Assembly of Louisiana may not enact statutes granting lands in present, and no one denies that Congress has enacted statutes which, no doubt properly, have been construed as so intended; but we have been referred to none, so construed, which have contained provisions such as those now under consideration, and a review of the jurisprudence interpreting statutes containing dissimilar provisions would serve no useful purpose.

It is admitted that defendant has paid \$751.09 of taxes on the lands here claimed, for which, we think, it is entitled to judgment, with a right to retain the property until payment thereof.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that there now be judgment in favor of plaintiff, the state of Louisiana, and against the defendant, the Cross Lake Hunting & Fishing Club, decreeing plaintiff to be the sole owner of the lands described in the petition herein filed, and further decreeing the title set up by defendant, including the attempted sale from the board of commissioners of the Caddo levee district to W. B. Jacobs, A. F. Jenkins, W. S. Penick, Jr., and S. J. Enders, of date August 20, 1895, and all mesne conveyances, to be null, void, and of no effect.

It is further adjudged and decreed that defendant recover the sum of \$751.09, with interest thereon, at the rate of 5 per cent. per annum from judicial demand until paid, and that it be allowed to retain the property in controversy in its possession until payment thereof.

It is further decreed that defendant pay all costs.

LAND, J., recused, having, while district judge, passed on defendant's title in another litigation.

PROVOSTY, J. (dissenting). The only serious question is as to whether the state did not by operation of the statute itself convey to the levee board an interest in the land

such as the levee board on its part could convey.

Differently from private persons, the state may by the mere expression of her will convey title to her property. 26 Am. & Eng. Enc. Law, 423; *Strother v. Lucas*, 37 U. S. 410, 9 L. Ed. 1137. Now, the statute reads that the lands "shall be and are hereby conveyed and delivered." It is not only that they "shall be," but that they "are hereby." They are not only granted, but "hereby conveyed and delivered." If these words do not import a present conveyance and delivery, they import nothing.

From and after the passage of the statute, the price of the lands is to go to the levee board in case of redemption. This shows conclusively that the intention was that from and after the passage of the statute the lands were to belong to the levee board.

Absolutely no discretion whatever is left to the Auditor and the Register of the Land Office in connection with the execution of the conveyance. They have to execute it upon demand. Why such demand could not be made just as well after as before a sale by the levee board, I cannot imagine.

If, after a sale by the levee board, the state can revoke the donation, then the donation was made with a string to it. I do not think that such was the intention. I think it is perfectly clear that the Legislature intended to transfer the lands presently and irrevocably to the levee board for the uses specified.

The language of the various grants of Congress to the states and to railroads is that the Secretary of the Interior shall make lists and plats of the lands, and "shall cause a patent to be issued * * * and on that patent the fee simple shall vest." It will be observed that this clause, "and on that patent the fee simple shall vest," is the full equivalent of the clause found in our statute, "and when said conveyances are recorded the title to the said lands shall from thenceforth vest." Now, the Supreme Court of the United States and the Supreme Courts of a number of states, construing said grants, have held that said clause, when read in connection with the granting parts of the statute importing a grant in present, did not mean that the issuance of a patent should be a condition precedent to the passing of the title of the government. This manner of construing these grants may be said to have become established jurisprudence. 26 Am. & Eng. Enc. Law, 244. I can see no reason why this court should depart from that jurisprudence.

By the majority opinion, the granting clause is brought in direct and sharp conflict with the clause, "and when said conveyances are recorded the title shall from thenceforth vest absolutely," and the Legislature is convicted of not having known its own mind or known the use of language.

The rule is not to read a statute in such a way as to bring the different clauses of it in conflict with each other.

What the Legislature meant by saying that the title shall from thenceforth vest absolutely is what it says, namely, that the title shall from thenceforth vest absolutely; that is to say, with the stress on "absolutely"—that the title which had theretofore vested subject to the right of redemption, or to whatever other infirmities might have inhered in it, should from thenceforth vest absolutely. The majority opinion interprets the statute as if it read, "shall vest"; when as a matter of fact it reads, "shall vest absolutely." Strike out the word "absolutely," and the reasoning of the majority opinion is just as applicable. Therefore the majority opinion reduces the word "absolutely" to a useless appendage. The rule is that:

"In the construction of one part of a statute, every other part ought to be taken into consideration." *Montesquieu v. Weil*, 4 La. 51, 23 Am. Dec. 471.

Let it be noted that in one important respect this donation differs from the grant of swamp and overflowed lands made by Congress to the several states by the act of 1850 (Act Sept. 28, 1850, c. 84, 9 Stat. 519), and from the grants made by Congress at various times in aid of railroads. This donation embraces all the lands, without exception, owned by the state within the district, and the district is delimited, so that the lands intended to be conveyed are identified as perfectly as they could be in words; whereas, in the grant by Congress of swamps and overflowed lands to the states, the character of the lands, as being or not swamp and overflowed, had to be determined by some authority in order that the land should be identified. And so the lands granted to the railroad; before they could be identified, the railroads in aid of which they were granted had to be constructed. And yet, notwithstanding the necessity of some action for identifying the lands embraced in these congressional grants, these grants, as already stated, have been uniformly held to have been grants in present, passing the title immediately, subject only to the future action of the authority charged with the duty of identifying the lands.

But even if I were mistaken in the reading by which the stress is laid on the word "absolutely," and not on the word "vest," the levee board, I think, would still have to be held to have had authority to sell these lands without the necessity of obtaining a formal deed to them. The situation would still be that by the first clause of the section the state divested itself and invested the levee board with all the equitable interest in the lands, leaving only a mere formality to be fulfilled in order that the legal title should also be vested. It will be noted that the levee board is given the unconditional,

unqualified, absolute right to demand and obtain the instrument of conveyance in question from the Auditor and the Register of the Land Office at any time; that is to say, at pleasure. The board was therefore owner, subject only to a mere formality which it was left entirely free to fulfill at any time. Now, if A. were to enter with B. into a contract by which A. became owner of B.'s lands, subject only to a mere formality which A. was left perfectly free to fulfill at any time, would not A. be held to have the entire equitable interest in the property, and would not A. have a perfect right to transfer this interest, together with the right to fulfill the formalities by which this interest was to be converted into a legal title? It follows from this that there certainly passed to the levee board, under this statute, an interest of which the levee board became immediately the owner, and which it could sell and transfer, as was done in this case.

The decisions of this court sustain, I think, the interpretation I have here adopted. In the case of *Worden v. Fisher*, 52 La. Ann. 576, 27 South. 83, this court said:

"Plaintiff in the second place attacks the conveyance to the levee board because it rests on the signature of the Auditor alone, and he invokes the provisions of the section of the amended act before cited as requiring a conveyance by the Auditor and Register of the State Land Office in the name of the state. He earnestly contends that there can be no conveyance unless signed by both Auditor and Register of the State Land Office. This we have answered by reference to the fact that the board has accepted the price. Moreover, the state at the time, and by the terms of the statute (Act No. 46, p. 50, of 1892), donated completely all the lands within the district, as before stated. From the date of the statute, for the purpose mentioned in it, the title became absolutely vested in the board. Though there were methods provided by its terms to complete the donation, the fact remained that the title was placed in the name of the levee board."

True, in *St. Paul v. La. Cypress Co.*, 116 La. 593, 40 South. 906, the court expressed a different opinion; but it did so without examining the question anew, and basing itself upon the case of *McDade v. Levee Board*, 109 La. 637, 33 South. 628, as if the latter case had settled the point, whereas, as a matter of fact, what was said in the *McDade* Case was in a per curiam, on application for

a rehearing, and merely incidentally, without the point having been argued at the bar, and without the decision in the case of *Worden v. Fisher* having been brought to the attention of the court.

The board was the mere creature of the Legislature. The Legislature which made it could at any moment unmake it. Its property remained entirely within the control of the Legislature. The Legislature could revoke the donation at any moment. Of all this there can be no doubt. But this power of the Legislature continued to exist only so long as third persons had not acquired rights by contract with the board. There can be no doubt that the Legislature can create a corporation and endow it with the same faculty of receiving and holding property and of making contracts with reference thereto which ordinary corporations possess, and that a donation or sale, or other transfer, of property to such a corporation has the same effect as a donation or sale or other transfer to any other corporation or person would have, in so far as conveying the property or interest therein is concerned. And this is exactly what the Legislature did in this case. It created this levee board, and endowed it with the faculty of receiving and holding property and making contracts with reference thereto. This board so created was as fully qualified to receive by donation from the Legislature as any ordinary corporation or person. The fact, therefore, that this board was the creature of the Legislature, and its mere agent, wholly subject to its control, does not detract one iota from its status as a body capable of receiving and holding property and making binding contracts with reference thereto. The question still continues to be, and is, whether or not a present interest was intended to be conveyed to the board. If yea, then the board had a right to make contracts with reference to the interest so conveyed. If nay, then the board had in the property no interest with reference to which it could contract.

I think the state is bound by the contract which the levee board made with reference to this property.

For these reasons, I respectfully dissent.

MUSE v. GULF & S. I. R. CO. (No. 13,853.)
(Supreme Court of Mississippi. April 5, 1909.)
RAILROADS (§ 484*)—FIRES—DESTRUCTION OF PROPERTY—QUESTIONS FOR JURY.

In an action against a railroad for destruction of plaintiff's property by fires alleged to have been started by sparks from defendant's locomotive, evidence held to require the submission of the case to the jury on the question of defendant's negligence.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1740, 1743; Dec. Dig. § 484.*]

Appeal from Circuit Court, Rankin County; J. R. Byrd, Judge.

Action by E. F. Muse against the Gulf & Ship Island Railroad Company. A peremptory instruction for defendant was granted, and plaintiff appeals. Reversed and remanded.

The appellant brought suit against the appellee for the loss by fire of his sawmill, alleged to have been caused by sparks escaping from the defendant's locomotive. There were no witnesses to prove that the fire was caused by sparks from the engine; but it was shown that the sawmill, around which had accumulated sawdust, shavings, and other combustible materials, was situated near the railroad track, and that there was no fire on or about the premises. It was further shown that an engine of the defendant pulling a large number of cars passed the mill a short while before the fire was discovered, and emitted sparks at other places near the mill. It was further shown that the weather was extremely dry, and that a strong wind was blowing from the direction of the railroad toward the mill, and that the engine was not properly equipped with a spark arrester. After plaintiff's evidence was in, defendant moved for a peremptory instruction, which was denied. Defendant then introduced its evidence, and renewed its motion for a peremptory instruction, which was granted; and from this action of the court this appeal is prosecuted.

S. L. McLaurin and Flowers & Whitfield, for appellant. J. H. Neville and R. L. Dent, for appellee.

WHITFIELD, C. J. The case should, manifestly, have gone to the jury on the facts. A peremptory instruction for the defendant was error.

Reversed and remanded.

(95 Miss. 585)

DABNEY v. CHILD. (No. 13,831.)
(Supreme Court of Mississippi. April 5, 1909.)

1. EASEMENTS (§ 48*)—WAYS.

Where complainant already had a way of necessity over defendant's land, over which he might go to his own land, he was not entitled to a different way, though the route used by him was at the sufferance of defendant.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. § 105; Dec. Dig. § 48.*]

2. EASEMENTS (§ 17*)—RESERVATIONS AND EXCEPTIONS—WAYS.

Implied reservations, as against the express covenants of a deed, are not favored by the courts, and are to be limited to ways of strict necessity, and that the land was practically given by the grantor to the grantee is immaterial.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. § 45; Dec. Dig. § 17.*]

Appeal from Chancery Court, Warren County; J. S. Hicks, Chancellor.

Bill by Marye Dabney against T. E. Child. Judgment for defendant, and plaintiff appeals. Affirmed.

Moncure Dabney, for appellant. McLaurin, Armistead & Brien, for appellee.

MAYES, J. The complainant in this case executed to Child a simple warranty deed to one acre of land in section 6, township 15, range 5 E., in Warren county, and the deed contains no reservation of any easement whatever. The object of this suit is to have the court declare that when this conveyance was made there was an implied reservation in the deed that complainant should have a right of way to his own premises over the land conveyed, on the idea that it is a way of necessity.

The complainant has not brought himself within that rule of law which would warrant the court in declaring that there was any way of necessity reserved by implication in the deed, since the bill itself shows that the way sought to be established is no more than a way of convenience, and in no sense one of necessity, since Child has already given him another way by which he has free access to and from his premises. One of the charges in the bill is that complainant is allowed "to pass to and from his land over land belonging to Child north of the one acre, but that this is by sufferance of said Child, and which, it avers, the complainant has no right to, but enjoys merely at defendant's will, and alleges that he has a right of way over the strip, which Child denies, and refuses to allow him to cross for this purpose, and that he seeks herein to have this court decree him this right." It is thus seen that the complainant already has a way of necessity open to him, over which he may go to the very land in question, and there can exist no right to claim another and different way as a way of necessity, even though the route now used may be at the sufferance of Child. If the appellant desires a private and permanent right of way, Code 1906, § 4411, provides an adequate remedy whereby he may have a private way laid out.

In 11 Cyc. p. 1171, a clear statement of the law in regard to implied reservations in deeds is made, supported by a great many authorities, and we quote that statement with approval. It is there said: "If the grantor intends to reserve any right over the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tenement granted, it is his duty to reserve it expressly in the grant. To say that a grantor reserves to himself in entirety that which may be beneficial to him, but which may be most injurious to his grantee, is quite contrary to the principle upon which an implied grant depends, which is that a grantor shall not derogate from or render less effectual his grant, or render that which he has granted less beneficial to his grantee. Accordingly, where there is a grant of land, with full covenants of warranty, without express reservation of easements, the best-considered cases hold that there can be no reservation by implication, unless the easement is strictly one of necessity; for the operation of a plain grant, not pretended to be otherwise than in conformity with the contract between the parties, ought not to be limited and cut down by the fiction of an implied reservation."

We do not think that the case of *Pleas v. Thomas*, 75 Miss. 495, 22 South. 820, is at all in point under the facts of this case. In the case just referred to the way claimed was one of necessity, well marked out, and had been in use for a considerable space of time. Not so here. The way is not one of necessity, and it is not shown that it was ever in use as a right of way. The court said in *Pleas v. Thomas*: "The principles of law governing the case are not doubtful, but their application to peculiar facts is difficult and delicate." We repeat the same here; but we do not think that appellant has shown any such facts as would authorize us to declare that there is an implied reservation of a way of necessity in the deed of conveyance, when no necessity exists. Implied reservations, as against the express covenants of a deed, are not favored by the courts, and are to be limited to ways of strict necessity. The fact that the land was practically given to Child by Dabney in no way alters the principle.

Affirmed.

(95 Miss. 576)

PEETS & NORMAN CO. v. BAKER.
(No. 13,813.)

(Supreme Court of Mississippi. April 5, 1909.)

LANDLORD AND TENANT (§ 252*)—LIEN ON CROP FOR RENT—CONVERSION BY TENANT'S CREDITORS AS AGAINST LANDLORD.

Where a tenant, without having paid his rent, delivered his crop of tomatoes to merchants, with whom he had an open account, with the understanding that they were to ship them out of the state and credit the proceeds of their sale on his account, which was done, it constituted, as against the landlord, a conversion of the tomatoes in this state, rendering the merchants liable to the extent of the landlord's lien, under Code 1906, § 2832, for the rent, which did not exceed the proceeds of the crop.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 1022; Dec. Dig. § 252.*]

Appeal from Circuit Court, Copiah County; W. H. Potter, Judge.

Suit by Fred N. Baker against the Peets & Norman Company. From a judgment for plaintiff, defendant appeals. Affirmed.

R. N. & H. B. Miller, for appellant.

MAYES, J. This is a suit by F. N. Baker against Peets & Norman Company to recover the alleged value of 800 crates of tomatoes claimed to have been bought by Peets & Norman Company from one T. W. Packer. The claim of Baker grows out of a rental contract which he had with Packer for the lease of certain agricultural lands during the year 1907. The right attempted to be asserted against Peets & Norman Company is based on section 2832 of the Code of 1906 whereunder is given to the landlord a lien on all the agricultural products grown on the leased premises, etc.

All of the witnesses in this case testify with great candor and fairness, but the facts are about as follows, viz.: Baker, being the owner of certain lands in Copiah county, made a lease of same to one T. W. Packer for the year 1907. Peets & Norman Company are merchants, and during the year furnished Packer, on open account, a considerable quantity of merchandise, largely exceeding in value the proceeds of tomatoes received by Peets & Norman Company from Packer. The crop made by Packer consisted altogether of a tomato crop, and it is shown by Mr. Baker that Mr. Packer delivered the tomatoes grown on the land to Mr. Norman, of the firm of Peets & Norman Company, without having discharged the debt owing for the rent, and Baker claims Peets & Norman Company converted these tomatoes and applied the proceeds of same to the payment of the debt which Packer owed him, thereby defeating his (Baker's) claim for rent; hence this suit for the conversion. It is agreed that Packer owes Baker a balance of \$150 for rent for 1907 at the date of this suit.

Mr. Baker testified that he had a talk with Norman some time in June, and told him that Packer had not paid his rent, and that he would hold Peets & Norman Company responsible for the value of the tomatoes received by them. This is not disputed by Norman but Norman says that he thinks this conversation occurred about the close of the tomato season.

Mr. Dodds, the bookkeeper for Peets & Norman Company, testified that he had a conversation with Baker in reference to the Tom Packer tomatoes; that in that conversation Baker told him that the rents were not paid, but he does not think he mentioned what Baker said to Norman; that all during the time Peets & Norman Company were receiving the tomatoes from Packer he (Packer) was trading with them on open ac-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

count, and was shipping the tomatoes through the firm of Peets & Norman Company; that the shipping began on the 28th day of May, and stopped about the 5th of July; and in answer to a direct interrogatory he was asked this question: "Q. What was the amount of tomatoes he (Packer) delivered to you? A. The total number of crates was 402, and the amount was \$255.60. He owed something like \$300 to the store at the beginning of the season. He delivered these tomatoes to be placed to this account." He further says that these tomatoes were delivered to, and they were shipped out of the state of Mississippi by, Peets & Norman Company, and sold in foreign markets.

Webster Millsaps testifies that he went with Baker to Peets & Norman Company's store and looked at the books to see if there was enough to pay the rent, and that at the time they went there the books showed, according to his best recollection, that at the time of the notice Peets & Norman Company had then received from Packer tomatoes of the value of \$154; that after Peets & Norman Company were notified they received from Packer other tomatoes of the value of about \$100.

Packer, the tenant, testifies that he does not know exactly how many tomatoes he took Peets & Norman Company, but that he brought them in there to Norman and took his receipts. He further says, in answer to the interrogatory as to whether or not there was any understanding between him and Norman about what to do with the proceeds of the sale, that he had an account there, and that Dodds, the bookkeeper, gave him credit on his account for the tomatoes shipped, and all the proceeds of the tomatoes shipped through Norman were applied to his account, and statements were rendered showing the amount they brought. On cross-examination he is asked the following questions, viz.: "Q. You turned over all your tomatoes to Norman that you raised? A. Yes, sir. Q. And the proceeds of the sale were applied to your account? A. Yes, sir. Q. You never saw a cent of the money? A. No, sir; but I always got the consignment receipts."

In Norman's testimony he states that Packer owed him an account amounting to \$560.76, and when asked, "Q. How many tomatoes did you buy from him?" he answered: "A. I see three different shipments, amounting to \$60. This was applied on his accounts, the tomatoes you see here. I believe in telling the truth about it. I can show you from our books. The tomatoes that were bought from Packer haven't been entered here. The tomatoes he grew on the Baker place were applied on his account, and those he sold for Lewis & Byrd were paid for at the time." Norman does not deny that the tomatoes were received to be applied to the account of Packer, as stated by

Dodds, when the proceeds should be returned, and does not deny that he knew, at the time, that Packer was the tenant of Baker.

The facts constitute a conversion by Norman of the tomatoes in this state, and he is estopped to deny that they were so converted. Baker is not seeking to recover as for a conversion against the purchaser of the tomatoes who bought outside of the state, but the suit is against one who converted, or gave active agency in this state in defeating the landlord's lien in order that he might convert, the proceeds to the payment of the tenant's debt with him. After Norman had the conversation with Baker, when Baker told him that he would hold him for the value of the tomatoes, the testimony then shows that he received enough tomatoes from Packer to about discharge the debt owing to Baker for the crop year of 1907 for the leased premises. In other words, the uncontradicted testimony shows that Packer delivered the tomatoes to Norman to be placed on his account, and they were received with this understanding. The only thing remaining to be done by Norman was to ship them to the market and make the actual credit on the books, when the returns came back showing the amount of the proceeds. The tomatoes were taken to Norman with the intent to be applied to the account. They were received by Norman for this purpose, and shipped out of the state for the purpose of converting them into money, intending, at the time when the proceeds should come in, that they should be applied as a payment of Packer's debt. If these facts do not make Peets & Norman Company liable for a conversion of these tomatoes, the lien attempted to be given to landlords under section 2832 of the Code of 1906 is mythical.

In the face of these facts, showing active agency of Peets & Norman Company in this state looking towards a sale of these tomatoes outside of the state and an application of the proceeds to Packer's debt with them, the principle declared by the cases of Ball v. Sledge, 82 Miss. 749, 35 South. 214, and Millsaps v. Tate, 75 Miss. 150, 21 South. 663, have no application. The conversion of the agricultural products must take place outside of the state in order to make the principle applicable, and there must have been no active agency on the part of the person seeking to invoke the principle taking place in this state and looking to a shipment out of the state. In the cases of Millsaps v. Tate, 75 Miss. 150, 21 South. 663, Eason v. Johnson, 69 Miss. 371, 12 South. 446, and Warren v. Jones, 70 Miss. 202, 14 South. 25, this court held that one who has purchased or converted agricultural products, on which there is a landlord's lien, is liable to the landlord for the value thereof, whether the party purchasing or converting same has, or does not have, any knowledge of the fact that the lien exists. If this be true, how can it ever be held

that a creditor of a tenant, knowing that the tenancy exists, does not then and there so convert agricultural products as to make him liable for the proceeds thereof, when the facts show that he accepts the agricultural products in this state from the tenant, intending to apply the proceeds to the payment of the account, ships the agricultural products away for the tenant to enable him to convert them into money, has receipts sent back to himself, and credits the amount to the account of the tenant, merely rendering to him an account of the amount of the sales? Let us see if *Ball v. Sledge* or *Millsaps v. Tate* is authority for any such proposition.

In the case of *Ball v. Sledge*, 82 Miss. 747, 35 South. 214, there was no controversy involving the rights of a landlord, except incidentally. There was no landlord in that case at all. The facts show that Sledge rented lands in this state from one Williamson for the year 1900 and agreed to pay \$150 as rent. Afterwards Sledge gave a deed in trust to Ball, who was a merchant living in Memphis, on his crop and some live stock, etc., for advances to be made him by them for the year 1900. Ball knew of Sledge's lease contract with Williamson, and paid Williamson Sledge's rent for the year. At the end of the year Sledge failed to pay Ball for the advances made him, and early in 1901 Ball sent his agent into Mississippi to see Sledge, who then owed a balance of \$295 on account and the \$150 for rent that Ball had paid to Williamson for him. A settlement was agreed upon between the agent of Ball and Sledge, whereby certain personal property was turned over by Sledge to be sold for the purpose of paying the debt. Accordingly the property was sold and the proceeds applied to the payment of the account alone, the agent at the time overlooking the amount that had been paid for Sledge to Williamson as rent, and the agent turned over a little surplus to Sledge. The mistake was shortly discovered, and, as Sledge declined to rectify it, an action of replevin was instituted under the deed in trust to recover from Sledge the property under the deed in trust for the purpose of satisfying this indebtedness. Sledge defended on the idea that the deed in trust did not cover the rent paid to Williamson by Ball for him, and the court so instructed. On the other hand, Ball sought to fix liability on Sledge under the deed in trust by asking the court to instruct the jury that though they believed Sledge shipped cotton to him in Memphis, and there sold it to him, still if they believed that the cotton was subject to the landlord's lien of Williamson, and that Ball had actual knowledge of this fact, and discharged the lien, the cotton having been shipped to Ball either because of the contract had by Ball with Sledge, or because of demand made for the shipment of the cotton, then they should find Sledge liable un-

der the deed in trust. The case was decided for Ball on another ground, but the court said as to this instruction that it should have been refused, saying: "It was decided in *Millsaps v. Tate*, 75 Miss. 150, 21 South. 663, upon a case strikingly similar to the one here presented, that the lien granted landlords by our law did not attach to cotton shipped out of the state, and the purchaser was not liable, even where he has actual notice of the existence of the lien. The fact that appellants paid the landlord a portion of the proceeds of cotton received beyond the confines of the state does not alter the controlling legal principles. The record does not show that the payment was made by the direction of the tenant, and appellants in this case are not asserting any rights as assignees of the landlord." This case shows that Ball was attempting by this instruction to be subrogated to the rights of the landlord in regard to the lien, even though the purchase had been made outside of the state, and the court properly held that this could not be done, both because the sale was made outside the state and because Ball had not attempted to assert any rights against Sledge as assignee of Williamson. It is thus seen that the *Ball Case* is no authority under the facts of this case.

The *Millsaps Case*, in 75 Miss. 150, 21 South. 663, is equally without application to the facts of this case. Millsaps owned a plantation in Washington county, Miss., and leased same for the year 1893. Tate lived in Memphis, Tenn., and the tenants executed to him a deed in trust on the crops to be grown on the leased premises during the year. In the fall the tenants shipped the cotton to Tate in Memphis, and Tate then sold and applied the proceeds to his indebtedness, and the rent was left unpaid. The record does not show that Tate was ever in the state, and it nowhere appears that the tenants delivered to him any of the cotton within the limits of the state of Mississippi. Millsaps sued Tate, and the court said that the lien stopped at the state line under the facts of this case. It was further argued in this case that the mere fact that Tate took a deed in trust on the cotton to be grown by the tenants on the leased premises for the year 1893, stipulating that the tenant should ship to Tate all the agricultural products raised on the leased premises, fixed fraudulent and unlawful participation on the part of Tate, and the court said that this act alone would not render Tate liable, and additionally said: "Appellees had no agency in shipping the cotton out of this state. They did not order it done. They did not know it had been shipped at all, until notified by the railroad company of its arrival. As a matter of fact, they did not know that the landlord's claim for rent had not been fully paid, and they did not know the cotton was raised on the leased premises." Now, all these things, which the court said Tate

did not know, Peets & Norman Company did know. Peets & Norman Company did have an agency in shipping the tomatoes out of the state. All their assistance in accomplishing this was given within the state. They knew that the landlord's rent had not been paid, and they knew that the tomatoes were raised on the leased premises. They shipped them away in order to apply the proceeds to their debt, and when the returns came they did apply it to their debt and cut out the landlord.

In the case of *Hernandez v. Aaron*, '73 Miss. 434, 16 South. 910, it was held that, when cotton liable under a deed in trust was shipped and sold to a party outside of the state, such party was not liable to the holder of the lien, and it was said, further: "Appellant was not aware of this shipment when it was made, nor was he informed of appellee's liens under his trust deeds until after the cotton had been sold in New Orleans. He did not receive the cotton at all in Wilkinson county." It will be noted that the court was very careful to state none of the cotton was received by the purchaser in this state; for, if it had been, there would undoubtedly have been a liability. Almost identical in its holding is the case of *Chism v. Thomson*, 73 Miss. 410, 19 South. 210.

If there can ever arise under the statute any case where a creditor of a tenant can be made liable to the landlord for the rent, where it is not shown that the creditor actually took the products themselves at an agreed valuation at the time, though in truth and in fact converted and intended to convert the products to his own use at the time he received them, this is the case.

Affirmed.

(94 Miss. 406)

BENNETT BROS. et al. v. DEMPSEY.
(No. 13,854.)

(Supreme Court of Mississippi. April 5, 1909.)

1. HOMESTEAD (§ 162*)—ABANDONMENT—LIABILITY TO EXECUTION.

Code 1906, § 2146, exempts from execution land and buildings owned and occupied as a residence; and section 2157 makes the homestead liable to debts whenever the debtor "shall cease to reside on his homestead," unless the removal is because of some casualty or necessity, and with the purpose of speedily reoccupying the same, etc. *Held* that, where a woman moved from her homestead to a nearby town to conduct a boarding house in a place which she purchased in part with borrowed money secured by mortgage on her homestead, it was an abandonment thereof, subjecting it to execution on a judgment against her, though it was her purpose to return thereto in case she failed to pay for the place into which she moved, and her net interest in the two places, after payment of the mortgages thereon, amounted to less than the homestead value allowed by statute.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 315-319; Dec. Dig. § 162.*]

2. HOMESTEAD (§ 66*)—VALUE—MORTGAGE AS AFFECTING QUANTITY OF LAND.

The fact that there is a mortgage on homestead land, thus cutting down the net value thereof, does not authorize the claim of a greater quantity of land than could be claimed if there were no mortgage.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 97; Dec. Dig. § 66.*]

3. HOMESTEAD (§ 171*)—MORTGAGE AS CONSTITUTING DISPOSAL OF PROPERTY—LIABILITY TO EXECUTION—"DISPOSAL."

The giving of a mortgage on exempt property is not a "disposal" thereof, within the meaning of Code 1906, § 2158, providing that, where an owner disposes of exempt property, it shall not thereby become liable to his debts; and so section 2139, cl. 10, par. "b," exempting the proceeds of a sale of such property, does not apply to a case where a homestead is mortgaged in acquiring another place, to which the occupant removed, and an execution is thereupon levied against the homestead; there having been no sale of the property and no attempt to subject the proceeds of a sale to the creditor's debts.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 338; Dec. Dig. § 171.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2113, 2114.]

4. JUDGMENT (§ 482*)—COLLATERAL ATTACK.

A judgment defendant, regularly served with summons and notified of the suit, but failing to make any sort of defense, and permitting judgment to be taken against her for the full amount sued for, is precluded by the judgment from any collateral attack thereon.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 918; Dec. Dig. § 482.*]

Appeal from Chancery Court, Winston County; J. F. McCool, Chancellor.

Injunction by Mrs. Ella Dempsey against Bennett Bros. and others. From a decree in favor of complainant, defendants appeal. Reversed.

This is an appeal from a decree of the chancery court enjoining the appellants from proceeding to sell under execution certain lands claimed by appellee as a homestead.

L. H. Hopkins, for appellants. Rodgers & Brantley, for appellee.

MAYES, J. On the 31st day of December, 1906, Mrs. Ella Dempsey owned and occupied as a homestead the following described lands, to wit: The E. ½ of N. W. ¼, less 11 acres off the west side; the exact description of the land being set out in full in the bill filed herein. The above land lies just outside of the corporate limits of the town of Louisville, in Winston county. Mrs. Dempsey continued to own and occupy the above premises as a homestead until in the early part of 1908, when she purchased another place from one Riley; this latter place being about a quarter of a mile from the former, and being located in the town of Louisville. The testimony shows that the Riley place cost her \$1,680, and that the other place, outside of the corporate limits, and from which she moved, was of the value of about \$2,000. There is no dispute as to the fact that early in 1908, when Mrs. Dempsey purchased the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Riley place, she abandoned her former home, and moved into the Riley place, and commenced conducting a boarding house. She says that, if she fails to pay all that she now owes on the Riley place, she expects to move back on the place outside of the corporation, and claims that place as her homestead, and not the Riley place, in the event she fails to pay for the latter. In order to pay for the Riley place, she executed a mortgage on her then homestead to the M. & F. Bank, of Louisville, and borrowed \$1,320, which, after paying some other debts on the place, she used to make a partial payment on the Riley place, falling short about \$880, which latter sum she borrowed from one W. F. McMillin. Now, at the time of the institution of this suit, Mrs. Dempsey was living at the Riley place, having abandoned her former home to take up her abode there, and she had a mortgage on both places, aggregating the sum of \$2,200. Some time in May, 1908, and while Mrs. Dempsey was living at the Riley place, Bennett Bros. et al. had an execution levied on the abandoned homestead for the purpose of satisfying a judgment that they had recovered against her in February, 1906, aggregating the sum of \$158.78. After the levy of the execution Mrs. Dempsey enjoined the sale thereunder on the idea that the property was exempt, and the theory of the injunction seems to be that, because the net interest that Mrs. Dempsey has in the two properties, after paying off the mortgages, is less than the value of a homestead exemption, and because it is her intention to sell her former homestead and apply the proceeds of same to the payment of the debts due on both places, that therefore the abandoned homestead is not liable to creditors. The two places are separate and distinct, situated over a quarter of a mile apart, and the value of the two places is proven to be \$3,500. The chancellor sustained the injunction, making it perpetual, from which an appeal is prosecuted here.

There can be no doubt but that Mrs. Dempsey has abandoned the place lived on, and has established her home on the Riley place, in the town of Louisville, and her former home is therefore liable to the payment of her debts. Section 2148 of the Code of 1906 only exempts the land and buildings owned and occupied as a residence, and when occupation ceases the property, if still owned by the debtor, becomes liable to the creditor for the payment of debts. Section 2157, Code 1906, makes the homestead liable to debts whenever the debtor "shall cease to reside on his homestead," unless the removal be temporary, by reason of some casualty or necessity, and with the purpose of speedily reoccupying same, etc. Mrs. Dempsey's own testimony makes out a clear case of abandonment within the meaning of the statute.

She has no purpose to return unless, as she says, she fails to pay for the Riley place. The court cannot presume this contingency will happen, and Mrs. Dempsey has no intention of returning unless it does. Her removal to the Riley place is permanent, in so far as she is able to make it so. The fact that she intends to sell her former place to pay for the Riley place does not alter the situation under the facts of this case. One can only hold as exempt the land and buildings owned and occupied as homestead, and occupation is one of the essentials necessary to a successful claim of exemption, except as modified by section 2157, and Mrs. Dempsey does not bring herself within that exception.

Neither can it make any difference that her net interest in the two places, after the payment of the mortgages, amounts to less than the homestead value allowed by the statute. The law does not exempt but one homestead. That homestead may be of the value of \$3,000, or less than that value; but, if it be less than \$3,000 in value, this does not warrant the debtor in claiming another tract of land, remote from the homestead and in no way used in connection therewith, as exempt in order to make up the value of the homestead. The statute does not exempt lands of the value of \$3,000 to a debtor, situated anywhere; but it exempts land, etc., occupied as a residence, this land so occupied not to exceed in quantity 160 acres, or in value the sum of \$3,000, where the homestead claimed is in the country, as is the case here.

Nor does the fact that there is a mortgage on the land, thus cutting down the net value of same, authorize the claiming of a greater quantity of land than could be claimed if there were no mortgage. Section 2158 provides that, where the property exempted is disposed of by the owner, it shall not thereby become liable to the debts of the owner; but the giving of a mortgage on the exempt property is in no sense a disposal of the property within the meaning of the section. To dispose of the property, within the meaning of this section, is to part with all title thereto. There having been no sale of the property, and there being no attempt to subject the proceeds of the sale of the property to the creditors' debts, paragraph "b" of the tenth clause of section 2139 has no application.

There is a question raised as to whether or not Mrs. Dempsey owed the amounts claimed by Bennett Bros. et al.; but we deem it unimportant to discuss this feature of the case, since she was regularly served with summons and notified of the suit, but failed to make any sort of defense, and permitted judgment to be taken against her for the full amount sued for. The judgment concludes her from any collateral attack on same.

Reversed and remanded.

(93 Miss. 732)

HOY v. HOY et al. (No. 13,908.)

(Supreme Court of Mississippi. April 5, 1909.)

1. DEEDS (§ 69*)—EXECUTION UNDER MISTAKE AS TO INTEREST IN PROPERTY—AVOIDANCE.

A mistake as to the interest of the grantor in the property, arising from advice of counsel, is ground for avoiding the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 160; Dec. Dig. § 69.*]

2. STATUTES (§ 225½*)—RE-ENACTMENT AFTER CONSTRUCTION.

Ann. Code 1892, §§ 4489, 4490, being a re-enactment without change of a statute, after its construction as not preventing implied revocations of a will, are to be given like construction.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 306; Dec. Dig. § 225½.*]

3. WILLS (§ 191*)—REVOCATION BY MARRIAGE OF TESTATOR.

A will is not revoked by mere subsequent marriage of testator; and this, though the statute makes the widow an heir.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 469, 470; Dec. Dig. § 191.*]

Appeal from Chancery Court, Yazoo County; G. G. Lyell, Chancellor.

Suit by Chlora Hoy against Leroy Hoy and others. From an adverse decree, complainant appeals. Affirmed.

E. L. Brown, for appellant. McWillie & Thompson and Campbell & Campbell, for appellees.

FLETCHER, J. One Louis Hoy, on the 23d day of April, 1898, made a will in which he divided his property equally between appellee Leroy Hoy, his nephew, and his then wife, Ellen Hoy. Some time thereafter Ellen Hoy died, and in 1900 Louis Hoy married the appellant, Chlora Hoy, and died without making any express revocation of his will. He left no children or descendants of children. Some time after the death of Louis Hoy, the surviving wife and the nephew, Leroy Hoy, were advised by counsel that the widow had the right to renounce the will and thereby secure one-half of the estate; and upon this understanding of the measure of her rights she executed a conveyance of all her property to appellee, reserving a life estate in the home place upon the further agreement by appellee that the widow should be paid an annuity of \$75. This agreement was entered into in the utmost good faith by both parties to the contract, and seems to have been faithfully carried out by Leroy Hoy. Appellant, however, having been advised that the will of her husband was by operation of law revoked by the second marriage, and that, instead of being entitled to one-half of the estate, she was in fact the sole heir of her husband, brought this suit to have her deed of conveyance set aside, upon the ground that it was entered into under a misapprehension of her legal rights. The chancellor, upon a record which presents no

issues of fact, dismissed the bill; and from this decree this appeal is prosecuted.

It is argued on behalf of the appellee that, since the deed was executed with full knowledge of the facts, it must stand, even if conceded to have been made under a mistake as to the law. We think, however, that the purport and effect of the holding in *A. & V. Ry. Co. v. Jones*, 73 Miss. 110, 19 South. 105, 55 Am. St. Rep. 488, destroys this contention. The deed was admittedly executed in the light of appellant's understanding of her legal rights as derived from the advice of eminent counsel, and it is clear to us that she would not have made the agreement, had she believed that she was entitled to the entire estate. The mistake, if one was made, was as to her interest in the property, and this was a "mistake as to her own private legal rights and interests." 2 Pomeroy, *Equity Jurisprudence*, 841 et seq. We are therefore, and for the first time in Mississippi, called upon to decide whether marriage, without birth of issue, revokes the will made by a person before marriage, and not in contemplation of marriage. There is no dispute as to the common-law rule upon this subject. The authorities are all agreed that at common law the will of an unmarried man is not revoked by implication upon his marriage, unless a child be born of such marriage, but that the birth of issue does work a revocation, or at least raises a strong presumption that a revocation has been wrought. This qualification of the rule will be considered presently in considering one phase of the argument.

It is said, however, on behalf of the appellee, that the statutes of Mississippi provide a complete scheme by which wills are executed and revoked; that the law of wills and their revocation in this state is all contained in the statutes, and that we need not concern ourselves with the common-law doctrine of implied revocations through marriage, or marriage and birth of issue; that sections 4489 and 4490 of the Annotated Code of 1892 are inconsistent with any theory of implied revocations, except such as are there mentioned and provided for. It must be admitted that the argument is forceful, and might prevail, if it were a matter of first impression in this state. Certainly this view has been taken by other courts of respectable authority. Thus by the Civil Code of California it was provided, by section 1292: "Except in the cases in this chapter mentioned, no written will, nor any part thereof, can be revoked or altered otherwise than: (1) By a written will or other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which a will should be executed by such testator; or, (2) by being burnt, torn, canceled, obliterated or destroyed with the intent and for the purpose of revoking the same, by the testator himself, or by some person in his presence,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and by his direction." In construing this statute, the California court held that: "The effect of these provisions is to do away with the doctrine of implied revocation, which was for so many years a subject of controversy in the English courts, and which, in many of the states of this country, is still permitted, under a clause in their statutes authorizing a revocation to be 'implied by law from subsequent changes in the condition or circumstances of the testator.'" In *re Comassi's Estate*, 107 Cal. 1, 40 Pac. 15, 28 L. R. A. 414. So in Texas, where the statute was substantially the same as ours (Pasch. Dig. arts. 5363 and 5364), it was held: "A statute which accomplishes effectually, as the one under consideration does, by ingrafting upon every will the statute itself, the purpose of protecting, without revocation, the interest of after-born children, evidences that it was not the intention of the Legislature, in providing how wills might be revoked, or for what causes, to permit them to be revoked by implication in order to protect such persons, and thus let in the claims of all persons to a part of the estate who, but for the will, would be entitled to take under the statutes regulating the descent and distribution of the estates of intestates." *Morgan v. Davenport*, 60 Tex. 230.

But the difficulty which precludes us from adopting this simple and apparently obvious view is that as early as 1854 the High Court of Errors and Appeals in this state plainly repudiated this contention. By comparing our present statute with section 15, c. 49, art. 1, p. 649, Hutch. Code, it will be seen that the present statute is identical with the statute in effect in 1854, and it was then said: "It is urged by the counsel for the appellants that the common-law rule, that the marriage revokes the will of a woman before marriage, is changed by the act of 1821, which provides that 'no devise made,' according to the statute, 'or any clause thereof, shall be revocable but by the testator or testatrix canceling or obliterating the same, or causing it to be done in his or her presence, or by a subsequent will, codicil, or declaration in writing made as aforesaid.'" Hutch. Code, p. 649. This statute is, in substance, the same as the sixth section of St. 29 Car. II. But, notwithstanding that statute and others to the same effect in this country, it is well settled in England and the United States that the statute applies to acts of direct and express revocation, and that a will may be revoked by implication or inference of law by various circumstances not within the purview of the statute (*Christopher v. Christopher*, Dick. 445; *Doe v. Lancashire*, 5 T. R. 49; *Brush v. Wilkins*, 4 Johns. Ch. [N. Y.] 507), among which is included the subsequent marriage of the woman (4 Kent's Com. 527; *Osgood v. Breed*, 12 Mass. 526). A doctrine so firmly settled, we do not feel disposed to call in question." *Garrett v. Dabney*, 27 Miss. 335. This view was clearly re-

announced in the case of *Jones v. Moseley*, 40 Miss. 261, 90 Am. Dec. 327, where it was stated that a will would be impliedly revoked by certain changes in the condition of the testator. So, in view of the fact that our present statute has been five times re-enacted without change since the decision in *Garrett v. Dabney*, we cannot see our way clear to disregard the holding in that case, sanctioned as it is by the lapse of time and the numerous readoptions of the statute so construed. We must recognize the doctrine that implied revocations are still possible in spite of the statute.

We have seen that at common law a will was generally held to be revoked by implication in case of marriage, accompanied by birth of issue, but that this result was not accomplished by marriage alone. It is contended by appellant, upon principle, and upon the authority of *Tyler v. Tyler*, 19 Ill. 151, *In re Teopfer's Estate*, 12 N. M. 372, 78 Pac. 53, 67 L. R. A. 315, *Morgan v. Ireland*, 1 Idaho, 786, *Brown v. Scherrer*, 5 Colo. App. 255, 38 Pac. 427, and *Colcord v. Conroy*, 40 Fla. 97, 23 South. 561, that this rule of the common law, while in force to a limited extent, is yet so modified of necessity by reason of the change in the status of the wife—a change wrought by statute, and which permits the wife to inherit directly from the husband—that marriage alone is now sufficient to work an implied revocation. It is said that the reason why, at common law, marriage alone did not lead to revocation, was because by marriage no new heir was brought into the family, but only a person whose property rights were determined by the law of dower; that the wife never took as heir upon the death of her husband, but as an incident to the marriage, and by virtue of the implied covenants of the marriage contract. Therefore it is said that, since by our law the wife is an heir, the rule upon any reasonable or logical interpretation must be held to be now in this state so modified as to make marriage alone the equivalent of marriage and birth of issue. Unquestionably this view finds some support in the authorities mentioned, although all of them, except *Brown v. Scherrer*, may be explained upon a consideration to be mentioned presently.

Looking at the question alone from the viewpoint of reason of the common-law rule, it is said that the doctrine of implied revocations rests, not upon the view that without a revocation issue subsequently born would not otherwise be provided for, but solely upon the ground that the testator will not be presumed to have intended to disinherit the natural objects of his bounty. The importance of this distinction is obvious. If the first be the correct view, the reason of the common-law rule does not wholly fall in this state, since the law makes special provision for the wife, in that she is given the right to renounce the will and thereby defeat her husband's neglect or hostility. But if the second

view be correct, that the will must be held to be revoked because the testator is not presumed to intend to omit the natural objects of his bounty, this is unquestionably a valid argument in favor of appellant's contention. This second view seems to have much weight with Chancellor Kent in his opinion in the leading case of *Brush v. Wilkins*, 4 Johns. Ch. (N. Y.) 506. In the opinion in this case he says: "It had become a settled rule of law and equity, as early as the year 1775, that implied revocations of wills were not within the statute of frauds, and that marriage and a child, taken together (though neither of them taken separately was sufficient), did amount to an implied revocation, and that such presumptive revocations might not be rebutted and controlled by circumstances. Without going minutely into all the cases, a cursory view of them will be sufficient to establish this position, and it can be shown to have received continued and unceasing sanction down to this day."

Let us notice particularly that Kent states that the revocation is only presumptive, and that this presumption may be rebutted and controlled by circumstances. It would seem that this idea is entirely consistent with the view that the rule is bottomed upon a presumed intent, rather than upon the alleged disinclination of the law to leave an heir unprovided for; for, if the revocation is implied because of a presumption as to intention, it must be essentially a presumption of fact, and hence a rebuttable presumption. Now, if Kent is correct as to this being only a presumption, this case was clearly properly decided; for, the will being only presumptively revoked, it might well be that the widow knew of facts and circumstances which would have tended to overthrow this presumption. If so, she did no more, in executing the deed, than to compromise a doubtful case, or, rather, to decline a contest which she might have known to be hopeless. It is no answer to this observation to say that the burden of proof was upon the appellee to show the existence of these facts and circumstances. That would, of course, be true in a contest directly affecting the will. But this is a suit predicated upon the contention that the will was utterly destroyed by the second marriage, and that the surviving widow was certainly entitled to the property. If there were, at the time of the settlement between the parties, unsettled issues of fact, which there might well have been, rendering the result doubtful, there was then a sufficient basis for a settlement which the courts would be slow to disturb; and this, we think, is what comes of the view that the common-law rule rests upon a presumed intent.

We have intimated that, but for the holding in *Garrett v. Dabney*, supra, we would incline to the view that our statutes furnish an all-sufficient scheme in which revocations by implication have no place. Let us see what

Garrett v. Dabney does hold, and why it holds it. The opinion in that case gives, as the sole reason for allowing implied revocations despite the statute, that the statute is almost an exact rescript of the statute of England (St. 29 Car. II), and that the English courts, in construing this statute, had universally held that implied revocations are not thereby abolished. This must mean that the English statute was adopted in Mississippi, together with the construction put upon it by the English courts. In other words, as we see it, our court in *Garrett v. Dabney* construed our statute as if there was read into it a proviso that implied revocations would still occur in case of marriage with birth of issue, but not in case of marriage alone. The Massachusetts court, in *Swan v. Hammond*, 138 Mass. 45, 52 Am. Rep. 255, held that a statute providing, "but that nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator," had the effect of limiting an implied revocation to the circumstances under which revocation would occur at common law; and to the same practical effect is *Brown v. Clark*, 77 N. Y. 369. If these words, placed in a statute by the Legislature, work this result, why is the same result not reached when they are written into the statute by the court?

No more convincing discussion of this question has been called to our attention than is found in the opinion of the New Hampshire court in *Holitt v. Holitt*, 68 N. H. 475, 3 Atl. 604, 56 Am. Rep. 530. That court held that a subsequent marriage without birth of issue did not revoke a will, and upon the general subject made these pertinent observations:

"The English statute was doubtless the basis and model of our statute, directly or indirectly; and the proviso in the latter, we think, is to be regarded as merely explanatory for the preceding part of the section, prescribing the manner of express revocation. Practically, and in effect, it was an adoption, under then existing conditions, of such implied revocations as had been introduced and established by the English courts, contrary to the plain meaning of the English statute, and solely through the usurpation of legislative power. But the English courts did not go the length of establishing a rule that revocation might be shown by any change of circumstances affording satisfactory evidence of the testator's revoking intention, but stopped far short of it, and restricted its application to a few exceptional cases, as to which it was held the statute did not apply. Hence there is no tenable ground for holding that any causes of revocation were intended by our Legislature to be embraced in the proviso to the act of 1822, aside from the existing exceptions established by the English courts upon supposed equitable considerations; and much less can it be held that any alteration was effected or intended by the revision of

1842, making the proviso a separate section and slightly changing its phraseology. And as strongly tending to show that the purpose of the Legislature was such as has been indicated, and that such has been the universal understanding of the bar of this state, it is a significant fact that no litigation has arisen as to the legislative intent, or the meaning of the language used in its expression, during the more than sixty years which have elapsed since the statute was first enacted."

This opinion makes two observations of value here: First, that the whole doctrine of implied revocation is a judicial defeat of a plain legislative intent, and second, that it rests upon equitable considerations which can only be such as grow out of the manifest injustice of leaving an heir otherwise unprovided for.

The question received careful consideration at the hands of the Minnesota court in the case of *In re Hulett*, 68 Minn. 327, 69 N. W. 81, 34 L. R. A. 384, 61 Am. St. Rep. 419. In view of the fact that the opinion reviews the authorities relied on by appellant and discusses the whole question, we set out the views of this court at some length. It is there said:

"This brings us to the last and most important question in the case, viz.: Was the will of Hulett revoked by his marriage to the respondent? At common law the marriage of a woman absolutely revoked her will. The reason usually given was that, a married woman having no testamentary capacity, her will was no longer ambulatory. But the marriage of a man did not revoke his previous will in regard to either real or personal estate. This was not considered such a change of condition as would work a revocation by implication or inference of law. The reason usually given was that the law made for the wife a provision, independently of the act of the husband, by means of dower. But the marriage and the birth of issue conjointly revoked a man's will, whether of real or personal estate; these circumstances producing such a total change in the testator's condition as to lead to a presumption that he could not intend a disposition of property previously made to continue unchanged. The issue, the birth of which would revoke a will, must have been such as could have inherited the property which was the subject of the will, so that the effect of throwing open the property to the disposition of the law would have been to let in the after-born child or children, for whose benefit alone the implied revocation obtained. The chief reason why marriage and the birth of issue was deemed such a change of condition on part of the testator as would work a revocation of his will was that otherwise his issue, which was the natural object of his bounty, would be wholly unprovided for, differing in that respect from the widow, for whom the law had made provision by means of dower. Hence it seems to have been the rule that marriage and the birth

of issue would not produce the revocation of a will, where provision was made by the will itself for the children of the future marriage. At common law a married woman could not inherit from her husband. In case of her husband dying intestate, she was not entitled to anything out of his estate except her dower. While by our statutes dower *eo nomine* has been abolished, yet the law makes provision for the widow, independently of the act of the husband, much more liberal than the common law did. She is entitled, first, to a life estate in the homestead of her deceased husband, free from any testamentary devise or other disposition to which she shall not have assented in writing, and free from all debts or claims against his estate; second, to an undivided third in fee simple, or such inferior tenure as the deceased husband was at any time during the coverture seised or possessed thereof, of one undivided third of all other lands of which the deceased was at any time during coverture seised or possessed, free from any testamentary or other disposition thereof to which she shall not have assented in writing, but subject in its just proportion with other real estate to the payment of such debts of the deceased as are not paid from the personal estate. Of the personal estate of which her husband dies possessed the widow is entitled to all his wearing apparel, his household furniture, not exceeding in value \$500, other personal property to be selected by her not exceeding in value \$500, a reasonable allowance for her maintenance during administration, which, in case the estate is insolvent, is not to be for more than one year. Gen. St. 1894, §§ 4470, 4471, 4477. Such is the provision which the law makes for the widow. The statute then provides that, where the husband dies intestate, the residue of his estate, real and personal, shall descend and be distributed as follows: First, to his children and to the lawful issue of any deceased child by right of representation; second, if there be no child, and no lawful issue of any deceased child, then to the surviving wife.

"It is mainly on this last provision by which the wife may inherit from her husband that counsel for the respondent base their contention that in this state marriage alone will revoke by implication of law the prior will of the husband. Their argument may all be summed up in the proposition that, inasmuch as a widow may now inherit from her husband (which she could not do at common law), therefore marriage alone effects the same change in the condition or circumstances of the husband as was effected under the common law by his marriage, and the birth of issue who would inherit. The courts of two of three Western states have taken substantially this position. See *Tyler v. Tyler*, 19 Ill. 151; *Morgan v. Ireland*, 1 Idaho, 786; *Brown v. Scherrer*, 5 Colo. App. 255, 38 Pac. 427, approved and affirmed in 21 Colo. 481, 42 Pac. 668. In *Tyler*

v. Tyler, *supra*, the question was not discussed at any great length, and the weight of that case as authority is somewhat impaired by the fact that in a subsequent case the court placed its refusal to reconsider the question mainly on the ground that the Legislature had subsequently enacted that marriage alone, without the birth of issue, revoked a will, and hence that any decision which the court might make would be merely retroactive. The most able and forcible presentation of the arguments on that side of the question is to be found in the opinion of the Colorado Court of Appeals in *Brown v. Scherrer*, *supra*. But, after carefully considering all that has been said on that side, we are compelled to the conclusion that due weight has not been given to the fact that the main reason why, at common law, marriage and the birth of issue was deemed such a change in the condition or circumstances of the husband as would work an implied revocation of his prior will, was that otherwise his issue would be wholly unprovided for, a thing which was not to be supposed to have been in the contemplation of the testator; whereas, under our statutes, and, we assume, without special examination, under the statutes of those states in which the decisions cited were rendered, even if the will stands, very liberal provision has been made for the widow independently of any act of the husband. There is a prevailing sentiment, often expressed by both courts and text-writers, that marriage alone should be deemed such a change in condition and circumstances as will revoke a prior will. A statute to that effect was passed in England in 1837 (St. 1 Vict. c. 26), followed by the enactment of statutes to the same effect in many of the states of the Union. How far this sentiment may have unconsciously influenced the decisions referred to it is impossible to say; but no court has ever assumed to hold on this ground alone, and in the absence of legislation affecting the question, that the common-law rule was abrogated, or so far modified, that marriage alone would revoke a will.

"It is also suggested that the common-law rule had its origin in part in the ancient desire to build upon families and family estates, a consideration which has no place in this country. It is undoubtedly true that many of the doctrines of the common law had their origin in social or political conditions which have in whole or in part ceased. But this fact alone will not usually justify courts in holding that these doctrines, when once thoroughly established, have been abrogated, any more than it would justify them in holding that a statute had been abrogated because the reason for its enactment had ceased. Any such rule would leave the body of the common law very much emasculated, as, for example, that pertaining to real estate. While, undoubtedly, the common law consists of a body of principles applicable to

new instances as they arise, and not of inflexible cast-iron rules, yet where the rules of the common law have become unsuited to changed conditions, political, social, or economic, it is the province of the Legislature, and not of the courts, to modify them. While we do not wish to be understood as intimating that no condition of legislation upon the subject of the rights of married women in their estates of their husbands would effect by implication a change of the common-law rule, yet our conclusion is that, in view of the main reason upon which the common-law rule was based that marriage alone would not, but that marriage and the birth of issue conjointly would, revoke the prior will of a man, and in view of the very liberal provision made by statute for the widow, independently of the act of her husband, the mere fact that she may now, under the statute, in certain contingencies, inherit more from her husband, is not sufficient to warrant us in holding that the common-law rule has been changed, that marriage alone is such a change of condition or circumstances as will work an implied revocation of the prior will of the husband. We should have stated that our statute relating to the revocation of wills is substantially, if not literally, the same as that of St. 29 Car. II, which has been so generally adopted by the American states."

This view has been widely accepted. It is indorsed in *Indiana* (*Bowers v. Bowers*, 53 Ind. 430), *Wisconsin* (*In re Lyon's Will*, 96 Wis. 339, 71 N. W. 362, 65 Am. St. Rep. 52), *Connecticut* (*Goodsell's Appeal*, 55 Conn. 171, 10 Atl. 557), *Maryland* (*Roane v. Hollingshead*, 76 Md. 369, 25 Atl. 307, 17 L. R. A. 592, 35 Am. St. Rep. 438), and *Maine* (*In re Hunt's Will*, 81 Me. 275, 17 Atl. 68). All of these cases, while containing some points of difference, support the doctrine of the *Minnesota* case in all substantial particulars. At least, they announce the continued existence of the common-law rule without modification, and disregard the argument that changed conditions should work a change in the rule. In the note to *Hulett v. Carey*, as reported in 61 Am. St. Rep., at page 431, it is stated the common-law rule is still in effect in the United States unless abrogated by statute. It is useless to say that great confidence can ordinarily be placed in the accuracy of these careful and scholarly notes. We think there can be no doubt that the decided weight of authority inclines to the view that a man's will is not revoked by a subsequent marriage without birth of issue.

It would protract this opinion to undue length to review in detail the authorities from *Florida*, *Idaho*, *Illinois*, *New Mexico*, and *Colorado*, holding to the contrary view. They are criticised in the case of *Hulett v. Carey*, *supra*. But one general observation may be made. All of these cases, except *Brown v. Scherrer*, are decided in states where an unrevoked will would leave the

widow without any redress. If it be correct, as most of the American authorities hold, that the common-law rule is based upon the consideration that, if the will is permitted to stand, the heir would not receive any part of the estate, no reason can exist why the rule should be altered in this state, since the widow is well cared for by the right to renounce the will. It is not an accurate statement of the effect of our statute that the wife is placed in the precise attitude of other heirs. She is more than that. She has the right to defeat absolutely any effort of the husband to prevent her participation in the estate. In this aspect, the right of renunciation is akin to that of dower. We think that the view by which we are bound is that indicated in *Garrett v. Dabney*, that the English statute has been incorporated into our law, and we cannot escape the conviction that the statute must be enforced as construed by the English courts.

Affirmed.

(95 Miss. 315)

VILLAGE OF GANDSI et al. v. TOWN OF SEMINARY. (No. 13,631.)

(Supreme Court of Mississippi. April 5, 1909.)

MUNICIPAL CORPORATIONS (§ 31*)—ABSORPTION OF ONE BY ANOTHER—STATUTES.

There is no authority for one municipality to absorb another municipality; Code 1906, § 3312, as amended by Laws 1908, p. 196, c. 187, granting no such power, but merely providing a time when, if the absorption occurs, the absorbed municipality shall stand abolished, and section 3301 and the other cognate sections of chapter 99 on municipalities providing alone for power in a municipality to incorporate, by extension of its limits, adjacent unincorporated territory.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 31.*]

Appeal from Circuit Court, Covington County; R. L. Bullard, Judge.

"To be officially reported."

Proceeding between the Village of Gandsi and others and the Town of Seminary. From an adverse judgment, the Village of Gandsi and others appeal. Reversed and dismissed.

The town of Seminary, a municipal corporation with a population of more than 500 people passed an ordinance extending its corporate limits so as to include the village of Gandsi, a municipal corporation with a population of less than 500 inhabitants chartered in 1905 and located less than one mile from the town of Seminary; the two municipalities having a common boundary line. From this ordinance the village of Gandsi appealed to the circuit court. The court required the appellant to tender issue, which was done; the following grounds being raised: That said ordinance is invalid, null, and void; that it is unreasonable, and is without authority of law. To the issue as tendered, the town of Seminary demurred. The

court sustained the demurrer, and, appellants declining to plead further, judgment final was entered against them, and they appeal.

Appellee claims authority for the action of the municipal board under section 3312 of the Code of 1906, as amended by Laws 1908, p. 196, c. 187, which provides that "all municipalities that have been chartered by proclamation of the Governor since January 1, 1891, whose nearest boundary line was within one mile of any corporate line of an existing city or town of over five hundred inhabitants shall be abolished when the said existing city or town shall extend their limits to take in said territory, and when so taken in all legal debts and liabilities shall be assumed by the city or town and they shall be legally responsible for same as if they had been contracted by the said city or town: Provided that any municipality affected by the foregoing provisions of this act shall have the privilege and right within sixty days from the passage and approval of this act of consolidating with its adjacent municipality as provided by sections 3301 and 3305 of chapter 99 of the Code of 1906."

Napier & Bilbo and Deavors & Shands, for appellants. H. P. Hosey, W. L. Cranford, and McIntosh Bros., for appellee.

WHITFIELD, C. J. The Legislature undoubtedly intended, by section 3312 of the Code of 1906, as amended in 1908 (Laws 1908, p. 196, c. 187), to give to an existing municipality with 500 inhabitants, whose boundary line was within one mile of another municipality, the right to absorb such other municipality; but it is just as manifest from an inspection of section 3312 that no grant of power to do that is anywhere contained in that section. There is nothing in the section but an incidental reference to such absorption. It merely provides a time when, if the absorption occurs, the other municipality absorbed shall stand abolished. In other words, while such was the legislative purpose, as we know from the history of this section and the reasons behind its enactment, it is just as clear as can be that the Legislature did not effectuate that intention, but wholly failed to give such grant of power in said section 3312. Section 3301 of the Code, and the other cognate sections in said chapter 99 on municipalities, provide alone for power in a municipality to incorporate, by extension of its limits, adjacent unincorporated territory. Those sections nowhere look in any of their provisions to any grant of power to an existing municipality to extend its territory over the territory of another municipality and thus absorb it. The thought in the legislative mind was, in the enactment of section 3312, that it was a great evil to have two municipalities, vested with full municipal powers, completely officered, etc., whose boundary lines

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

were only one mile apart, and so they intended to abolish minor municipalities so circumstanced and permit existing municipalities with 500 inhabitants in such circumstances to absorb such lesser municipalities, and thus get rid of this very undesirable condition. The purpose was manifestly a good one; but they wholly failed, as a simple inspection of section 3312 clearly demonstrates, to provide any means whereby this could be done to grant any authority for such action. It is fortunate that it is less than a year to the next session of the Legislature, when the purpose of the Legislature can be properly effectuated by an act properly drawn.

The result is that the ordinance of Seminary is void, the absorption of Gandsi by Seminary is a nullity, and the judgment is reversed and the suit dismissed.

WILLIAMSON v. WILLIAMSON. (No. 13,599.)

(Supreme Court of Mississippi. April 5, 1909.)

Appeal from Chancery Court, Pontotoc County; J. Q. Robbins, Chancellor.

Action by J. D. Williamson against Lula B. Williamson. From the judgment, J. D. Williamson appeals. Affirmed.

Mitchell & Roberson and Watkins & Watkins, for appellant. Stephens & Stephens and Flowers & Whitfield, for appellee.

PER CURIAM. Affirmed.

WILLIAMS v. STATE. (No. 13,415.)

(Supreme Court of Mississippi. April 5, 1909.)

Appeal from Circuit Court, Lincoln County; M. H. Wilkinson, Judge.

Tom Williams was convicted of manslaughter, and appeals. Affirmed.

A. C. & J. W. McNair, for appellant. Geo Butler, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

ROBINSON v. STATE. (No. 13,844.)

(Supreme Court of Mississippi. April 5, 1909.)

Appeal from Circuit Court, Oktibbeha County; E. O. Sykes, Judge.

Mellen Robinson was convicted of assault with intent to kill, and appeals. Affirmed.

Carroll & Magruder, for appellant. Geo. Butler, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

W. J. DAVIS & CO. v. HOLLINGSWORTH. (No. 13,842.)

(Supreme Court of Mississippi. April 5, 1909.)

Appeal from Circuit Court, Hinds County; W. H. Potter, Judge.

Action between W. J. Davis & Co. and Robert L. Hollingsworth. From the judgment W. J. Davis & Co. appeal. Affirmed.

Williamson & Wells, for appellants. Wells & Wells, for appellee.

PER CURIAM. Affirmed.

PACKARD v. HARRY BERESFORD CO. (MARKS-ROTHENBERG CO., Garnishee). (No. 13,871.)

(Supreme Court of Mississippi. April 5, 1909.)

Appeal from Circuit Court, Lauderdale County; Jno. L. Buckley, Judge.

Action between Mrs. Beaumont Packard and the Harry Beresford Company; the Marks-Rotherberg Company being garnishee. From the judgment, Mrs. Packard appeals. Affirmed.

F. V. Brahan, for appellant. Bozeman & Fewell, for appellees.

PER CURIAM. Affirmed.

DAVIS v. HAMEL. (No. 13,798.)

(Supreme Court of Mississippi. April 5, 1909.)

Appeal from Circuit Court, Sunflower County; Sydney Smith, Judge.

Action between J. L. Davis and J. B. Hamel. From the judgment, Davis appeals. Affirmed.

Percy & Moody, for appellant. Johnson & Neill, for appellee.

PER CURIAM. Affirmed.

W. T. ADAMS MACH. CO. v. BOSWELL BROS. (No. 13,759.)

(Supreme Court of Mississippi. April 5, 1909.)

Appeal from Circuit Court, Simpson County; R. L. Bullard, Judge.

Action between the W. T. Adams Machine Company and Boswell Bros. From the judgment, the Adams Company appeals. Affirmed.

R. L. & E. L. Dent and E. G. Caston, for appellant. C. M. Whitworth, for appellees.

PER CURIAM. Affirmed.

CATLETT v. KENNEDY et al. (No. 13,874.)

(Supreme Court of Mississippi. April 5, 1909.)

Appeal from Circuit Court, Lauderdale County; Jno. L. Buckley, Judge.

Action between W. S. Catlett and C. M. Kennedy and others. From the judgment Catlett appeals. Affirmed.

F. V. Brahan, for appellant. Chas. M. Wright, for appellees.

PER CURIAM. Affirmed.

REID, Sheriff, v. YAZOO & M. V. R. CO. (No. 13,787.)

(Supreme Court of Mississippi. April 5, 1909.)

Appeal from Circuit Court, Holmes County; Sydney Smith, Judge.

Action between G. C. Reid, sheriff and administrator ad litem, against the Yazoo & Mississippi Valley Railroad Company. From the judgment, Reid appeals. Affirmed.

William Arthur Pierce, for appellant. Mayes & Longstreet, for appellee.

PER CURIAM. Affirmed.

PEPPLE v. J. VAN LINDLEY NURSERY CO. (No. 13,797.)

(Supreme Court of Mississippi. April 5, 1909.)

Appeal from Circuit Court, Sunflower County; Sydney Smith, Judge.

Action between W. O. Pepple and the J. Van Lindley Nursery Company. From the judgment, Pepple appeals. Affirmed.

J. H. Price and S. F. Davis, for appellant. Frank E. Everett, for appellee.

PER CURIAM. Affirmed.**J. & B. HART v. H. L. & C. W. HICKS.** (No. 13,846.)

(Supreme Court of Mississippi. April 5, 1909.)

Appeal from Circuit Court, Hinds County; W. H. Potter, Judge.

Action between J. & B. Hart and H. L. & C. W. Hicks. From the judgment, J. & B. Hart appeal. Affirmed.

J. B. Stirling and F. M. West, for appellants. Williamson & Wells, for appellees.

PER CURIAM. Affirmed.

(87 Fla. 120)

McKINNON v. JOHNSON et al.

(Supreme Court of Florida. March 2, 1909.)

1. APPEAL AND ERROR (§ 1097*)—SUBSEQUENT APPEAL—PREVIOUS DECISION AS LAW OF THE CASE.

All the points adjudicated by an appellate court upon a writ of error or an appeal become the law of the case, and are no longer open for discussion or consideration.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4358; Dec. Dig. § 1097.*]

2. EJECTMENT (§ 84*)—PLEA OF NOT GUILTY—DEFENSES ADMISSIBLE.

In an action of ejectment, all matters of legal defense (excepting special denials of possession and denials of adverse claim under the statute) may be given in evidence under the plea of not guilty. Special pleas of matter affecting the legal title or in estoppel should be struck out.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 230; Dec. Dig. § 84.*]

3. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—PRACTICE.

Where a demurrer is interposed to a plea, when a motion to strike out would have been the proper method of attack, but such plea is so faulty that the court would have been justified in striking it out of its own motion, the sustaining of the demurrer will be considered harmless error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4090; Dec. Dig. § 1040.*]

4. EJECTMENT (§ 84*)—GENERAL ISSUE—EVIDENCE ADMISSIBLE.

In an action of ejectment, the striking out of a plea setting up matters admissible in evidence under the general issue or the sustaining of a demurrer to such plea will not preclude proof at the trial under the general issue of such matters attempted to be so pleaded.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 230; Dec. Dig. § 84.*]

5. APPEAL AND ERROR (§ 231*)—OBJECTIONS TO EVIDENCE—SUFFICIENCY.

General objections to evidence proposed, without stating the precise grounds of objection, are vague and nugatory, and are without weight before an appellate court, unless the evidence objected to is palpably prejudicial, improper, and inadmissible for any purpose or under any circumstances.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1299; Dec. Dig. § 231; Trial, Cent. Dig. § 195.]

6. TRIAL (§ 83*)—OBJECTIONS TO EVIDENCE—SUFFICIENCY.

A party who objects to the competency of a witness or to proffered evidence should state specifically the grounds of his objection, in order to apprise the court and his adversary of the precise objection he intends to make.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 198; Dec. Dig. § 83.*]

7. EVIDENCE (§ 43*)—JUDICIAL NOTICE—APPELLATE COURT OPINIONS.

An appellate court will take judicial notice of its own opinions, and, although the judgment and the mandate entered and issued express the decision of the court, yet upon a second appeal or writ of error in the same case the court may properly examine the opinion in order to determine what matters were considered, upon what grounds the judgment was entered, and what has become settled for future disposition of the case.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 63; Dec. Dig. § 43.*]

8. EVIDENCE (§ 208*)—JUDICIAL ADMISSIONS—PLEADINGS.

In an action of ejectment, where the defendant relies upon adverse possession for the requisite statutory period under a void sheriff's deed as color of title, and he offers in evidence a petition filed by the plaintiffs in the same court for a "writ and order of restitution commanding" the defendants thereto, of whom the defendant in ejectment was one, "to restore and return to the possession" of the plaintiffs the lands in controversy, the answer of such defendant thereto, the plaintiffs' demurrer to such answer, and the judgment of the court overruling the demurrer, allowing the plaintiffs time in which to file a replication to the answer, in default whereof such petition "shall stand dismissed out of the court without any further order of dismissal," it is error to exclude such proffered documentary evidence on the grounds of objection of irrelevancy and immateriality. Even if admissible for no other purpose, such evidence was admissible as an admission on the part of plaintiffs that the defendant was in the possession of the lands at the time of the filing of such petition.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 714; Dec. Dig. § 208.*]

9. JUDGMENT (§ 572*)—RES JUDICATA—FINAL JUDGMENT.

In order to sustain a defense of res judicata, there must have been a final judgment or decree rendered in the former action or suit. Where the judgment offered in evidence is a judgment overruling a demurrer, with leave to the plaintiffs, against whom such judgment was rendered, to file a replication by a day certain, in default of which their petition "shall stand dismissed out of the court without any further order of dismissal," and it is not made to appear that the conditions of such judgment were ever complied with, it must be held to be not a final, but a conditional, judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1049; Dec. Dig. § 572.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

10. APPEAL AND ERROR (§ 1212*)—MANDATE AND PROCEEDINGS IN LOWER COURT—NEW TRIAL.

An issue determined by the appellate court cannot be relitigated in the lower court on a new trial. But an issue left undetermined by the appellate court is open for a new trial. An adjudication by an appellate court upon a writ of error in an action of ejectment that the defendant's paper title fell, without passing upon any title which defendant might have acquired by adverse possession for the requisite statutory period, does not preclude the defendant from establishing such adverse possession upon a new trial, provided he is able to do so by competent evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4713; Dec. Dig. § 1212.*]

11. TRIAL (§ 168*)—DIRECTION OF VERDICT.

A charge directing a verdict for the plaintiffs should never be given unless it is clear that there is no evidence whatever adduced that could in law support a verdict for the defendant. If the evidence is conflicting, or will admit of different reasonable inferences, or if there is evidence tending to prove the issue, it should be submitted to the jury as a question of fact, and not taken from them and passed upon by the judge as a question of law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 376; Dec. Dig. § 168.*]

(Syllabus by the Court.)

In Banc. Error to Circuit Court, Jackson County; J. Emmet Wolfe, Judge.

Action by Seth Johnson, as administrator, and others, against Daniel L. McKinnon. Judgment for plaintiffs, and defendant brings error. Reversed.

D. L. McKinnon, in pro. per. Liddon & Carter, for defendants in error.

SHACKLEFORD, J. This case comes here for the second time on writ of error. For the former opinion, see *Johnson v. McKinnon*, 54 Fla. 221, 45 South. 23, 13 L. R. A. (N. S.) 874, wherein will be found a statement of the facts in which is given a résumé of former litigation out of which this action of ejectment arose. Also see *McKinnon v. Johnson*, 54 Fla. 538, 45 South. 451, which was the second time the appeal in the equity suit came before this court. The first opinion rendered therein will be found reported as *Johnson v. McKinnon*, 45 Fla. 388, 34 South. 272.

We start out with the proposition that all the points adjudicated upon the former writ of error have become the law of this case, and are no longer open for discussion or consideration. *Wilson v. Fridenberg*, 21 Fla. 388; *Doyle v. Wade*, 23 Fla. 90, 1 South. 516, 11 Am. St. Rep. 334; *Hart v. Stribling*, 25 Fla. 435, text 445, 6 South. 455, text 456; *State v. White*, 40 Fla. 297, text 318, 24 South. 160, text 167; *Anderson v. Northrop*, 44 Fla. 472, 33 South. 419; *Louisville & Nashville R. Co. v. Jones*, 50 Fla. 225, 39 South. 485; *Hoodless v. Jernigan*, 51 Fla. 211, 41 South. 194; *Jacksonville Electric Co. v. Bowden*, 54 Fla. 461, 45 South. 755, 15 L. R. A. (N. S.)

451; *Valdosta Mercantile Co. v. White*, 56 Fla. —, 47 South. 981.

The declaration in this case is in the usual form. The defendant filed a disclaimer as to a portion of the lands, a plea of not guilty as to the residue, and also a special plea, in which he attempted to set up some former adjudication as being in the nature of res judicata. It would seem that a demurrer was interposed to this special plea, which was sustained, although the transcript is not clear upon this point. However, it is a matter of no moment, even though error is attempted to be predicated upon such alleged ruling, for the reason that the defendant by leave of court filed an amended plea in which he more fully set out the matters relied upon in his first special plea. A demurrer was also interposed and sustained to this amended special plea, which ruling also forms the basis for an assignment of error. We do not copy such plea, the demurrer thereto, or the ruling thereon, for the reason that this assignment must fall, whether the matters undertaken to be set up in such plea were well pleaded or not. This court in *Coffee v. Groover*, 20 Fla. 64, expressly held that "in ejectment all matters of legal defense (excepting special denials of possession and denials of adverse claim under the statute) may be given in evidence under the plea of not guilty. Special pleas of matters affecting the legal title or in estoppel should be struck out. A judgment sustaining a demurrer to such pleas will not preclude proof at the trial of the facts pleaded." This holding was approved and followed in *Hagan v. Ellis*, 39 Fla. 463, text 472, 22 South. 727, text 729, 63 Am. St. Rep. 167. It may well be, notwithstanding the intimation in *Coffee v. Groover*, supra, that such pleas could be reached by demurrer, the proper method of attack would be by motion to strike out. See *Wade v. Doyle*, 17 Fla. 522, text 531; *Weiskoph v. Dibble*, 18 Fla. 24, text 28; *Neal v. Spooner*, 20 Fla. 38; *Horne v. Carter's Adm'rs*, 20 Fla. 45; *Barco v. Fennell*, 24 Fla. 378, 5 South. 9; *Buesing v. Forbes*, 33 Fla. 495, 15 South. 209; *Parkhurst v. Stone*, 36 Fla. 456, text 462, 18 South. 594, text 595; *Camp v. Hall*, 39 Fla. 535, 22 South. 792; *Little v. Bradley*, 43 Fla. 402, 31 South. 342; *Atlantic Coast Line R. Co. v. Benedict Pineapple Co.*, 52 Fla. 165, text 177, 42 South. 529, text 533; *Atlantic Coast Line R. Co. v. Crosby*, 53 Fla. 400, text 428, 43 South. 318, text 326. From an examination of these as well as other decisions referred to therein, it would seem clear that this court is now committed to the doctrine that a special plea tendering an issue covered by the plea of not guilty is not for that reason demurrable, but that the proper method of attacking such a plea is by motion. It may well be that the plea in question was also open to attack by proper and sufficient

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

grounds of demurrer for the reason that it was not sufficiently comprehensive or broad in its scope to constitute a full reply to the allegations of the declaration. See *Atlantic Coast Line R. Co. v. Crosby*, supra. Be that as it may, we are clear from an examination of the plea in question that the court would have been justified in striking it out of its own motion. Therefore no reversible error was committed in sustaining the demurrer thereto. *Hooker v. Forrester*, 53 Fla. 392, 43 South. 241; *O'Brien v. State*, 55 Fla. 146, 47 South. 11; *Poppell v. Culpepper*, 56 Fla. —, 47 South. 351; *Hoopes v. Crane*, 56 Fla. —, 47 South. 992.

During the trial the defendant produced and offered in evidence the petition of plaintiffs for restitution against A. D. and D. L. McKinnon, the answer thereto of D. L. McKinnon, who is the defendant in the instant case, the demurrer interposed thereto and the ruling or judgment of the court upon such demurrer, to the introduction of which the plaintiffs objected "on the grounds that it was irrelevant and immaterial." The court sustained the objection, to which ruling the defendant excepted, and this forms the basis for another assignment. We see no useful purpose to be accomplished by setting out herein this proffered and rejected documentary evidence. Suffice it to say, as appears from the opinion rendered on the former writ of error (*Johnson v. McKinnon*, 54 Fla. 221, 45 South. 23, s. c. 13 L. R. A. [N. S.] 874), that "it was admitted in the evidence at the trial that D. L. McKinnon, defendant herein, was counsel for A. D. McKinnon in obtaining the decrees admitted in evidence herein under which this sale was made, that D. L. McKinnon had full knowledge of the proceedings in said cause, and conducted the same, had sale of the land in controversy made as counsel for A. D. McKinnon, and bought the lands involved herein at the execution sale under said decrees, and received sheriff's deed which was admitted in evidence herein; that this cause, wherein the decrees were rendered, was appealed to the Supreme Court without supersedeas, and the decree of December 17, 1897, was reversed; that before the reversal of said decree D. L. McKinnon bought the lands herein at the execution sale and received the sheriff's deed." The reasons for the reversal of the decree in question are set forth in *Johnson v. McKinnon*, 45 Fla. 388, 34 South. 272, and the subsequent history of that litigation will be found in *McKinnon v. Johnson*, 54 Fla. 538, 45 South. 451. We held upon the former writ of error that "the law imputes to an attorney knowledge of defects in legal proceedings for the sale of property taken under his direction, and the title of such attorney to land purchased by him at a judicial sale decreed in proceedings in which he acted as an attorney falls with the reversal of the decree directing the sale." As we have already seen, that becomes the law of this case.

We find upon an examination of the proffered and rejected documentary evidence that it appears therefrom, after the reversal of the decree appealed from by this court in *Johnson v. McKinnon*, 45 Fla. 388, 34 South. 272, and after the mandate had issued therein, but prior to the institution of this action of ejectment, the plaintiffs filed in the circuit court for Jackson county their petition against A. D. McKinnon and D. L. McKinnon, the defendant herein, wherein they sought "a writ and order of restitution commanding" the defendants thereto "to restore and return to the possession" of the plaintiffs "the real estate which has been sold in this case"; such real estate being particularly described therein. To this petition the defendant, D. L. McKinnon, filed an answer, which, omitting the formal parts, is as follows:

"This respondent says: That he was simply the agent and attorney of the said A. D. McKinnon in said suit, and had no other connection or privity with him. That the lands purporting to be purchased by him were but payments to him by said A. D. McKinnon on his fees for services in said suit by agreement, instead of paying the money to him, and the amount of the purchase or consideration was inserted on the execution.

"D. L. McKinnon, in pro. per."

To this answer the plaintiffs interposed a demurrer upon the ground that the "answer states no matter of defense to the petition for restitution or any reason why restitution should not be made." The court made the following order thereon:

"This cause coming on to be heard upon the demurrer to the answer of D. L. McKinnon to the rule and petition, after hearing the argument of the respective parties and the court being advised of its opinion, it is hereby ordered and adjudged that the demurrer be, and the same is hereby, overruled. It is hereby further ordered and adjudged that the petitioners have till rule day in August, 1904, within which to file a replication to said answer, and that in failure to do so within said time that the rule and petition as to said D. L. McKinnon shall stand dismissed out of the court without any further order or dismissal.

"Done at Marianna, Florida, on this 12th day of July, 1904."

As we have already seen, the sole grounds of objection urged against the admission of this documentary evidence were irrelevancy and immateriality. We have repeatedly held that general objections to evidence proposed, without stating the precise grounds of objection, are vague and nugatory, and are without weight before an appellate court, unless the evidence objected to is palpably prejudicial, improper, and inadmissible for any purpose or under any circumstances. *Putnal v. State*, 56 Fla. —, 47 South. 864, and authorities there cited. See, especially, *Hoodless v. Jernigan*, 46 Fla. 213, text 217, 35 South. 656, text

658, citing and quoting with approval the following language used in *Carter v. Bennett*, 4 Fla. 283: "A party who objects to evidence or the competency of witnesses should state specifically the grounds of his objections. It is not sufficient to object generally that the evidence is illegal, or the witness is incompetent; but the party objecting must put his finger upon the very point to apprise the court and his adversary of the precise objection he intends to make." Was this proffered documentary evidence "palpably prejudicial, improper, and inadmissible for any purpose or under any circumstances," so that the general grounds of objection of irrelevancy and immateriality were sufficient to warrant the trial court in excluding it? See *Kirby v. State*, 44 Fla. 81, 32 South. 836, and *Williams v. State*, 53 Fla. 89, 43 South. 428. This is the question we are called upon to answer. Before doing so, however, it is advisable for us to determine whether or not this point either expressly or by necessary implication was adjudicated upon the former writ of error. If so, it has become the law of this case, and is no longer open for discussion or consideration. As was said by Mr. Justice Brewer in *Thompson v. Maxwell Land Grant & Ry. Co.*, 168 U. S. 451, text 456, 18 Sup. Ct. 121, 42 L. Ed. 539: "We take judicial notice of our own opinions, and, although the judgment and the mandate express the decision of the court, yet we may properly examine the opinion in order to determine what matters were considered, upon what grounds the judgment was entered, and what has become settled for future disposition of the case." Following his example, "we therefore turn to the former opinion and the mandate to see what was presented and decided."

We find that it was held therein that the deficiency decree, upon which execution issued and under which the defendant bought the lands in controversy, was absolutely void, and, further, as we have already seen, that the title of an "attorney to land purchased by him at a judicial sale decreed in proceedings in which he acted as an attorney falls with the reversal of the decree directing the sale." We further find that the assignment of error upon which the reversal was planted was the failure or refusal of the trial court "to give an appropriate instruction, submitting this contention to the jury"; the opinion closing with the expression: "We conclude, therefore, that the court erred in refusing to so instruct at the request of the plaintiff. For the errors found the judgment is reversed." The opinion does not set forth the requested and refused instruction, but it sufficiently appears therein that this court held that the jury should have been instructed upon and in accordance with the principles just enunciated as having been taken from the former opinion. It nowhere appears in the opinion that this point of evidence was

raised upon the former writ of error, presented to or passed upon by this court. So far as we are advised, no such evidence was adduced at the former trial in the court below. We reach the conclusion, then, that this point has never been adjudicated by this court so as to become the law of the case. "An issue determined by the appellate court cannot be relitigated in the lower court on a new trial. But an issue left undetermined by the appellate court is open for a new trial." 13 Ency. of Pl. & Pr. 856, and authorities cited in notes. As was held in *St. Louis, I. M. & S. Ry. Co. v. Cleere*, 76 Ark. 377, 88 S. W. 995: "Where, on appeal, the evidence is found sufficient to support the verdict, but the cause is reversed because of erroneous instructions, the finding as to the sufficiency of the evidence is not conclusive on the next appeal after a retrial." Also see *Heard v. Ewan*, 73 Ark. 513, 85 S. W. 240. *Balch v. Haas*, 73 Fed. 974, 20 C. C. A. 151, 36 U. S. App. 693, will be found to be a well-reasoned and instructive case. It was held therein that "on a second writ of error an appellate court is bound by its prior decision only upon points distinctly made and determined, and not upon points which might have been, but were not, raised," also that "the rule that an appellate tribunal is bound by its decision on a former appeal in the same case is not applicable where the point decided was dependent on the evidence, and on the second trial the evidence is different in a material respect."

We must now determine whether or not the trial court erred in excluding the proffered evidence upon the grounds urged against it. At the time it was offered it had developed in the trial that the defendant who took the stand as a witness in his own behalf had admitted that the decree and proceedings under which he had purchased the lands had been pronounced by this court null and void, and that he relied upon the sheriff's deed only as color of title. He sought to establish by his own testimony as well as that of other witnesses adverse possession under such deed as color of title for the requisite statutory period. See *Kendrick v. Latham*, 25 Fla. 819, 6 South. 871. Even if the proposed documentary evidence was admissible for no other purpose, was it not admissible as an admission on the part of the plaintiffs that the defendant was in the possession of the lands at the time the petition was filed by them "for a writ and order of restitution in the case" commanding A. D. McKinnon and the defendant "to restore and return to the possession" of petitioners? We think so. As this necessarily must cause a reversal of the judgment, we might stop here, but we think it may be well to consider briefly some of the other contentions made before us by the respective parties. It is strenuously urged by the defendant that the judgment upon the demurrer to his answer to the petition is res

adjudicata, and constitutes a bar to this action of ejectment. Is this contention tenable? "In order to support the plea of *res judicata*, there must have been a final judgment or decree rendered in the former action or suit." 24 Amer. & Eng. Ency. of Law (2d Ed.) 793, and authorities cited in note 6, especially *Marvin v. Hampton*, 18 Fla. 131. Can we say that this ruling on the demurrer constituted a final judgment? It does not appear whether a replication was ever filed to the petition or not, or that any subsequent proceedings of any kind were ever had. It would seem that, at best, it must be held to be merely a conditional judgment. See *Dallam v. Sanchez*, 56 Fla. —, 47 South. 871, and authorities there cited. We are not overlooking the fact that the order itself says that on failure to file a replication the rule and petition as to this defendant "shall stand dismissed out of the court, without any further order or dismissal," but, even so, that would not seem to dispense with the necessity of showing a compliance with the conditions of the order. See, as bearing upon this question, *Gregory v. Woodworth*, 107 Iowa, 151, 77 N. W. 837; *Folsom v. Howell*, 94 Ga. 112, 21 S. E. 136; *State v. Jenkins*, 70 Md. 472, 17 Atl. 392; *Scherff v. Missouri Pacific Ry. Co.*, 81 Tex. 471, 17 S. W. 39, 26 Am. St. Rep. 828. Even if we could pass this difficulty, it may well be doubtful as to whether or not such a ruling could be held to be a judgment on the merits, but it is not necessary to discuss that question. As to the principles constituting *res judicata*, see *Thornton v. Campbell*, 6 Fla. 546; *Yulee v. Canova*, 11 Fla. 9; *Gould v. Evansville & C. R. R. Co.*, 91 U. S. 526, 23 L. Ed. 416; *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195; *Bissell v. Spring Valley Township*, 124 U. S. 225, 8 Sup. Ct. 495, 31 L. Ed. 411.

As we have already seen, the defendant relied upon adverse possession under a void sheriff's deed as color of title. If this deed and the proceedings upon which it was based were void, as we held upon the former writ of error, then they must necessarily have all been void *ab initio*, and the plaintiffs must be charged with knowledge of this fact as well as the defendant. In the former opinion it appeared that the appeal in the equity suit was taken to this court without a supersedeas. See *Gould v. Carr*, 33 Fla. 523, 15 South. 259, 24 L. R. A. 130. This being true, it must be held that the defendant was holding such lands adversely from the time he entered into the possession thereof, whenever that was. Upon the former writ of error, we simply held that the defendant's paper title fell, but did not pass upon any title that he might have acquired by adverse possession for the requisite statutory period, nor do we now express any opinion as to the evidence upon that point. It would not be proper for us to do so, as that is a matter primarily for the jury to pass on. As there was evidence

adduced at least tending to establish such adverse possession by the defendant, it was error for the court to withdraw the case from the consideration of the jury, and direct a verdict for the plaintiffs. See *German-American Lumber Co. v. Brock*, 55 Fla. 577, 46 South. 740, and authorities there cited.

For the errors found, the judgment is reversed, and the cause is remanded. All concur, except PARKHILL, J., absent on account of illness.

(123 La. 219)

No. 17,116.

KOHLMAN v. COCHRANE.

(Supreme Court of Louisiana. Dec. 14, 1908.

On Rehearing. March 29, 1909.)

1. HUSBAND AND WIFE (§ 169*)—WIFE'S SEPARATE ESTATE—MORTGAGES—ORDER OF COURT.

The legal capacity of a married woman to create debts against herself and to mortgage her property is not essentially dependent upon the fact that she should have applied to and obtained the authority of the district judge to create such debts and to grant such mortgages. The authorization of such judge and his certificate thereof are accorded by law to a married woman as a protection to herself from her imprudence and ignorance, and as protection in respect to her capacity to the public who might deal with her.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 630; Dec. Dig. § 169.*]

2. HUSBAND AND WIFE (§ 152*)—WIFE'S SEPARATE ESTATE—CONTRACTS—ORDER OF COURT—ESTOPPEL.

Where a married woman, having recourse to proceedings taken by her under articles 126 and 127 of the Civil Code, not only fails to avail herself of the opportunity for protection afforded to her, but makes use, on the contrary of these proceedings designedly or through ignorance to deceive or mislead the public by misstating or suppressing the actual facts of the case, she should not be permitted to avail herself later of the actual facts to work injury upon those who have shaped their course in ignorance of those facts and acted in good faith, relying upon her action and conduct. A married woman is not released from all responsibility for her conduct.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 596; Dec. Dig. § 152.*]

(Syllabus by the Court.)

Appeal from Fourteenth Judicial District Court, Parish of Avoyelles; Gregory Horatio Couvillon, Judge.

Action by Louis Kohlman against Clara Cochrane. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Peterman & Couvillon, for appellant. Lafargue & Lafargue, for appellee.

NICHOLLS, J. The plaintiff seeks to recover from the defendant, wife of David Sless, from whom she is judicially separated in property, the sum of \$3,400, with interest thereon subject to certain credits, and to obtain recognition and enforcement of a special mortgage as securing payment of said amount

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

on the property described in his petition. His prayer for judgment was based on the allegations that he was the holder and owner for value in good faith and before maturity of four promissory notes executed by the defendant with the authorization of her husband, and all dated on the 27th of May, 1898, maturing respectively on the 1st of January, 1901, 1902, 1903, and 1904, to the order of and indorsed by the maker, the two notes falling due on the 1st of January, 1901 and 1902, being each for the sum of \$900, and those maturing in January, 1903 and 1904, being each for \$900, all bearing interest at 8 per cent. per annum from January 1, 1899, until paid. That these notes were on the date of their execution, by act before Alfred E. Gremillion, notary (with which act the notes were identified), secured by the maker, with her husband's authorization, by special mortgage on the property described in that act in favor of Henry Newman and in favor of any future holder or holders of said notes. That the said special mortgage was made and executed after presentation to said notary of the judicial certificate authorized by article 127 of the Civil Code. That the debt evidenced by said notes and secured by said mortgage was one which inured solely to the separate advantage of the maker (Mrs. Siess), or to the separate benefit of her paraphernal estate. That the said mortgage and said certificate accompanying the same were duly recorded in the parish of Avoyelles.

Defendant answered, pleading, first, a general denial. Further answering, she denied that the plaintiff was the owner and transferor of the notes sued on, and which he alleged were in his possession. She alleged that her husband, David Siess, had for years been doing business with H. & C. Newman, and that, as he became embarrassed in his pecuniary affairs, she had to protect her future earnings and property from his creditors by becoming separated in property from him by judgment of court.

That her husband continued to do business with H. & C. Newman on the 15th of April, 1899, through the solicitation of H. & C. Newman, and through the entreaties, persuasions, threats, and marital influence of her husband she executed notes in favor of Henry Newman, of said firm, and gave a mortgage on her separate property to secure the payment of said notes. Respondent averred that the indebtedness for which said notes and mortgage were given was the debt of her husband, and that it did not inure to her credit or that of her separate estate.

Respondent averred that on the 27th day of May, 1898, the said firm of H. & C. Newman, and particularly Henry Newman, requested and demanded a renewal of said notes due and said mortgage under threats, and her husband coerced and influenced her again to recognize said debt, though said Newman knew, as well as her said husband, that it was for the debt of her husband.

Respondent averred that she refused at first to renew the notes and give a second mortgage, as the consideration was the indebtedness under the first mortgage, and that was the debt of her husband. That she did not receive any money or other values, and nothing was paid to her under either mortgage or as a consideration for the notes. The notes were given in representation of an indebtedness due by her said husband, David Siess, in the first instance, and, in the second, in representation of the debt due under said first obligation, none of which inured to her benefit or that of her separate estate.

Respondent averred that in truth and in fact the notes sued on were for the debt of her husband, and the effort of respondent to assume said debt and give a mortgage therefor was in contravention of a prohibitory law, and therefore void, and the nullity could be pleaded, and the judge's certificate was no bar thereto, for the reason that no money or other values was put out by said Henry Newman on the faith of said certificate, but said notes and mortgage were given simply to cover an antecedent debt due to said Henry Newman by her said husband, which debt did not inure to her benefit or that of her separate estate, and this the judge's certificate did not and could not authorize. Respondent represented that said Henry Newman kept money he had belonging to her, and failed to allow her credit which he received from the Greenwich Insurance Company on August 4, 1901, being the sum of \$1,054.92 paid by said company as insurance on her gln, which burned in Mansura, and also \$50 received on August 8, 1901, for right of way across her lands from the Shreveport & Red River Valley Railroad Company, aggregating the sum of \$1,104.92, which should be credited on the notes sued on, if any portion thereof was shown to be her debt, but which she denied emphatically.

Respondent averred that the notes sued on were the property of Henry Newman, and it was only after their maturity that plaintiff claimed to be the owner of the same. She represented that said amount above mentioned was paid long before plaintiff claimed ownership of the notes.

In view of the premises, respondent prayed that the demand of plaintiff be rejected and his suit be dismissed, and that the notes sued on and the mortgage given to secure their payment be declared to be for a debt of respondent's husband, and not enforceable in law against her, and absolutely null and void, and that same be ordered canceled.

Respondent further prayed that in case any portion of the debt sued on be recognized as her own that she be allowed credit on the same to the amount of \$1,104.92, amount collected as aforesaid, to take effect August 8, 1901. Respondent prayed for costs and general and equitable relief.

The district court rendered judgment in favor of the plaintiff against defendant, Clara Cochrane, wife of David Siess, for the sum

of \$800, with 8 per cent. per annum interest thereon, from January 1st, until paid, and recognizing that payment of said amount was secured by special mortgage on the property described in plaintiff's petition. It decreed that said mortgage be enforced upon said property. The court further ordered, adjudged, and decreed that in all other respects the demand of the plaintiff be rejected. It ordered that defendant pay all costs.

Plaintiff has appealed. The defendant has answered the appeal praying that the judgment appealed from be set aside in so far as it condemned the defendant to pay plaintiff the sum of \$800, with interest, with recognition of mortgage on her property, and that in other respects it be affirmed.

On the 14th of April, 1890, Mrs. Clara Cochrane, wife of David Sless (her said husband then and there present aiding and authorizing her so to do) specially mortgaged by notarial act before Alcide E. Bordonon, notary public in and for the parish of Avoyelles, certain real property belonging to her in that parish, which was described in the act of mortgage, to secure the payment of five promissory notes, that day drawn and executed by her, one for \$808.58, two for the sum of \$500 each, another for the sum of \$425, and the remaining one for the sum of \$400, all of said notes payable to the order of Henry Newman, at the Whitney National Bank in New Orleans, on the 1st day of December in the years 1890, 1891, 1892, 1893, and 1894, bearing 8 per cent. per annum interest from the 1st day of April, 1890, until paid. The mortgage was made in favor of Henry Newman or any further holder of said notes.

The mortgage was accepted by Newman through his attorneys. In the act Mrs. Sless declared that:

"She was justly and truly indebted to Henry Newman in the full sum of two thousand six hundred and thirty-three dollars and fifty-eight cents, advanced and paid to her for the purpose of enabling her to liquidate and discharge her separate property from the lien and obligation of certain mortgage debts with which her said separate property was incumbered."

The parties declared that the certificate of mortgage required by article — of the Revised Civil Code was dispensed with by them, and that they freed the notary from any responsibility for nonproduction of the same.

Accompanying this act and annexed to it for reference was a certificate of and authorization from the judge of the twelfth judicial district to the effect that Mrs. Clara Cochrane, wife of David Sless (her husband being present to assist and authorize her), had appeared before him and declared that it was her wish and intention to borrow the sum of \$2,633.58 for the purpose of enabling her to liquidate and discharge her separate property from the lien and obligation of certain mortgage debts with which her said property was incumbered.

The judge certified that he had examined

Mrs. Clara Cochrane, in accordance with article 127 of the Civil Code, in chambers, separate and apart and out of the presence and hearing of her husband, and that she had satisfied him that the debt was to be contracted for the purpose aforesaid.

In view of the premises—

"he authorized and empowered her to contract the said debt, to sign and execute any and all necessary note or notes required in the premises and to grant and execute a mortgage to secure the same upon the property by her owned, consisting of a tract of land containing twenty-one ¹⁵/₁₀₀ arpents situated in the town of Mansura now occupied by her as a resident, as the said Mrs. Clara Cochrane requested so to do."

Neither in the certificate and the authorization of the judge, nor in the act of mortgage subsequently executed by Mrs. Sless, were the existing mortgages which were declared to be then existing described, nor were the parties who held the same named. There is, however, found in the transcript a copy of an act of sale passed on the 29th of December, 1886, before Pierre A. Durand, notary public, by which Alonzo L. Boyer sold with full warranty to Mrs. Clara Cochrane, authorized and assisted by her said husband, David Sless, from which it was declared that she separated in property:

(1) A tract or parcel of land in the town of Mansura containing 40 arpents, more or less (boundaries described), being the same land acquired by the vendor from David Sless, by act before the notary on the 16th of January, 1886.

(2) A lot No. 12, of the sixteenth section, T. 11 N., R. 4 E., situated in the town of Mansura, with the steam engine, cotton house and gin, and all the buildings and improvements thereon, containing eight arpents more or less, being the same lot acquired by the vendor from David Sless on the 26th of January, 1886, by act before the same notary.

(3) A tract of land situated near Mansura, with all the buildings and improvements thereon, acquired by the vendor from David Sless, through notarial act as stated.

The sale was made for the consideration of the price of \$2,000 of which \$1,000 was hard cash, and the balance represented by two notes each of \$500, payable on the 1st of January, 1888, and the 1st of January, 1889, with 8 per cent. interest from their respective maturities, said notes drawn to the order of and indorsed by the purchaser, and payment of these two notes being secured by the special mortgage on the properties so purchased.

There is also in the transcript a copy of a notarial act of the 10th of May, 1876, before Durand, recorder of the parish of Avoyelles, in which Jules C. Defousses, acting as administrator of the succession of Elizabeth Bowman, declared at a sale made by him on the 3d of May, 1876, under order of the parish court of Avoyelles, of the lands belonging to said estate, Mrs. Clara Cochrane,

wife of David Siess, separated in property from him, had purchased the town property upon which the deceased had resided in the town of Mansura, containing 20 arpents, more or less (boundaries given), for the price of \$850, payable one-fifth cash, and the balance in four equal installments maturing severally at one, two, three, and four years from the day of sale, with interest from the several maturities at 8 per cent. per annum, in representation of which she had executed her four promissory notes to the order of the said administrator, which notes were secured as to payment by special mortgage on the property purchased by her.

In view of the premises, the said administrator sold and conveyed the said property to Mrs. Clara Cochrane then and there present. As appeared by said copy of sale, Mrs. Clara Cochrane and her husband, David Siess—the latter to authorize and assist his wife—appeared as parties to said notarial act, and signed the same, she accepting the sale so made to her, and executing the notes and granting the special mortgage to secure payment thereof as recited in the act.

The parties to the act dispensed with the production of a certificate from the recorder as to the mortgages which might exist on said property.

On some day prior to the 27th of May, 1898, Mrs. Clara Cochrane, wife of David Siess (from whom she was separated in property), presented to the judge of the district court for the parish of Avoyelles a petition in which she declared that Henry Newman held against her four mortgage notes aggregating the sum of \$1,825, representing balance of a mortgage executed by her on April 4, 1890, in favor of Henry Newman, as well as another mortgage note for \$1,100 executed by her on March 9, 1894, in favor of H. & C. Newman, which, together with interest up to January 1, 1899, amounted to the sum of \$4,473.54, which said amount inured to her own separate use and benefit, and not to the benefit of her husband. That in order to redeem said notes and release her property from the operation of said mortgage she desired to obtain from him an authorization permitting her to grant and execute in favor of said Henry Newman a mortgage for the aforesaid sum of \$4,473 upon the cancellation and surrender of said notes. She therefore prayed that after due examination and interrogatories by him she be authorized to grant in favor of said Newman a mortgage on her property to the said amount.

On reading this petition the district judge signed a certificate in which he recited the fact that he had done so, and that he had thereafter re-examined her apart and out of the presence of her husband, and that she had satisfied him that the allegations of her petition were true, and that the mortgage sought to be executed by her in favor of Henry Newman was for the purposes set out in her petition; that is to say, to redeem

from said Henry Newman the following notes: [Describing the mortgage notes described in her petition.] In view of the premises, he authorized her to execute in favor of Henry Newman a mortgage for the aforesaid sum of \$4,400.54 on her separate property.

On the 27th of May, 1898, by notarial act before Gremillion, notary, Mrs. Clara Cochrane, wife of David Siess (authorized thereto by her husband, then present), declared that she was well, truly, and legitimately indebted to Henry Newman in the sum of \$4,473, which amount represented five certain promissory notes delivered to her duly canceled by William J. Peterman, agent and attorney in fact of said Newman, and fully described in the authorization of the district judge annexed to and made part of the mortgage act then being executed. She further declared that in order to represent said indebtedness she had on that day drawn and executed to her own order and by her indorsed six several promissory notes made payable as follows: One for the sum of \$473.54 due January 1, 1899, one for the sum of \$600 due January 1, 1900, one for the sum of \$800 due January 1, 1901, one for the sum of \$900 due January 1, 1902, one for the sum of \$900 due January 1, 1903, one for the sum of \$800 due January 1, 1904, all bearing 8 per cent. per annum interest thereon from January 1, 1899.

These notes were identified by paraph with the mortgage act then being executed and delivered to William J. Peterman, attorney and agent of Henry Newman.

In order to secure the payment of the notes so executed, the appearer, Mrs. Clara Cochrane, specially mortgaged in favor of Henry Newman, or any future holder of the notes, the property described in the act. She further bound herself to insure and keep insured against fire the property described by the number "3" in the mortgage act, designated as the gin lot, and to transfer the policy to the mortgagee, the policy to be collected by him and applied to the credit of the mortgage then granted.

It was agreed between the parties that upon the payment of the two first notes due respectively January 1, 1899 and 1900, the mortgagee would release the mortgage then being granted in so far as it affected the property described in the act under the number "2," designated as the "Home Place."

The testimony of Louis Kohlman, the plaintiff, was taken under commission. He testified that on October 14, 1902, he bought from H. & C. Newman one note due January 1, 1903, for \$900, with interest, for the sum of \$900. On March 19, 1903, he bought from H. & C. Newman three notes aggregating the sum of \$1,929, with interest, for \$1,745. The maturity of the last three notes was as follows:

One note showing a balance of \$229.33, due January 1, 1901, one note of \$900, due

January 1, 1902, and one note of \$800, due January 1, 1904, for which he gave H. & C. Newman a check on the State National Bank, and all of those notes were owned and held by him and were for collection in the present suit; he bought them in good faith, and knew nothing of any defect in them or that the defendant disputed her liability upon them.

The defendant, Mrs. Siess, was placed on the stand as a witness in her own behalf.

She was asked whether she had not executed notes and granted a mortgage in favor of Henry Newman in April, 1890, to which she replied that she had. She was then asked for whose debt they were given, to which she answered "for her husband's." She was then asked whether she remembered any special debt of her husband's was included in the notes and mortgage of 1890, to which she replied, "Yes, one debt that her husband owed to Hambro & Sons of \$1,100, and \$711 of interest, that Mr. Newman paid for her husband; that those notes and that mortgage included \$1,100 due by her husband under a judgment of Hambro & Sons, and \$711 paid by Henry Newman as interest on that judgment." Proceeding, she testified under questions propounded to her that the interest on the judgment was paid by Newman before she executed the judgment (mortgage) the year before; the other items of the amount of the notes and mortgage were not due by her, but by her husband; no portion of the same inured to her benefit or that of her separate estate; that she had not voluntarily and willingly given these notes and that mortgage; she did not want to accede to it, but it was by threats and promises that she signed the mortgage—threats and promises by her husband and Mr. Newman. When she gave the mortgage of 1890, Mr. Newman added or put interest on the \$1,100 and \$711 which she had testified to about 8 per cent. interest; she did not remember the year when Newman paid the \$711 interest on the Hambro judgment. The second mortgage which she gave was in May, 1898. It was given to renew the old mortgage. Outside of the old mortgage there was included therein \$1,400 due on a note given by her to Mr. Newman, she believed, for advances on her place; it was her note. Outside of that note for \$1,400, no part of that debt inured to her benefit or that of her separate estate. When she received the judge's certificate she had not received any part of the \$1,400; it was an account carried on for her plantation; it was to be given to her. Mr. Newman and her husband made her give the second mortgage; she did not give it voluntarily, but was forced to do so by her husband and Mr. Newman. During all those years her husband was doing business and handling that money from Newman; she never received any benefit or anything in all those transactions, not a cent. Mr. Newman collected in 1901

\$1,050 for her from insurance policy which was paid for the burning of her gin. He never paid her a cent of that money; he also collected \$50 from the railroad for a right of way over her place. On cross-examination she testified that two of the notes securing the mortgage of 1898 had been paid, one for \$454, the other for \$600. Being asked whether she had not about 1895 executed a mortgage in favor of N. Thompson for \$1,590, she said she had not, nor had she executed one to Boyer or Jules Defousses. She first denied that the first mortgage given to Newman in 1890 had been canceled (on redirect examination she admitted that it had been). The defendant examined Henry Newman under a commission as a witness on her own behalf, and propounded to him a number of questions, to which he answered substantially as follows:

The firm of which he was a member had had business relations with the defendant (Mrs. Siess) beginning in 1875 until recently; during that time he occasionally loaned sums of money to her husband individually; the first series of mortgage notes which Mrs. Siess executed was given to cover an existing indebtedness, being the balance due after business dealings of about 15 years. It was impossible for him to furnish an itemized statement of said indebtedness, as the books since 1875 were not available. It was impossible for him to state what amounts were paid on the first series of mortgage notes up to 1898, as the parish records would show another series of notes was then executed covering the balance due on the first mortgage notes and the balance due on an open account, as Mrs. Siess continued to do business with his firm; there was nothing due by Mrs. Siess to him on the notes, as they had been sold by him and had passed out of his hands. It was impossible to furnish an itemized statement of the business, as every record in a business as large as that of his firm could not be kept for as long a period as 80 years. It was the custom to occasionally dispose of old records to junk dealers, and statements of accounts were regularly sent to defendant each year, and at no time was any objection or fault found with same.

The business with Mrs. Siess was conducted principally through her regularly authorized agent, David Siess, and all the obligations were contracted for Mrs. Siess, and he could not recall what debts she contracted personally; he could not recall that any one else had any charges made to the defendant's account, nor to whose order Mrs. Siess made her various drafts drawn on the firm payable, as it was impossible to remember such items.

He had made personal loans to David Siess, and two notes were still past due and unpaid, one of date October 1, 1897, due January 1, 1899, for \$128, which note was

renewed by agreement and extended to maturity on January 1, 1905; also one note of date April 6, 1904, due seven months after date, for \$100.

He did not recall that any one directed any charges to be made of an obligation of David Sless, nor did he recall that any such charge was. The defendant's husband still owed him a sum of money, as had already been stated.

The defendant, Mrs. Sless, being recalled as a witness on her own behalf, was cross-examined by plaintiff's counsel as to whether she had purchased any property along about 1887 from Lonzo Boyer and Jules Defousses. She replied, "No, sir." The question being repeated, she asked, "From Jules Defousses?" and answered, "Well, I bought our place there at the succession sale—it was not this property" (the property in suit). Asked whether she remembered purchasing property from Lonzo Boyer or Jules Defousses partly on cash and partly on credit, she answered, "No, sir; not from Boyer."

Being asked whether she had any recollection of having bought property from these people and paying the mortgage in 1890, she answered she did not.

On the trial defendant introduced in evidence an instrument bearing date New Orleans, March 31, 1888, to the following effect:

David Sless owing Henry Newman \$1,175.08, the amount of a judgment now due by said Sless, and rendered in the Circuit Court of the United States for the Eastern District of Louisiana, in the suit of J. C. Hambro & Son versus David Sless et al., No. 8,001 of the docket of said court, the said sum being the amount of principal and costs, all interest up to this date having been paid, Henry Newman agrees to give said Sless a stay of execution on said judgment for one (1) year from this date, which stay of execution the said Sless accepts.

The amount to become due at the end of the stay of execution to be the principal of the judgment as above stated, with interest as stipulated in the judgment from this date until payment eleven hundred and seventy five 08/100 dollars.

On April 4, 1890, Henry Newman wrote the following letter addressed to David Sless, individually:

"Mr. D. Sless, Mansura.

"Dear Sir: In reply to your letter of the 3rd instant, I am very much surprised at the tenor of your letter for when we have agreed upon everything and I wrote the letter in your presence to Messrs. Thorpe & Peterman and in order to avoid any misunderstanding I got you to O. K. the same which letter explains everything and I must insist upon its being complied with, for I do not believe in making so many different agreements. Regarding the amount paid me I find upon examination that the amount of \$35.05 you paid me Jan. 21/86 was a balance due me for money paid out by me the amount of \$174.42 paid March 12th/84,

\$50 was for costs paid to me T. B. Brooks and the remainder of \$125 was settled as follows:

Interest in judgment.....	\$875 81
Less amount received.....	124 42
Leaving a balance of	
Interest of.....	\$711 39

which you paid by draft on my firm March/88. In conclusion permit me to add that I fully appreciate your remarks relative to having a family dependent upon you, and it is with a sense of pleasure and satisfaction that I refer to my action and treatment towards you and yours.

"I feel warranted in saying that they have ever been of the most friendly nature. All I desire is my own. I wish nothing more and should my explanation not be sufficient to enlighten your legal head, I am ready to explain everything to the satisfaction of any honorably disposed person."

On July 15, 1907, H. & C. Newman wrote to David Sless individually, expressing dissatisfaction with his having failed to comply with his promises made to them while in New Orleans, and urging him to go down to New Orleans and see their firm, otherwise they would write Mr. Peterman to institute legal proceedings against him.

This letter was the last attempt made by them to bring about a pacific settlement. What these letters refer to is not explained. A previous letter of April 12, 1897, refers to some agreement with reference to a redemption of some land in respect to which they claimed that Sless' understanding of the matter was wrong, and urging him to comply with the agreement as contended for by them.

We have examined the case with care, and have reached the conclusion that the claim of the defendant that the notes and mortgage executed by defendant in 1890 included the judgment of Hambro & Sons and interest thereon is not borne out by the record. The record shows that, at the date of the defendant's application in 1890 to Judge Coco to be authorized to create a debt secured by mortgage on her property to release its existing mortgage notes on the same, there were mortgage notes outstanding representing the credit portion of price of the properties sold to the defendant on the 29th of December, 1886, by Alonzo Boyer, and the credit portion of the price of the sale made on the 10th of May, 1876, by Jules Defousses, administrator of the succession of Elizabeth Bowman, to the defendant, in confirmation of the purchase of the property of that succession which she had made at judicial sale in that succession.

The aggregate amount of those outstanding mortgage notes was the sum of \$2,633.58, being the same amount for which she recognized and admitted in the act of special mortgage passed on the 14th of April, 1890, that she was indebted to Henry Newman for money advanced and paid by him to her for the purpose of enabling her to liquidate and discharge her separate property from the lien and obligation of certain mortgage debts with which her separate property was incumber-

ed. The fact that such advances were made by Newman was not denied in 1898, when Mrs. Sless was a second time before the district judge for examination and interrogation. In representation of the indebtedness so recognized, defendant executed the notes referred to in that act, and secured payment of the same by special mortgage thereon granted in favor of Henry Newman. The mortgage notes for which Newman advanced defendant money to liquidate and pay were unquestionably debts which inured to her separate use and benefit, as they represented the credit portion of the price of property which through such sales became her own individually, which fact is admitted. The defendant evidently knew herself very little of her husband's business affairs, and based her testimony upon what she had been told by others was the situation. But for this, it would be singular that she should have denied under oath that she had ever granted a mortgage in favor of Thompson, of Boyer, and of Defousses, when there was authentic evidence at hand to disprove her statements. The same may be said of her denial that Newman had paid her the amount of the insurance money due to her from the loss by fire of her gin, and the amount of \$50 which he had received from the railroad company for a right of way over her property.

It is true that he did not pay that money directly into her hands, but he applied the same towards the payment of the mortgage notes which he then held. He (Newman) did unquestionably make such application of the money so received. The legal capacity of a married woman to create debts against herself and to mortgage her property is not made essentially dependent upon the fact that a district judge should have authorized her to create such debts and to execute such mortgages. Such certificate and authorization are merely accorded by law to her as a protection from her own imprudence or ignorance, and a protection to the public who might act on the strength of her having the needed capacity.

When a married woman having recourse to proceedings under articles 126 and 127 of the Civil Code not only fails to avail herself of the benefits to accrue to her from the opportunity afforded her thereby, but, on the contrary, makes use of the same as an instrumentality to deceive or mislead the judge and the public by misstating or suppressing the actual facts of the case, she should not be permitted to avail herself later of the actual facts of the case to work injury upon those who have shaped their course relying upon her action and conduct. A married woman is not released from all responsibility for what she does. *Hellwig v. West*, 2 La. Ann. 2; *Sausley v. Joubert*, 51 La. Ann. 1048, 25 South. 934; *Dougherty v. Hibernia Ins. Co.*, 35 La. Ann. 629.

It is unnecessary to discuss whether the

plaintiff acquired the notes held by him before or after maturity, for, granting they were purchased by him after maturity and with the equities open as between Newman and herself, we do not think that they can be urged in this case against plaintiff, who not only has acted in good faith and in ignorance of any equities, but, on the contrary, did so by reason of defendant's action and conduct.

We are of the opinion that the judgment appealed from is erroneous in some respects, and that plaintiff is entitled to judgment as prayed for by him.

For the reasons herein assigned, it is hereby ordered, adjudged, and decreed that the judgment appealed from be, and the same is hereby, altered and amended so that the plaintiff, Louis Kohlman, do have and recover judgment from the defendant, Mrs. Clara Cochrane, wife of David Sless, the sum of \$3,400, with interest thereon at the rate of 8 per cent. per annum from the 1st day of January, 1899, until paid, subject, however, to a credit of \$704.42 to take effect on and from the 28th day of October, 1901, and that the special mortgage and hypothecation referred to and recited in plaintiff's petition be recognized as existing upon the separate property of the defendant, described in plaintiff's petition, and enforced against the same to satisfy and pay the amount of plaintiff's judgment and costs.

On Rehearing.

PROVOSTY, J. In 1875 the defendant, Mrs. Clara Cochrane, wife of David Sless, residing in Avoyelles parish, obtained a judgment of separation of property from her husband, owing to the embarrassed condition of his affairs.

From that time to 1896, inclusive, she did business with H. & C. Newman, of New Orleans, commission merchants, receiving advances from them and shipping her cotton to them.

In 1876 she acquired some real estate, partly cash and partly on credit; and for the credit part executed her four notes, each for \$170, falling due in one, two, three, and four years, respectively, and bearing 8 per cent. interest from date. To secure same she gave a mortgage on the property. Also the vendor's privilege was reserved.

In December, 1886, she bought, partly cash and partly on credit, other real estate, the same which her vendor had bought from her husband some months before. For the credit part she executed her two notes for \$500 each, payable respectively on January 1, 1888 and 1889. To secure the payment of these notes she gave a mortgage on the property. Also the vendor's privilege was reserved.

In 1890, with the authorization of her husband and of the judge, she executed a mortgage in favor of Henry Newman, of the firm

of H. & C. Newman, for \$2,633.58, for which she gave her notes. Both the certificate of the judge authorizing her and the act of mortgage recite that the mortgage is given for money borrowed by her to be used in paying certain debts secured by mortgage on her property.

In 1897, with the authorization of her husband and of the judge, she executed in favor of the same Henry Newman the mortgage notes upon which the present suit has been brought. In her petition to the judge asking for the authorization she said that Henry Newman holds against her the four mortgage notes of the mortgage of 1890, amounting to \$1,825, and also another mortgage note of \$1,100, executed by her in favor of H. & C. Newman in 1894; that said notes had been given for her debts, and that she desired to pay same, and for that purpose to execute a new mortgage. The judge's certificate contains the usual recital of his having examined her separate and apart from her husband and ascertained from her answers that the statements of her petition were true. The mortgage was given for \$4,473.54, represented by six notes, to the order of the maker and by her indorsed in blank, for the amounts, and falling due, as follows:

\$473.54, due Jan. 1, 1899;

\$600, due Jan. 1, 1900;

\$800, due Jan. 1, 1901;

\$900, due Jan. 1, 1902;

\$900, due Jan. 1, 1903;

\$900, due Jan. 1, 1904—

all bearing 8 per cent. interest from January 1, 1899.

The defendant paid the first and second of these notes, and paid all of the third except \$229.33. She has paid nothing on the others.

The plaintiff, Kohlman, testified that he acquired this partially paid note and the unpaid notes from H. & C. Newman in good faith for valuable consideration. He gives the date of his acquisition, which would show that he acquired the two notes due January 1, 1903 and 1904, before maturity, but the others after maturity.

For answer, defendant pleads the general denial. She specially denies that the notes have ceased to belong to Henry Newman. She avers that they were given in renewal of a mortgage given by her to the said Henry Newman in 1890 for a debt of her husband; that neither of said mortgages was executed by her of her own free will, but through the entreaties and threats of her husband and said Newman.

Defendant testified that the mortgage of 1890 was given for a judgment of \$1,100, which a certain firm of Hambro & Sons had obtained against her husband, plus interest, and plus also \$711 of interest which said Newman had paid on said judgment, and interest on this interest. What the balance of the mortgage was for, defendant does not

say, but she says generally that it was for a debt of her husband.

She testified that the mortgage of 1898, now sued on, was given in renewal of the balance due on the mortgage of 1890, and for a debt of her own of \$1,400. She testified further that all these mortgages were given by her by reason of threats made by said Newman and of the entreaties and threats of her husband, and not of her own free will.

Defendant's husband testified that he acted as agent of his wife during the time she dealt with H. & C. Newman, and that she came out with money each year except the last, 1896.

Henry Newman, as a witness for defendant, testified that his firm did business with Mrs. Sless, beginning in 1875 until recently, and during that time occasionally lent money to David Sless individually; that the mortgage of 1890 was given to cover a then existing indebtedness, being a balance due after business dealings of about 15 years. He says that it is impossible for him to furnish the accounts of those years, because the records of his business for that time have been disposed of to junk dealers. That he does not recall that any obligation of David Sless was ever charged to his wife's account. That he made personal loans to David Sless, and still holds his notes for same.

The testimony of defendant that the mortgage of 1890 was given for a judgment against her husband does not harmonize very well with her declaration to the judge that she desired to borrow the money to liberate her property from incumbrances, and with her recital to the same effect in the act of mortgage. Nor does it harmonize with the testimony of her witness Newman that the mortgage was given for a balance due in her business of many years with his firm, and that he does not recall that any debt of her husband was ever charged to her. Again, her statement with reference to the interest which was added to the face amount of the Hambro & Sons judgment in making up the amount of the mortgage of 1890 does not accord with an agreement offered in evidence by herself, dated March, 1888, reciting that all interest on said judgment up to date has been paid, and that an extension of time is granted for payment of the principal.

The learned judge a quo considered that defendant had proved that the mortgage of 1898 had been given for a debt of the husband, except as to the \$1,400, which defendant acknowledged to have been her own debt. He thought, however, that defendant, having been authorized by the judge to execute the notes, was precluded from setting up equities as against a bona fide holder for value before maturity; and he found that one of the notes, that last maturing, had been acquired before due. For the amount of this note he gave plaintiff judgment, and dismissed his suit for the remainder.

We agree with our learned Brother on the two points that the equities are open to defendant as to the notes acquired after maturity, and that they are not as to those acquired before maturity. The defendant, having been authorized by the judge to contract, could bind herself as a feme sole, and therefore she is bound for the note or notes acquired before maturity as a feme sole would be in her place. But a feme sole could set up equities as against a holder who had acquired after maturity; and because defendant is a married woman and can contract as a feme sole is no reason why she should be in a worse position.

The case of *Koechlin v. Thontke*, 28 La. Ann. 737, to which we are referred by the learned counsel for defendant, in support of their contention that even as against a bona fide holder before maturity a married woman duly authorized by the judge can set up that her mortgage note was given for a debt of her husband, is not in point. The authorization of the judge in that case was informal and illegal on its face; it authorized the giving of a mortgage to secure an already existing debt, which is a thing the act of 1855, now articles 125, 126, and 127, Civ. Code, does not authorize, as has been repeatedly decided. *Falconer v. Stapleton*, 24 La. Ann. 89; *Brooks v. Stewart*, 26 La. Ann. 715; *Conrad v. Le Blanc*, 29 La. Ann. 125; *Gibson v. Hitchcock*, 37 La. Ann. 212, 333; *Berwick v. Frere*, 49 La. Ann. 229, 21 South. 602.

Decisions more nearly in point are those where it has been held that the lender of money to a married woman is protected by the certificate of the judge where he has made the loan in good faith believing it to be for the benefit of the wife. *Reich v. Rosselin*, 26 La. Ann. 418; *O'Keefe v. Handy, Shff.*, 31 La. Ann. 832; *Henry v. Gauthreaux*, 32 La. Ann. 1107; *Sausley v. Joubert*, 51 La. Ann. 1048, 25 South. 934; *Dougherty v. Ins. Co.*, 35 La. Ann. 629, and cases there cited.

Cases exactly in point are *Miller v. Wisner*, 22 La. Ann. 457; *Locke v. Lafitte*, etc., 28 La. Ann. 232; *Taylor v. Boules*, 28 La. Ann. 294.

We are not as well satisfied as our learned Brother was upon the facts of the case, especially in view of statements made by counsel on both sides in the course of the argument as to what they could prove if an opportunity were offered. We have therefore concluded to remand the case for trial on the facts.

We will add that, as a matter of course, the nature of a debt is not changed by its renewal, or by the renewal of the evidence of it, or of the securities given to secure it. So that, if the consideration of the mortgage of 1898 was given in renewal of preceding mortgages, the question will have to be

whether these preceding mortgages were given for a debt of the husband.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be set aside, and that his case be remanded for further trial.

NICHOLLS, J., concurs in the decree.

(123 La. 243)

No. 17,290.

PROVIDENT BANK & TRUST CO. v.
SAXON et al.

LOUISIANA NAT. BANK v. HENDERSON
et al.

(Supreme Court of Louisiana. March 15, 1909.)

CONSTITUTIONAL LAW (§ 154*)—OBLIGATION
OF CONTRACTS.

Act No. 120, p. 281, of 1904, entitled "An act recognizing the validity of corporations heretofore attempted to be formed under the laws of this state and providing that the validity of their acts and contracts shall be the same as if said corporations had been always valid," is held, for reasons assigned, to be not unconstitutional as impairing the obligations of contracts.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 467, 469; Dec. Dig. § 154.*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Fred Durieve King, Judge.

Actions by the Provident Bank & Trust Company against W. L. Saxon and others, and by the Louisiana National Bank against Thomas J. Henderson and others. The actions were consolidated. Judgment for defendants, and plaintiffs appeal. Affirmed.

Miller, Dufour & Dufour, Henry Mooney, and Frank McGloin, for appellants. Lyle Saxon, for appellees Walter L. Saxon, Edward Aarons, Col. Peter F. Pescud, Claude Smith, and Capt. James B. Sinnott. Samuel Louis Gilmore, for appellee Col. Peter F. Pescud. Richardson & Soule and J. Sexton, for appellees Dr. Luther Sexton and E. S. Maunsell. McCloskey & Benedict, for appellee T. J. Henderson. Rice & Montgomery, for appellee Robert W. Willmot. Charles Louque, for appellee H. A. Testard. James Edwin Zunts, for appellee C. N. Dudley.

NICHOLLS, J. These two cases were consolidated in the lower court. They were before the court separately in 1906, each appealing from a judgment of the district court sustaining an exception "of no cause of action" and dismissing their suits. The judgments were reversed, and the cases were remanded to the lower court for further proceedings according to law. See *Louisiana National Bank v. Henderson et al.* (No. 15,873) 116 La. 414, 40 South. 779, and *Provident Bank & Trust Company v. Saxon et al.* (No. 15,874) 116 La. 408, 40 South. 778.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and where the pleadings in each will be found. As the court stated in its opinion in the former case that the allegations therein were more far-reaching than those in the one last mentioned, we will transcribe at length the allegations of the petition in No. 15,873, noting later the differences between them and the petition in 15,874, if deemed necessary. The plaintiff in No. 15,873 alleged that:

"The parties hereinafter named are each one in solido indebted to petitioner in the sum of six thousand eight hundred and twenty-six and $\frac{21}{100}$ dollars, besides interest and costs of suit, for this, to wit: That the parties hereinafter named have in law and in fact been engaged in the buying and selling of mineral waters, personal property, and for and in the prosecution of said business have been associated in the commercial partnership, and as to the same are and have been commercial partners; that the said business or commercial partnership has been carried on by the parties hereinafter named, under the name and style of the 'Vossburg Mineral Springs Company, Limited,' under the pretense that the same was a corporation, whereas, in law and in fact, the said Vossburg Mineral Springs Company, Limited, and the said parties hereinafter named, were not and did not form a corporation; that the said contract between the parties was one of partnership, commercial in its character, and in which each one of the said parties was and is liable as a commercial partner; that in the attempted organization of the said so-called corporation the law was violated or not complied with in many particulars, especially in the following, to wit:

"That while the pretended charter of said so-called corporation evidenced by authentic act passed before Fergus Kernan, notary public, in this city on August 27, 1902, was recorded in the mortgage office for the parish of Orleans, in book 723, folio 629, there was not recorded then or at any other time in said mortgage office the original subscriptions made for the purpose of organizing said pretended corporation, in which respect there was a total failure to comply with the law prescribed for the validity of such a corporation or the valid creation of such a corporation, in consequence of which no corporation was created, and all members engaged in the prosecution of said business, under the color of said pretended incorporation, became and remained liable as commercial partners, and are liable as such in solido, for and upon all contracts and for any doings of the said pretended corporation; that although the said authentic act of incorporation aforesaid was recorded in the office of the recorder of mortgages for the parish of Orleans, besides the fact that the original subscriptions for the purpose of organizing the same was not therein recorded, it is, and was also, a fact, that there was an entire failure or omission to publish the said pretended charter in a newspaper at the domicile of said pretended corporation, in accordance with law; that said publication was made in a religious paper published weekly, known as the 'Southwestern Presbyterian,' which is a religious paper of special and limited circulation, and such was not in compliance with the requirements of law touching such publication.

"That, under the statutes in such cases made and provided in the law, the publication of a charter of any corporation to be valid and effective must have been in a secular paper published daily and of general circulation. That the following named parties all residing in this city were those who, as commercial partners, engaged in the business aforesaid, under the name and style of the 'Vossburg Mineral

Springs Company, Limited,' a pretended corporation, the creation and organization of which was not in accordance with law, as aforesaid, and who, by noncompliance with the requisites of law as aforesaid, made themselves liable and responsible, in solido, for all of the contracts and doings of the pretended corporation in the same manner and to the same extent as commercial partners, engaged in such commercial business, to wit: Thomas J. Henderson, James B. Sinnott, Edward Aarons, Peter F. Pescud, John H. Kamlade, Robert W. Wilmot, Henry A. Testard, Walter J. Saxon, Charles L. Dudley, Claude M. Smith, Edward J. Maunsell, and Luther Sexton.

"That all of said parties falsely claiming to be a corporation, as petitioner then and there erroneously believed, and acting under and by virtue of the said attempted incorporation of the said Vossburg Mineral Springs Company, Limited, the incorporation of which was invalid for the reasons hereinbefore set out, and assuming without authority to act as such corporation, then and there maintained in its name, with petitioner, and as incidental to said commercial business, a deposit account; that under said assumed corporate name the said parties discounted with petitioner its drafts against the several persons named, and for the amounts set out in the statement filed herewith as part hereof; that the proceeds or the avails of said discount of the said drafts, drawn ostensibly by said pretended corporation, but in reality drawn by said parties, were to and with their full knowledge and consent, passed to the credit of the said so-called corporation, said Vossburg Mineral Springs Company, Limited, to and upon the said deposit account kept by said parties in the name of said pretended corporation, and by petitioner paid out in due course on the checks of the said pretended corporation under the name of which said defendants operated and did business; that all of the aforesaid acts and doings of the said Vossburg Mineral Springs Company, Limited, were, in reality, the acts and doings of the said parties defendant aforesaid, acting together as commercial partners in the business aforesaid, but pretending to act as such corporation; that the discounts of said drafts aforesaid, and the proceeds or avails thereof, were received, realized, and reduced to possession by said parties defendant, unlawfully under the acts of the pretended corporation aforesaid, in violation of law, of which facts they had then and there full knowledge, but of which petitioners were then and there ignorant.

"That all of this was done by and through Henry Mordecai, the agent and representative of said so-called corporation, and the aforesaid partners pretending to act as such corporation, and the said proceeds of the said drafts were duly received, used, and employed in said business by said parties, pretending to act as the corporation aforesaid, and in violation of law.

"That the aforesaid business incidental to which the said drafts were discounted by petitioner and passed to the credit as aforesaid, and used by the said parties pretending to act as such corporation, was the buying and selling of mineral springs water, personal property, and the business by reason of the character which said parties became bound and liable in solido as commercial partners in any contract, matter, or thing relating to the same. That, prior to and at the time of the creation of said indebtedness by said parties, petitioner was ignorant of the said failure to comply with the law regarding said attempted or pretended corporation, but only learned of the same long after the creation of said indebtedness. That said indebtedness so created by said parties, claiming unlawfully to act as such corporation, to petitioner, amounts to the aforesaid sum of six thousand eight hundred and twenty-six and $\frac{21}{100}$ dollars, after allowing the proper credits upon the

same, as is shown by said account, and is now wholly due, owing, and remaining unpaid.

"In view of the premises, petitioner prays that the said Thomas J. Henderson, James B. Sinnott, Edward Aarons, Peter F. Pescud, John H. Kamlade, Robert W. Wilmot, Henry A. Testard, Walter L. Saxon, Charles N. Dudley, Claude M. Smith, Edward S. Maunsell, and Luther Sexton, may, each one of them, be duly cited to appear and answer this petition, and that, after due proceedings had, petitioner have and recover judgment against each one of said defendants in solido in the full sum of six thousand eight hundred and twenty-six and $\frac{21}{100}$ dollars, with legal interest thereon from judicial demand until paid, for costs and for general relief."

After pleading various exceptions, the defendants answered, pleading a general denial, and all for the purposes of this opinion substantially answering alike. They admitted that they were stockholders in the Vossburg Mineral Company, Limited, but denied that they were organizers of the company or had anything to do with the organization of same, or signed any subsequent list of original subscribers, or at any time subscribed to the treasury stock of said company; that they acquired the stock which they held in said corporation for value in the open market, in good faith believing that said stock was issued by a regular and legal corporation; that they never at any time held themselves out as members of any partnership concerning the business and purposes of said corporation, and that neither plaintiff nor any other person when dealing with said Vossburg Mineral Springs Company, Limited, ever supposed that said company was a copartnership, or that defendants were liable as members of a firm or copartnership. They specially averred that plaintiff in this case dealt with the said Vossburg Mineral Springs Company, Limited, in the belief that it was a corporation, and that said plaintiff was acquiring rights as against said corporation. They averred that they were informed and believed that the Vossburg Mineral Springs Company, Limited, was a legally organized corporation in this parish and state, and that if any irregularity existed in the formation or organization thereof, nevertheless said corporation was, in law and in fact, a de facto corporation, and that plaintiff had no right to treat the stockholders of said corporation as partners in a commercial firm. Further, that if such irregularities existed in the formation and organization of the said Vossburg Mineral Springs Company, Limited, which was denied, same was cured by the provisions of Act No. 78, p. 191, of 1904, and by Act No. 120, p. 281, of 1904 of the General Assembly of Louisiana, which respondents pleaded as a special defense in this suit. That before the plaintiff herein dealt with the Vossburg Mineral Springs Company, Limited, a special inquiry was made into the standing and condition of said company, and the making of said loan herein sued on was especially discussed, and the

said directors making said loans made special and particular inquiry into the matter, and then dealt with the Vossburg Mineral Springs Company, Limited, as a corporation; that the plaintiff herein is now estopped from attempting to hold the shareholders of said Vossburg Mineral Springs Company, Limited, as partners in a commercial firm, and that said plaintiff is estopped from attempting to enforce the contract herein in any other sense, or with any other effect, than both parties to said contract understood would be given said contract when it was entered into. That said contract was entered into with the mutual understanding of both parties thereto that the said Vossburg Mineral Springs Company, Limited, was a corporation, and that said contract would be effective only as a contract with a corporation, and would bind the property of the said Vossburg Mineral Springs Company, Limited, only as the property of a corporation would be bound, and that no other liability than that would arise out of said contract; that plaintiff herein was without right legally or equitably now to seek to give another and a wider effect to said contract, and to hold your respondents as liable thereunder.

Respondents especially showed that after plaintiff had dealt for many months with the Vossburg Mineral Springs Company, Limited, a corporation with all the forms of transactions with a corporation, and had confirmed the shareholders of said corporation in the belief that said corporation was legal and valid and was accepted and dealt with by plaintiff, that plaintiff was now estopped from changing its position and from attempting to hold the said Vossburg Mineral Springs Company, Limited, as a commercial partnership and your respondents as partners therein.

Respondents further averred and showed that all the transactions and dealings between the plaintiff herein and the Vossburg Mineral Springs Company, Limited, were through Henry Mordecai in the express capacity as president of the Vossburg Mineral Springs Company, Limited; that said dealings and transactions were all based on the assumption and belief, both by the plaintiff herein and by the said Henry Mordecai, that said Vossburg Mineral Springs Company was a legally valid and existing corporation; and that if the said plaintiff and the said Henry Mordecai were mistaken in their said assumption and belief, then the said contracts between them were null and void, and the plaintiff's remedy was by an action against the said Mordecai for money had or received or borrowed by him; and respondents especially and expressly denied that they ever intended or considered themselves to have formed or entered into a commercial partnership or firm, and they expressly denied that there ever was a commercial partnership or firm existing between them, and they especially denied that

they ever authorized said Mordecai or any one else to represent or act for or bind them as a commercial firm or partnership in any partnership.

In view of the premises, respondents prayed that, after due hearing and proceedings had, plaintiff's suit be dismissed at its costs, and for all such further and general relief as may be proper in the premises.

On January 3, 1905, counsel for plaintiff filed the following pleadings in court:

"In view of the fact that defendants on trial of exceptions by them herein presented have pretended and maintained that the acts of the General Assembly of this state, Nos. 78 and 120, of the Session of 1904, constitute and establish a discharge to defendants and exceptors from the obligation set forth in the petition herein and charged against them, the Provident Bank & Trust Company, plaintiff herein, for defense against the said plea and contention of defendants, itself pleads that if the said statutes are to be interpreted and held as carrying with them, and having the effect so contended for, or having the meaning pretended by defendants and exceptors, the said statutes are, in such event or view, unconstitutional, null, and void, as being against the Constitution of the United States, and against, also, the Constitution of this state, in that they seek to impair the obligations of the contract or contracts described in the petition herein, and to divest the vested rights of petitioner in the premises for a private purpose and without compensation made: that the said statutes, if in their body and text intended to have the retroactive effect claimed for them by defendants, and to be held as calculated or meant by their terms and expressions to apply to and govern past and perfected contracts of any sort, or to govern or apply in any way to contracts with third persons, or to the extent that same may be suggestive of such retroactive effects of any kind with third persons, contrary to the Constitution of this state, in that the titles to said statutes contain no mention, suggestion, or intimation of the presence in the body or text of the statutes of any provisions intended to have or accomplish such retroactive effect, or to touch upon, in any way contracts, particularly past, with third persons."

Plaintiff prayed that:

"If the statutes above named be held or considered, as by their terms or expressions, applying to affecting or impairing in any way the contract or contracts, and divesting the vested rights, titles, or taking away the property of petitioner as set forth and described in the petition herein, that said statutes be decreed, in so far as they pretend to apply or affect in any way petitioner's contract or contracts, or impair the obligations thereof, or affect injuriously its property, or divest its vested rights, are unconstitutional, hence null, void, and of no effect, and of no force, and for general relief."

On June 29, 1908, the district court rendered the following judgment:

"Louisiana National Bank vs. T. J. Henderson et al. Provident Bank & Trust Co. vs. Walter L. Saxon et al. No. 74,440. Civil District Court, Division B.

"This matter having been submitted to the court for adjudication, and the court considering the law and the evidence to be in favor of defendants and against plaintiffs, for the reasons orally assigned:

"It is ordered, adjudged, and decreed that there be judgment in favor of defendants R. W. Wilmot, Walter L. Saxon, Peter F. Pescud,

Edward Aaron, J. B. Sinnott, Claude M. Smith, Henry A. Testard, T. J. Henderson, Dr. Luther Sexton, E. S. Maunsell, and against plaintiffs, Louisiana National Bank and Provident Bank & Trust Company, rejecting said plaintiffs' demand at its costs. Judgment rendered and read in open court, June 23rd, 1908. Judgment read and signed in open court, June 29th, 1908."

Plaintiff appealed.

We have said that the allegations of the Provident Bank are somewhat different from those of the Louisiana National Bank. The only averment, we think, we need allude to is the additional averment of the Provident in its attack upon the organization of the Vossburg Mineral Springs Company, Limited:

"That that company had never had a true capital subscribed of \$5,000, as required by law," and "that the pretended charter does not fix any manner of payment, or terms of payment, of its alleged stock, as enjoined by section 685 of the Revised Statutes, and that there never was any real subscription to stock of the said corporation, or any intention of the parties forming same to so subscribe; that there never were payments for such stock either made or intended by the parties concerned."

On the 27th of August, 1902, Henry Mordecai, John E. Hollingsworth, and Robert E. L. Goldsborough appeared before Fergus Kernan, notary public in and for the parish of Orleans, and two witnesses, and declaring that, availing themselves of the provisions of the act of the Legislature of this state known as "Act No. 36, p. 27, of the session of 1888," approved June 29, 1888, as well as those of the state relative to the organization of corporations, they, by those presents, formed themselves and those whom they represented into and constituted a corporation for the objects and purposes, and under the stipulations and conditions, set forth in the act, which they adopted as their charter.

They then proceeded to declare the name and title of that corporation to be "The Vossburg Mineral Springs Company, Limited," and the domicile to be in the city of New Orleans. It was to have and enjoy succession of its corporate name for a period of 99 years. It might hold, purchase, lease, sell, convey, sublease, pledge, and mortgage property, real, personal, and mixed, sue and be sued, have a seal, with such inscription and device as might be selected by the board of directors, and to change the same at pleasure. The president, or, in his absence or inability to act from any cause, the secretary, was designated as the officer upon whom citation or other legal process should be served. The objects and purposes for which the corporation was organized and the nature of the business to be carried on by it were declared to be to purchase, hold, lease, or otherwise acquire mineral springs property and to operate the same in the state of Louisiana or in any other states or territories of the United States of America or foreign countries, and to do any and all things necessary and requisite to develop and promote the operations of such mineral springs property

and for the sale of the waters thereof; to sell, convey, lease, and sublease the same, and also to rent, purchase, build, or otherwise acquire hotel property or other property, and to conduct the business of hotel keeping in all its various branches, and to sell, convey, lease, or sublease such said hotel property whenever the corporation might see fit. The capital stock of the corporation was declared to be the sum of \$100,000, divided into 1,000 shares of \$100 each, to be issued and paid for in cash, or in property, all rights as above named, or for services rendered to said corporation or for other valuable consideration, in such manner and at such time or times as the board of directors might direct. The affairs of the corporation were to be managed by a board of seven directors. The first board of directors should be composed of Henry Mordecai and E. S. Maunsell, New Orleans, La., L. A. Mordecai, Denver, Colo., Henry A. Mordecai, W. C. Mordecai, R. E. L. Goldsborough, and John E. Hollingsworth, New York.

They could make, change, modify, and alter all by-laws, rules, and regulations for the management of the business thereof as they might think proper, purchase, lease, sell, sublease, mortgage, and pledge property, real, personal, and mixed, make and assign notes, bonds, and contracts, and, generally, do all such other matters and things as are necessary and proper for the successful management of the business of the corporation.

No stockholder should ever be held liable or responsible for the contracts or faults of the corporation, or in any further sum than the amount of his indebtedness to the corporation, nor should any mere informality in the organization of the corporation have the effect of rendering its charter null, or of exposing a stockholder to any liability beyond the amount of his or her shares.

The foregoing act of incorporation of the Vossburg Mineral Springs Company, Limited, was recorded in the recorder of mortgages' office on the 28th of August, 1902.

Under the number "120," the General Assembly of the state of Louisiana, of its session of 1904, enacted an act entitled:

"An act recognizing the validity of corporations heretofore attempted to be formed under the laws of this state, and providing that the validity of their acts and contracts shall be the same as if said corporations had been always valid."

The first section provides that whenever persons have undertaken to form a corporation under any of the existing laws of this state, and have executed, recorded in the mortgage office, and published their charters, the corporations so formed and subsequently doing business as corporations are hereby recognized and declared to be, now and hereafter for the term stated in their charters, valid corporations, notwithstanding that the charters may have authorized the carrying on by one corporation of several branches of business,

the carrying on of which by corporations is authorized by different statutes of this state, and notwithstanding irregularities in the proceedings and instruments of the incorporation.

The second section provided that the validity of all contracts made, and acts generally, by said corporations, and the liability of shareholders therein, shall be in all respects the same as if the said corporations had been regular and valid from the beginning.

The defendants are not charter members of the Vossburg Mineral Springs Company, Limited. They acquired the stock which they hold under that company, acting ostensibly as a legally organized corporation engaged in a business not forbidden by law, with stockholders whose responsibility as such was under the provisions of section 686 of the Revised Statutes was expressly declared should not extend beyond their liability to it for the shares which they owned. It is not claimed that in the conduct of its business it has passed outside of the purposes for which it was created.

They are not in this suit resisting a demand for the forfeiture of the charter of the corporation in which they are stockholders, nor for the enforcement by proper parties, and in proper manner and form, for the enforcement to the full extent of their liability to that corporation for the shares which they own. Had this suit been of that character, issues would have been before us entirely different from those which are now submitted to us for decision.

As matters stand, defendants are defending themselves against a direct action brought against themselves personally by a plaintiff in enforcement of a contract which it had made, not with them, but with the corporation in which they are members, basing themselves entirely upon the fact that they were stockholders in that corporation, and ignoring the corporation itself.

Plaintiffs seek to extend their rights entirely beyond those which their contract gave them when entered into, and at the same time to broaden the liability of the stockholders otherwise and far beyond that which they consented to incur towards the corporation when becoming such under their contract with it.

Consequences not contemplated by any of those concerned would result if persons buying a small amount of stock in a de facto corporation should become responsible as commercial partners towards those who had dealt with it as a corporation to the full amount of claims held by them against that corporation, because of some defect in the organization of that corporation.

The plaintiffs in making their contracts were left perfectly free to select the persons with whom they should do so. They were at liberty to confine their business entirely to dealing with individuals who would engage all of their property, present or future, to se-

sure the payment of their obligations, or they could, if they thought proper, enter into contracts with corporations or associations and depend entirely on the enforcement of their claims upon the property belonging to them and upon the personal liability of the stockholders to the corporation. If they should elect to deal with such persons, it was their duty to inform themselves of the situation before taking action. In this instance plaintiffs were fully advised that they were dealing with a limited liability company of some kind; the passbook which they furnished the company bore upon its face that it was dealing with a limited company. They took the chances of dealing with it being profitable, and when they found it was not so they could not turn upon the stockholders, with whom they had no contract. That is precisely what they are attempting to do.

Defendants claim that plaintiffs' demands against them (if they ever existed, which they deny) is barred by the provisions of Act No. 120, p. 281, of 1904. Plaintiffs urge that that statute is unconstitutional "in that it impairs the obligation of contracts." We do not see wherein that statute has had the effect of impairing the obligation of any contract. On the contrary, it has had the effect of effectuating the contract entered into between the parties at its origin, and of holding all parties to the exact legal situation in which each had placed itself at that time, and of not permitting any of the parties to depart from it. If, under the statute, each party obtains everything which it was legally entitled to claim, or to obtain through its own contracts, it is impossible to discover wherein the obligations of any contract have been impaired.

What the plaintiffs really complain of is that they have been prevented by the statute from widening their rights under their contracts, and, by urging that they had committed an error of fact as to the capacity of the person with whom they had dealt, they could profit by the error. That is a very different matter from asserting that the rights of the parties, under the contract as made, had been impaired. We find no feature of unconstitutionality in the statute. Plaintiffs have no constitutional right to complain of its provisions. We find that the conditions of Act No. 120, p. 281, of 1904, have arisen under which the organization of the Vossburg Mineral Springs Company, Limited, if defective at its creation, was, and could, and should be legalized, and, also, its contracts ratified and confirmed, and, therefore, that plaintiffs' demands and contentions asserted herein are not well grounded, but, on the contrary, that they are neither just nor well founded. All the parties must be held to their contracts as made, and this must be enforced against the persons with whom made. There have been at no time contractual relations between the

plaintiffs and the defendants. The following language of the Supreme Court of Tennessee, in *Shields v. Land Co.*, 94 Tenn. 123, 28 S. W. 668, 26 L. R. A. 509, 45 Am. St. Rep. 700, is pertinent to this case:

"Clearly the act of 1890 (Acts Ex. Sess. 1890, p. 43, c. 17), does not impair the obligation of any contract with complainants, for they had no contract with the individual themselves. Their contract was with the corporation; hence that act, which gives life to the corporation, effectuates, rather than impairs, the life of its contract. No more does the act divest or impair any vested right of the complainants. They have no vested right in the defect in the charter of the Clifton Hill Land Company; hence the cure or removal of that defect did not divest or impair any vested rights of theirs. The right to sue the defendants personally was not a vested right in legal contemplation. It was but a consequential right resulting from the disability of the corporation, and not a right flowing from any contract with the individuals as such. The mutual intention was to bind the corporation, not the incorporators, for the price of the land, and no vested right could arise contrary to that intention. A law which facilitates the intention of the parties to a contract never impairs its obligation, or divests or impairs any vested right thereunder. As forcibly remarked by Mr. Justice Washington in an early case, 'It is not easy to perceive how a law which gives validity to a contract can be said to impair the obligation of that contract'"—citing *Satterlee v. Matthewson*, 2 Pet. 412, 7 L. Ed. 469.

It is therefore ordered, adjudged and decreed that the judgment appealed from be, and it is hereby affirmed.

(123 La. 257)

No. 17,101.

CAMP v. BALDWIN-MELVILLE CO. et al.
(Supreme Court of Louisiana. Feb. 15, 1909.
Rehearing Denied March 29, 1909.)

1. CUSTOMS AND USAGES (§ 14*)—ADDING TO TERMS OF CONTRACT.

Where, in a contract of employment, a definite term is agreed on, evidence as to usage in similar cases is irrelevant and inadmissible, since, the contract being lawful, usage cannot be substituted for the will of the parties.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 29; Dec. Dig. § 14.*]

2. CUSTOMS AND USAGES (§§ 14, 19*)—ADDING TO TERMS OF CONTRACT—EVIDENCE—SUFFICIENCY.

A theatrical manager having telegraphed to an actor, "Telegraph, here, lowest salary for next season, opening about September first, possible," and the actor having replied, stating his terms, and the manager having telegraphed again, offering somewhat less than the amount demanded, and adding, "If accepted, consider yourself engaged; answer, here, without fail, to-night," and the actor having answered, accepting the offer, *held*, that the engagement was for the season, and that evidence tending to show usage, among theatrical people, whereby there should be read into the contract a stipulation giving to either party the right to terminate the relation resulting therefrom, on giving the other two weeks' notice, was irrelevant and inadmissible. *Held*, further, that the evidence (which was admitted, though, as subse-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

quently held, improperly) fails to show any such usage applicable to the case stated.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 29; Dec. Dig. §§ 14, 19.*]

3. MASTER AND SERVANT (§ 42*)—WRONGFUL DISCHARGE—OTHER EMPLOYMENT.

Where an actor, employed for the season, is discharged without cause before the close of the season, the fact that he may elsewhere earn money during the unexpired term of his contract has no bearing, under the law and jurisprudence of this state, upon his right to recover his salary for such unexpired term.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 42.*]

4. APPEAL AND ERROR (§ 173*)—PRESENTATION AND RESERVATION OF GROUNDS OF REVIEW—QUESTIONS NOT RAISED BELOW.

Where, in a cause in which there are two parties defendant, an agreement is entered into, in advance of the trial, to the effect that, quoad the plaintiff, the defendants, if liable at all are liable in solido, and shall be so condemned, without prejudice to their rights inter sese, and, pending the trial, one of the defendants goes into bankruptcy, placing the claim of the plaintiff on his schedule (though denying its validity), and is discharged, and judgment is thereafter rendered against the other defendant for the whole amount claimed, and such other defendant makes no complaint in the district court, and shows no injury, the judgment so rendered will not be disturbed, on the appeal, upon the suggestion that the agreement contemplated that both defendants should be condemned, and that plaintiff should have made the bankrupt's trustee a party defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079-1120; Dec. Dig. § 173.*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Thomas C. W. Ellis, Judge.

Action by Frank E. Camp against the Baldwin-Melville Company and Henry Greenwall. Judgment for plaintiff, and defendant Greenwall appeals. Affirmed.

Henry Denis and Clegg, Quintero & Gidierre, for appellant. Lazarus, Michel & Lazarus and David Sessler, for appellee.

Statement of the Case.

MONROE, J. Plaintiff alleges that he was employed by defendants, as a dramatic artist, for the theatrical season of 1904-05, at a salary of \$125 a week, and was discharged, without cause, before the expiration of the term for which he was employed, and he prays judgment for \$3,625 as the balance due for the unexpired time. The Baldwin-Melville Company admits that plaintiff accepted an offer of employment, made by it, at a salary of \$125 per week, payable weekly, and alleges that he entered upon his employment upon the terms and conditions, and with the understanding, usual in such cases, that the engagement might be terminated, by either party, upon the giving of two weeks' notice to the other; that he was given two weeks' notice "for the break in, or termination of," his engagement, and was laid off for four days, and that he acquiesc-

ed therein, and subsequently asked to be, and was, re-employed on the same terms; that, on receiving the notice of discharge of which he now complains, he obtained employment elsewhere, and has, since then, been earning a large salary in such other employment. Henry Greenwall denies that he had any contract with plaintiff; but there is an agreement in the record to the effect that any judgment that plaintiff may obtain shall be rendered against him and his codefendant in solido, without prejudice, however, to their rights inter sese.

The facts of the case appear to be as follows: Plaintiff, on June 27, 1904, at Columbus, Ohio, received from Walter S. Baldwin, then in New York, representing one or both of the defendants, a telegram reading:

"Telegraph, here, lowest salary for next season, opening about September first, possible."

To which he replied:

"One hundred and thirty-five, New Orleans."

On the next day Baldwin again telegraphed:

"One hundred and twenty-five best possible. If accepted, consider yourself engaged. Answer, here, without fail, to-night."

Plaintiff replied:

"We won't argue. Will accept, and consider myself engaged at one hundred and twenty-five. Shake."

Under the agreement thus entered into, plaintiff came to New Orleans, about September 1st, and acted with the Baldwin-Melville Company at the French Opera House (which the company was using, pending the completion of the Greenwall Theater) until October 15th—say six weeks. About October 1st, however, notice was posted on the board in the greenroom "that the season at the French Opera House of the Baldwin-Melville Company would terminate Saturday night, October 13th [15th], and the season at the Greenwall Theater would open Thursday, October 20th"—the object being to let the members of the company know that "for the intervening time, between the closing of the season at the French Opera House and the opening at the Greenwall, there would be no salaries paid." The notice so given was accepted, and the members of the company, including the plaintiff, acquiescing in the withholding of their salaries during the interval mentioned, took up their work at the new theater when it opened.

On October 30th plaintiff received from defendant a communication reading:

"Your engagement with the Baldwin-Melville Stock Company will terminate Saturday night, November 12, 1904. You will kindly consider this the customary two weeks' notice, obliging, yours very truly."

And within 48 hours, he took legal advice from the counsel now representing him. Re-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ferring to the "season," H. P. Meldon, defendant's stage manager, called as a witness on their behalf, testifies as follows (on cross-examination):

"Q. The season 1904-05 began in September and terminated in May? A. Yes, sir; May 27th, or about that. Q. That was the theatrical season of the Baldwin-Melville Dramatic Company; that is correct, is it not? A. Yes, sir."

On November 7th Baldwin, the manager of the company, being sick in the North, and the witness last quoted finding that he would need plaintiff's services for a while after the date fixed in the notice of October 30th for his discharge, spoke to him on the subject, and thereupon the following correspondence ensued, to wit:

"New Orleans, La., Nov. 7, 1904.

"H. P. Meldon, Esq., Stage Manager, Baldwin-Melville Co. * * * I have carefully considered your verbal request, since my peremptory discharge, without cause, was submitted to me in writing. All communications hereafter between us must be reduced to writing. I will entertain any proposition that you see fit to submit and make my reply promptly.

"Yours very truly,

"[Signed] F. E. Camp."

"New Orleans, La., Nov. 7th.

"Frank E. Camp, Esq.—Dear Sir: Messrs. Baldwin and Greenwall would be glad if you could arrange to remain over for week Nov. 13th-19th, and play the part of Terry Denison in 'Hearts of Oak.' As my first rehearsal of the play will be held to-morrow (Tuesday) morning, may I request an immediate reply, by bearer.

"Sincerely yours,

"[Signed] H. Percy Meldon,

"Stage Director, Baldwin-Melville Stock Co."

On the same day that these letters were written, plaintiff telegraphed to Baldwin (at Buffalo):

"I ask you to reconsider. Give me a chance with better parts, and I'll convince you of my ability. Answer."

He received no answer, and on the following day he replied to the offer, or request, of the stage manager, saying (among other things):

"Considering your request, in the interest of your employers, and without prejudice to my rights, resulting from the breach of contract on the part of the Baldwin-Melville Stock Company, which, I am advised, entitles me to full compensation for the period of my engagement, I will, under the condition stated, take the part, * * * beginning Nov. 13th and closing Nov. 19th, at which date, I desire to advise you, and, through you, your employers, that I shall claim, and insist upon, the payment of my compensation for the full term of my employment, as above set forth."

And, pursuant to the agreement thus made, he remained in defendant's employ until November 19th, and left New Orleans, a day or two after that date, for his home in Ohio. It is conceded that there was no other expressed understanding in the matter of the contract sued on than as contained in the telegraphic correspondence which has been

quoted, and defendants, through their counsel, disclaim having discharged plaintiff for cause; their position in the matter being that there is to be read into the contract, as evidenced by the telegrams, a custom or usage, known to theatrical managers and actors, agreeably to which either of the parties to said contract had the right to terminate the relations resulting therefrom by giving two weeks' notice to the other. Plaintiff's counsel objected to the introduction of evidence to prove the alleged custom; but the objection was overruled, though, in deciding the case, the learned judge a quo reached the conclusion that it should have been excluded. The testimony adduced upon that subject was, in substance, as follows:

Plaintiff testified that, in written contracts, where the right to terminate the relations between the parties, by giving two weeks' notice, is intended to be reserved, it is so expressed, and that, whether the contract be written or verbal, where the employment is for a definite term, the right does not exist unless expressed.

Being asked:

"Did you have any understanding, or did you understand, when you were employed, under the telegrams that passed between Mr. Baldwin and yourself, that you could be discharged on two weeks' notice, or that you could leave on two weeks' notice?"

—he replied:

"I never thought of such a thing. It never occurred to me."

Lester Lonergan, an actor of 13 years' experience, testified that, if he were employed "for the season," he would consider himself employed for the entire theatrical season, and that the season of the Baldwin-Melville Company, of 1904-05, began in September and ended in May. Being asked:

"In the absence of any express stipulation that the contract relation may be terminated between the management of the theater and the actor, is there any implied understanding, in verbal agreements, authorizing the termination of those relations, when the employment is 'for the season'?"

—he answered:

"No."

Being asked, on cross-examination:

"Now, Mr. Lonergan, is it not a custom of the profession for actors to sever their connections with companies, or for managers to sever their connections with employes, actors, by giving two weeks' notice?"

—he answered:

"It is loosely called a custom."

He further said that he was a member of the Baldwin-Melville Company during the season 1905-06, and severed his connection with it for cause (as he considered); that as a matter of fact he did not leave the company until the expiration of some two weeks after he had informed the manager of his

intention, having told him that he would remain until a substitute would be found. He also said that, if the manager had given him two weeks' notice, he would have accepted it.

The testimony of the defendant Baldwin is in part as follows:

"Q. Now, Mr. Baldwin, state what you understood by this telegram: 'One hundred and twenty-five, positively best; if accepted, consider yourself engaged. Answer, here, to-night.' What contract were you tendering him then? A. I was tendering him the contract as leading man of the Baldwin-Melville Stock Company, at New Orleans, at a salary of \$125 a week, provided that he fill the bill or would be satisfactory; or he must be subject— Do you want to know how I understood it? Q. Yes. A. He was to be subject to the rules and regulations governing my company, the same as the other people, and the rules and regulations of theatrical contracts. * * * Q. What is the custom in theatrical engagements, and what is the implied and understood condition in all theatrical contracts, that are not in writing, respecting the term of employment, or the right of discharge, or to leave? * * * A. The custom and rule is two weeks' notice on either side, providing said contract is not made in writing with the two weeks clause eliminated. Q. I don't quite understand. If a contract is printed or written, and the two weeks clause is struck out, then it does not govern? A. Possibly, if I tell you in my own way, the court may understand it. If I would engage you, Judge Clegg, engage your services for a number of weeks or years, I should stipulate the number of weeks or years, thus eliminating all rules or custom, and stating no rules would apply on either side, and both parties would be held responsible to the contract until the expiration of the same. Otherwise, the two weeks clause is inserted in the contract on both sides, and unless it is stipulated no two weeks' notice will be accepted on either side, then either party would be bound by the two weeks' notice. All contracts, in theatrical parlance, carry two weeks' notice, on either side, unless the contract states it is eliminated."

Greenwall, the other defendant, testifies that he has been a theatrical manager for many years and is thoroughly familiar with the "understandings and conditions and terms of contracts that are usual and customary among players and theatrical managers"; and his examination proceeds:

"Q. What is the usual and customary understanding between players and the manager or employer with respect to the termination of contracts? (Objection.) A. Two weeks on either side. Q. What do you mean by that? A. That I would give a man or woman notice, and they can give me notice. Q. When there is no stipulation in a written contract respecting the two weeks' notice, what is always the rule or understanding, verbally? (Objection.) A. It applies to the same thing. It has been decided here a few weeks ago. * * * Q. Suppose a telegram invites or contracts an engagement of a player at a salary per week—at a named salary per week—and the offer of employment is accepted and is undertaken, and the actor enters into the services of the employer, is it understood that this agreement, respecting the reciprocal rights to determine that the engagement shall be terminated on notice from either side, obtains? A. Provided it is not otherwise mentioned. If the contract reads 'for the season,' you are bound for the season. If it does not say anything, you are bound for the usual contract in theatrical com-

panies. Q. Suppose the contract reads 'for the season,' what is the theatrical season in New Orleans? A. According to business; I can close in two weeks if I want to, if the business does not justify me in keeping open."

Meldon, defendant's stage manager, testifying on their behalf, says:

"In every printed contract, where a contract exists, the clause is printed: 'Two weeks' notice on either side, in writing, will terminate this engagement.' A man signing a contract 'for a season' simply signs a contract for two weeks. I have not signed a contract myself for 20 years, because I have not asked for one. I did not want it. Q. Suppose the contract is simply a verbal contract or agreement? A. According to the rules governing all contracts, the same thing applies. * * * My engagement was with Mr. Baldwin, * * * with the usual rules to govern. That wasn't even mentioned. It's not necessary to mention it, between manager and actors, unless there is a contract with the two weeks clause cut out. Then it is the number of weeks, and you can claim that number of weeks, or the manager can call on you to play that number of weeks."

It was admitted, in the course of the trial, that the defendant Baldwin had gone into bankruptcy, that he had put plaintiff's claim on his schedule (without admitting its justness), and that he had been discharged, and there was judgment for plaintiff, against the defendant Greenwall, for \$3,375, with interest, and ordering the case to be reinstated as to Baldwin, with reservation of plaintiff's right to make the trustee in bankruptcy a party defendant. Greenwall has appealed.

Opinion.

Defendants' counsel have filed a supplemental brief in which they frankly say:

"We recognize that it would be sheer nonsense to attempt to vary, by custom, the certain and definite terms of a contract, and we admit that, in a case where an actor has been employed under a contract which fixes, with certainty and definiteness, the terms of his employment, he cannot be discharged before the expiration of that term, upon the customary two weeks' notice, no matter how well established that custom is."

They then proceed to argue that the contract sued on, as expressed in the telegrams through which it was made, does not fix the term of plaintiff's employment, and hence that evidence as to custom was admissible, and, being admitted, establishes defendants' right to terminate the relations resulting from the contract by giving plaintiff two weeks' notice. We have given this argument serious attention, but we find the impression that Baldwin intended to engage plaintiff for the season, produced by his first telegram, reading, "Telegraph, here, lowest salary for next season, opening about September first, possible," confirmed by the fact that no such view as that now propounded is suggested in the answer, and no such defense was relied on in the district court, and by the testimony of Baldwin himself, in which he rests his defense, as we understand him, not upon the fact that plaintiff was not engaged for the

season, but upon the proposition that, having been engaged for the season, he was so engaged subject to a custom which authorized his discharge on two weeks' notice. Thus, having been called as a witness for plaintiff, his examination in chief reads in part as follows:

"Q. And he was employed for the season as leading man, was he not? A. He was employed the same as every other man of the company. Q. There was no other agreement between you, except that embodied in the telegram which I have read? A. No other agreement [than] that the telegram called for the agreement subject to the rules and regulations of the company and theatrical contracts generally. Q. Whatever the agreement was between Mr. Camp and yourself is embodied in these telegrams? A. No, sir; it is not. Q. But the telegrams were sent? A. The telegram simply shows the amount of salary he was to receive for the engagement there for the season, subject to the mutual—you understand—to the mutual satisfaction of both parties. Q. That is the inference you now draw? A. That is the rule, and the one under which I have conducted business for 24 years. * * *

Cross-examined by his own counsel:

"Q. Now, state to the court exactly what was the agreement between you and Mr. Camp respecting his employment? A. The agreement between Mr. Camp and myself was: He was engaged for the season, at New Orleans, at a salary of \$125 per week, subject to all rules and regulations governing my company and regulating theatrical contracts generally."

We conclude, therefore, that plaintiff was employed, and understood that he was employed, for the season; and, whilst it may be that the manager of a theater may bring a season to a close when, acting in good faith, he finds that the necessities of the situation demand it, the fact remains that, whether the season be long or short, those who are employed for that term are entitled to be paid according to their contracts, unless they are discharged for cause. In view of the conclusion so reached, we are of opinion that the judge *a quo* was right in holding (in deciding the case) that the testimony offered to prove usage, as affecting the terms of the contract sued on, was inadmissible. But, even if it were otherwise, the proof so offered fails of its purpose. Plaintiff testified that he knew of no such usage (as applicable to the instant case) and Loneragan said, in substance, that there is none. To the question:

"Is it not a custom of the profession for actors to sever their connections with companies, or for managers to sever their connections with employes, actors, by giving two weeks' notice?"

—he answered:

"It is loosely called a custom."

But it does not appear that either the question or the answer relates to the case of an actor who is employed for a definite time. Baldwin, as we have seen, says that, though the employment of an actor may be for a definite term, the manager may discharge him, according to the usage which is read into the contract, on giving two weeks' notice, unless there is an express stipulation in such

contract "stating no rules would apply on either side." "All contracts," he says, "in theatrical parlance, carry two weeks' notice on either side, unless the contract states it is eliminated." But Greenwall, who has been in the theatrical business nearly twice as long as Baldwin, says:

"If the contract reads 'for the season,' you are bound for the season. If it does not say anything, you are bound for the usual contract in theatrical companies."

And Meldon tells us that all "printed" contracts contain the stipulation, "Two weeks' notice, on either side, in writing, will terminate this engagement;" that "a man signing [such] a contract simply signs for two weeks" (meaning, as we understand him, that the stipulation quoted controls any stipulation by which the term may be fixed); and that the same rule applies to verbal contracts. From all of which it will be seen that there are two witnesses who testify, in effect, that they know of no such usage, applicable to this case, as that relied on; that, of the other three witnesses, one (Baldwin) goes beyond the position assumed by his counsel, another (Greenwall) says that, "if the contract reads 'for the season,' you are bound for the season" (and that is the way Baldwin's proposition, accepted by plaintiff, reads), and the third (Meldon) testifies as to the usage in regard to contracts containing stipulations that they may be terminated by notice (which is not the case with the contract sued on).

The other defenses set up in the answer are not urged in this court and are without merit. Nothing in the evidence justifies the belief that the plaintiff intended to acquiesce in his discharge. The fact that he earned, or may have earned, money elsewhere during the unexpired term of his contract with defendant, has no bearing, under the textual provisions of our law and the jurisprudence predicated thereon, upon his right of recovery in this case. Civ. Code, art. 2749; *Shea v. Schlatre*, 1 Rob. 319; *Woods v. M. A. Shumard & Co.*, 114 La. 451, 38 South. 416; *Curtis v. A. Lehman & Co.*, 115 La. 40, 38 South. 887; *Daspl v. Holmes*, 120 La. 86, 44 South. 993.

It is suggested, in the brief of defendants' counsel, that the judgment appealed from (against Greenwall) being based upon a stipulation to the effect that any judgment that might be rendered in favor of plaintiff should be rendered against the defendants in *solido*, and no judgment having been rendered against Baldwin, the judgment against Greenwall should be reduced by one-half—which seems to us to involve a non sequitur, since, upon the theory propounded, plaintiff would no more be entitled to judgment against Greenwall for one-half the amount claimed than for the whole of it. The facts, in that connection, however, are as follows: Plaintiff sued the Baldwin-Melville Company and Henry Greenwall, and prayed for judgment against them in *solido*, and the defendants

appeared and answered as hereinbefore stated. When the case was taken up for trial, and before any testimony had been taken, the following agreement was taken down by the stenographer, to wit:

"It is agreed that the plaintiff shall be dispensed from making proof of the existence of the partnership between Walter S. Baldwin, representing the Baldwin-Melville Company, and Henry Greenwall, both of whom are made defendants in this cause, and for the purposes of the trial of this case, and the decision therein, it is expressly stipulated and agreed that whatever judgment, if any, shall go against the defendant in the above-entitled cause, shall be a judgment in solido against Walter S. Baldwin and Henry Greenwall; and this agreement and understanding is made without prejudice to the rights of these defendants inter sese, or to the effect upon any evidence introduced in the cause respecting any partnership agreement."

There was no evidence introduced in regard to any partnership, or in regard to the relation which may exist between Baldwin and Greenwall, or between either of them and the Baldwin-Melville Company; and, after the testimony had been taken, the fact that Baldwin had been adjudicated a bankrupt and had been discharged (after placing plaintiff's claim on his schedule) was made to appear by the following admission, to wit:

"It is further admitted that, since the institution of this suit, and subsequent to the administration of the evidence, * * * Walter S. Baldwin, one of the defendants, has applied for, upon his voluntary petition, the benefit of the bankrupt act of the United States, and that, on his schedule, he has placed Frank E. Camp as a creditor for the amount claimed, if there exists any liability therefor, which is by said Baldwin denied, and that said Baldwin has been granted a discharge by judgment of the bankruptcy court."

Thereafter the case was argued and submitted, and some six weeks later judgment was rendered, as has been stated, and defendant Greenwall thereupon filed a motion for new trial, setting up six alleged errors in the judgment as rendered, but making no complaint on the ground that Baldwin or his trustee had not been condemned. Beyond that, it is not now suggested that the defendant before the court has been prejudiced by that circumstance, and it may be, for aught we know, that Baldwin surrendered no assets, or that the assets surrendered have been consumed in costs, or that, as between Baldwin and Greenwall, the latter had no recourse against the former. But if these hypotheses be unfounded, and there is anything to be gained by it, the defendant Greenwall may seek his recourse in the bankruptcy court. We do not find that plaintiff undertook to follow Baldwin into that tribunal, or that, upon a fair construction of the stipulation agreeably to which the case was tried, the defendant now before the court is to escape liability because his codebtor in solido applied for and obtained the benefit of the bankrupt law. We construe the stipulation as in effect an

admission that, quoad the plaintiff, the two defendants, if liable at all, were liable in solido; and we think, moreover, that if the defendant, in court, considered the ground of complaint now suggested well founded, he should have urged it in the district court, before and after judgment, as he had ample opportunity to do.

There being no error in the judgment appealed from, it is affirmed, at the cost of the appellant.

(123 La. 271)

No. 17,460.

STATE v. SCHEFFIELD et al.

(Supreme Court of Louisiana. March 15, 1909.)

1. GAMING (§ 63*)—CRIMINAL RESPONSIBILITY—BETTING ON HORSE RACES.

The intention of Act No. 57 of 1908 (Laws 1908, p. 64) was to put an end to wagering as conducted on race tracks.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 120; Dec. Dig. § 63.*]

2. DEFENSES—BOOK.

Were the theory correct (under the statute), and "betting book" were the only book against which the statute aims, it would afford small comfort to the defense.

3. GAMING (§ 73*)—CRIMINAL RESPONSIBILITY—BETTING ON HORSE RACES—"BETTING BOOK."

It would be difficult to separate the "betting book" from the wagering, or the whole wagering plan as it was conducted. The words "betting book," as used, connected with the other devices, is broad enough to include the whole scheme of betting.

[Ed. Note.—For other cases, see Gaming, Dec. Dig. § 73.*]

4. INTENTION OF STATUTE.

The statute in express terms includes betting books or other devices, showing that betting as conducted must come to an end.

5. PERSONS RESPONSIBLE.

The "agents" and "employés" of the betting combination, against which the statute aims, have a certain and definite meaning.

6. GAMING (§ 73*)—CRIMINAL RESPONSIBILITY—BETTING ON HORSE RACES—PERSONS RESPONSIBLE.

The "owners" (words of the statute) are those who conduct the betting by using "betting books," "sheets," "tickets," and "other devices"; and the statute includes "agents" and "employés" within its prohibitive terms, and those who are interested in the "book maker's book."

[Ed. Note.—For other cases, see Gaming, Dec. Dig. § 73.*]

7. GAMING (§ 85*)—CRIMINAL RESPONSIBILITY—INFORMATION—SUFFICIENCY.

The information is substantially a reproduction of the words of the statute.

[Ed. Note.—For other cases, see Gaming, Dec. Dig. § 85.*]

8. STATUTES (§ 118*)—EXPRESSION OF SUBJECT IN TITLE.

The object expressed in title and body of the act is the same.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 158; Dec. Dig. § 118.*]

9. STATUTES (§ 181*)—CONSTRUCTION—INTENT.

Ingenuous distinctions in construing the language of statutes and close analysis of sen-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tences are engaging. They cannot be held controlling, when the intention of the lawmaking power is evident enough.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 259; Dec. Dig. § 181.*]

(Syllabus by the Court.)

Appeal from Criminal District Court, Parish of Orleans; Frank D. Chrétien, Judge.

Robert M. Scheffield and another were convicted of illegal betting on horse races, in violation of Act No. 57, p. 64, of 1908, and they appeal. Affirmed.

Thomas C. Ryan, Adams & Otero, and E. Howard McCaleb, for appellants. St. Clair Adams, Dist. Atty., and Warren Doyle, Asst. Dist. Atty., for the State.

BREAUX, C. J. Illegal betting on horse races is the offense with which the defendants are charged, and of which they have been found guilty and sentenced to pay a fine of \$350 and to seven months' imprisonment in the parish prison.

On appeal to this court, their complaint is that the verdict and sentence are illegal, as they have committed no act for which they should be condemned under the terms of the law.

The information under which they were found guilty charged them with having engaged in promoting and aiding in operating a betting book upon a horse race which was about to take place at the City Park race track.

The title of the act under which the information was filed is indicative of the purpose of the law: To prevent gambling and to provide a penalty for gambling.

The act, following the title, prohibits any one from operating a betting book. To quote literally:

"To prohibit any person as 'agent,' 'owner,' 'officer,' or 'employee' from engaging, encouraging, promoting, aiding or assisting in the operation of a betting book" upon horse races, or in "selling auction pools upon any horse race."

A demurrer was filed and overruled.

Subsequently a motion was filed, urging that the information was vague. Defendants moved for a bill of particulars.

The court allowed the motion.

The defendants complain of the bill of particulars as being a shift from the position taken in the information, which charged that "defendants" did engage in promoting and in aiding in the operation of the lottery book, while in the bill of particulars it is charged that they directly operated the betting book, an act not prohibited by the statute, nor described in or named in the information.

The defendants further urged that the description of the offense in the bill of particulars is not prohibited by the statute.

The bill of particulars sets out in the first paragraph that the defendants are the agents or employes of the owners of said betting book.

The second paragraph of the bill of particulars sets out that defendants, by receiving and recording bets upon horses whose names were exhibited and against whom odds were laid in said betting book, were, at the same time, delivering to the individual bettors tickets which were evidence of the amount and conditions of their bet.

In another paragraph of the bill of particulars, the state sets out that the "betting book," with the operation of which defendants are charged, consists of the following paraphernalia:

Of a slate and board, on which the names of the horses were written.

And the bill of particulars further sets out or refers to all that is necessary in keeping account of the "bookmaker's" business.

It also makes special reference to the tickets given to the individual bettor as evidence of his bet; also to the sheet upon which is recorded the number of each bet.

The clear shift urged by defendants:

That there was in some respects a change of position by the state in the bill of particulars from what the charge is in the information. That in the former (the bill of particulars) the prosecution sought more particularly to charge the defendants with having not only assisted in the betting and in promoting the game of chance, but charged that they were actually engaged in betting or gambling. That in the latter (the bill of information) the defendants were only charged with having "aided and assisted" in the betting.

In considering this point, we went back to the information, and there did not find that defendants are charged exclusively with aiding and assisting. The information is not as limited in its terms as defendants urge. "Engage in promoting," the words used in the information, go beyond mere assisting in the operating of a "betting book" upon a horse race. It follows that defendants are charged not only with having assisted in the betting, but that they were charged in the information with having actually engaged in betting, or its equivalent, against the terms of the statute.

The next proposition urged by defendants is that they are not among those against whose acts the statute is aimed.

The defendants, to the end of sustaining their proposition, through learned counsel invite attention to the different acts on the statute book regarding gambling. They urge that, which is true, generally persons denounced in all acts regarding gambling and acts similar of a date prior to the Act No. 57, p. 64, of 1908, are the owners of the places where the gambling is done.

Generally in these laws the "subject" is the owner, proprietor, or "agent."

We have read the quotations in the elaborate brief of learned counsel from these acts.

Taking the facts above stated—that is, that the "owners" of the place where the wagering is done under prior laws is nearly always the person pointed out as the initial point—they arrive at the conclusion that Act No. 57, p. 64, of 1908, the one before us for interpretation, is aimed against "owners" and their "agents," "officers," and "employés" as the offending persons; that is, that the words "agents," "officers," "owner," and "employés" relate to the owner—that is, the owner of the property named, room, hall, horse, inclosure, path, track, road course—and their "agents" and "employés"; that the "owner" is the person intended.

We can only say in answer that the statute in question provides that those who promote and encourage, aid, and assist in operating the betting prohibited in or upon the property are the offenders, without regard to the "owner."

Learned counsel in their able defense gave an importance to "owner" with which we are not able to agree.

If we were to concede to them this point, their conclusion is then logical enough. We do not attach the importance they do to the word "owner." Without reference to that word, it is possible to violate the statute by any one coming within the meaning of the word used; that is, the "agent"—the employé—is singled out as a possible offending party, without reference to "owners" of the property; that is, the agent or employé of the "book," whether he is owner of the property or not.

Taking a practical view of things, we propound a question: Why could not the statute punish those who "encourage," "promote," or aid in operating a betting book, and those who are their "agents" and "employés" as well?

But, even if we were to take the view propounded by learned counsel in regard to the "betting book," it seems to us that it would be reasonable and logical to hold that this "book" forms part of the betting process which is prohibited. It would then be possible to hold that the betting to which the statute has reference begins at the booth or stall erected on the track, and would include the "betting book," without which there can be no such complete betting as that denounced by the statute.

From that point of view, the law prohibits certain named persons from operating a "betting book." It is then to be considered part of the act made illegal. The "betting book" is denounced as an illegal mode of betting, and by the terms of the statute it includes the whole scheme of betting on horse races as conducted at the time.

The able counsel for defendants state in their elaborate brief that the practice of mak-

ing bets on credit is an evil great enough to justify legislative action for its suppression.

We can only say in answer this is the effect of the statute; but it does not end there. The statute also aims at betting as conducted on a cash basis.

But again, as to this betting book:

We have followed the very able counsel in their ingenious defense to this point. We take up the subject as we understand was the intention of the Legislature. We precede our statement upon the subject with reference to the lexicographers and those who have given to the meaning of words special study.

"Betting," the "layer entries," and other similar definitions:

In its broader sense "the betting book" is that book which enables the professional bettor to carry on his business. We construe it literally. It refers to a "betting book" used in promoting the race. It includes the "book," the "making" book, and the book-maker. James v. State, 68 Md. 265; Russell on Crimes (Ed. 1896) vol. 1, p. 478.

We think we are justified in reaching that conclusion by the words of the statute, "or any other device," which, in our opinion, includes betting books as before stated; that is, that it is a book kept for registering bets upon the result of the race as operated on the race course. It includes all property or interest in these books.

We return for a moment to the bill of particulars, which is referred to a second time by learned counsel in their brief just a few pages before the end of it.

We will at once state, without stating the principal objection of defendants, that the offense is charged with the degree of certainty required; that it gives a description of the whole paraphernalia in use, the tickets and everything else connected with the betting, and sufficient enough to inform the defendants to place them on their trial.

The learned counsel have directed the force of their logical argument from their standpoint to the title of the statute, and urge that the object of the law is not expressed in the title of the act.

The title reads:

"To prohibit gambling on horse races by the operation of betting books, French mutual pooling devices, auction pools or any other device, and to provide penalties for the violation of the provisions thereof."

The act prohibited in the statute relates to gambling and to "betting books" and to horse races to the extent only that they come within the gambling denounced by the statute. The title of the act is complete enough to indicate the object.

Now as to aleatory contracts: While aleatory contracts, as urged by counsel for defendant, are still known to the laws of this state, the betting denounced by the statute is not. In the nature of things, laws regarding aleatory contracts are re-

pealed to that extent, and there is therefore no merit in the contention that this is an aleatory contract protected by the laws.

Horse racing has a history. It goes back to ancient times. The taste for horses and the raising of horses has been a trait of the English character since many years. Derby Day and the Oaks at Epsom are great days among the English people. At one time in England horse racing was not interesting to the general public.

In France, years ago, the government and the governing classes were much concerned on account of the extravagant betting on horse races and the ruin it occasioned among the bettors.

The bettors' trouble came to an end at the outbreak of the Revolution of 1793. It has recovered its influence since, but never to an extent to give annoyance.

In this country horse racing has its record. Prominent men have given them encouragement. In argument at bar and in the brief, counsel interestingly refer to the horse racing of the past.

It is not for us to applaud the past, not to criticize the present. The statute is the expression of the lawmaking power. It must be obeyed.

We have given our most careful attention to the interpretation of the statute, to the decisions, and the text of writers on law cited by learned counsel for the defense. We have also considered the analysis learned counsel made of the statute, and we have deliberated over the rules of grammatical construction invoked. Reasoning from the premises of the defendants, they are, perhaps, persuasive; but they do not explain away the second, or the alternative, part of the statute, which reads as follows:

"Or shall by any other device encourage, promote, aid or assist any person or persons to bet or wager upon a horse race or races run, or trotted or paced within this state or elsewhere."

And less do they explain away the first part of the statute expressive, further, of the intention.

It only remains for us to affirm the judgment.

The law and the evidence being in favor of plaintiff, and against defendants, the judgment appealed from is affirmed.

LAND, J. I concur in the result.

(123 La. 279)

No. 17,186.

FARWELL et al. v. ELLINGTON PLANTING CO., Limited.

(Supreme Court of Louisiana. Feb. 15, 1909.)

1. LEASE OF PLANTATION—GOOD CONDITION.

The lease of the plantation is general in its terms.

2. RETURN IN GOOD CONDITION.

About the return of the property at the end of the lease, it contains the stipulation that the lessee return the property in the good condition received.

3. ISSUE—CONTRACT.

The suit turns upon the stipulation: Good condition.

4. PLAINTIFFS' CONTENTION.

The plaintiffs' contention is that the property leased was not returned in good condition at the end of the lease.

5. DENIAL BY DEFENDANT.

The defendant denied plaintiffs' allegation.

6. LANDLORD AND TENANT (§ 160*)—CONDITION OF PREMISES AT TERMINATION OF TENANCY—PRESUMPTION.

No inventory having been taken as directed by article 2720 of the Civil Code, the plaintiffs urge that the presumption stated in the article was controlling.

The testimony rebuts the presumption.

It does not appear that the plantation was in very good condition just prior to the lease, nor at the end of the lease.

Whatever difference there was in the condition of the place is not made to appear in a sufficiently clear manner to sustain a judgment for the damages for which plaintiffs pray.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 160.*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; John St. Paul, Judge.

Action by Charles A. Farwell and others against the Ellington Planting Company, Limited. Judgment for defendant, and plaintiffs appeal. Affirmed.

Solomon Wolff, for appellants. Carroll, Henderson & Carroll, for appellee.

BREAUX, C. J. This is a suit for damages to a plantation. Over \$27,000 is the amount of plaintiffs' claim.

Plaintiffs, owners of the Ashton sugar plantation, leased it to defendant for one year, from January, 1902, to January, 1903.

At the end of the first year the lease was renewed for a period of two years, bringing the term of the lease to December 31, 1905, on which date it came to an end.

The pertinent provision of the lease was that at the end of this lease the plantation was to be delivered back to the lessors, also the ditches, canals, bridges, drainage machinery, railroad track, locomotive, and cars, carts, farming utensils, and implements, ordinary wear and tear and vis major excepted, in the same good condition as lessee would find it on taking possession. (The lease was entered into a few months before lessee went into possession of the place.)

It was further stated in the contract of lease that the lessee was to preserve the drainage of the plantation by cleaning the ditches. Further, lessee bound itself to keep the machinery and buildings in good order and condition, all at lessee's expense.

In another paragraph of the lease, lessee

bound itself to leave at the expiration of the lease good and sound seed cane equal in quantity and quality to that found by the company on taking possession.

The company also bound itself to leave the same quantity of sound first-year stubble as would be left on the plantation at the date that lessee would take possession.

As the term of the delivery of the plantation was near at hand, on January 9, 1906, plaintiffs wrote to the representative of the defendant company proposing that each would appoint a representative to examine into and report the exact condition in which the place was, in order to ascertain whether the defendant was liable for damage on account of the bad condition of the place, as plaintiffs asserted. The defendant did not answer.

Review of the pleadings:

The pleadings set forth in detail the grounds of the respective parties to the suit.

The defense is that it had bound itself as lessee to return the plantation in the same condition in which it had been received, ordinary wear and tear and unavoidable accidents excepted; that the taking of an inventory has no application to drains, fences, bridges, or drainage machinery; that the onus of proving the difference in value between the date of the lease and at the end of the lease was on plaintiffs; that the amount expended in improvements, which the plaintiffs chose to make after they returned into possession of the plantation in the year 1906, was not a fair criterion whereby to judge whether the defendant had complied with its obligations; that these improvements had naught to do with the difference in value between the date the defendant took charge as lessee in 1902 and the date the plaintiffs returned into possession in 1906.

There were a number of grounds of attack and defense; also quite a number of pages of testimony taken. We will refer to these when necessary in deciding the issues.

For the time being we take up for decision the question on the statement above made. The different claims of plaintiffs are 12 in number.

- (1) Shortage in seed cane.
- (2) Value of peas not planted by defendant.
- (3) Rental values of land, due because of defendant's failure to plant peas.
- (4) Damage to fences.
- (5) Failure to keep up drainage.
- (6) Damage to drainage machinery.
- (7) Damage to railroad cars.
- (8) Damage to bridges.
- (9) Damage to cabins.
- (10) Damage to scales.
- (11) House destroyed by fire.
- (12) Cordwood, tires, and trees used by defendants.

We are decidedly of the opinion that, if there were 12 different suits, it would be less difficult to present them to be decided, and

for the court to decide them; but the case being between the same parties, its huge proportion on account of the number of witnesses and the extent of the examination is properly before us.

Taking up the first item: Plaintiffs' contention is that they have a right to the value of 82 acres of cane planted in the fall of 1902, and 109 acres in windrow, enough, plaintiffs alleged, to plant 272½ acres.

There is no special dispute about the quantity delivered. The dispute at this point is the number of acres of seed cane planted.

The contention on the part of the defendant is that the 109 acres in windrow was not sufficient to plant over 101 acres, and that of the 109 acres only 60 acres were ever fit for cultivation.

There was evidence introduced in support of the averment.

It is in place to state that in the year 1902 plaintiffs bought the plantation, and that in accordance with the conditions of the deed the vendor was to take off the crop for his own account and deliver the plantation to the vendees after the grinding season. There was an understanding that the vendor was to leave on the place a sufficient number of acres of seed cane to plant the number of acres agreed upon between the parties, vendor and vendees.

The vendees did not go into possession with the view of cultivating the place themselves in the year succeeding. They entered into a contract of lease just about the time of the purchase, and the place passed from the vendor to defendant as lessee.

Five years from the date of the lease, the vendor to plaintiffs, Mr. Emile Legendre was called upon to testify. Both he and his manager, Mr. Armand, testified that the cane put in windrow by them was good, sound seed cane, which had been properly planted, and that the work of windrowing the seed had been properly done.

Witnesses for the defendant testified to the contrary. One of the managers of defendant in the year 1903, Mr. Hanson, under whose supervision the seed cane was planted, testified positively that the seed cane did not plant over 100 acres. In this he is corroborated by other witnesses. Besides this, his statement was that he was informed by the manager of the vendor of the place in 1902 that the vendor had erred in the number of acres which had been planted while he was manager.

The vendor's manager, Mr. Armand, testified in regard to this statement, and while he did not entirely agree with it he expressed friendly feeling toward this witness, and said that he was very much given to what is known as heavy planting; that is, that he generally planted a large number of stalks of cane in the furrow prepared for the seed, and he thought that on that account he would meet with disappointment.

We are of opinion that the statement of

each was sincerely made, and that the number was as stated by the first manager mentioned above. He knew that a sufficient quantity had been windrowed to plant the number of acres of land stated; but, as he left at the end of the year, he knew nothing of the quality of the cane and the number of acres it would plant, on account of its bad quality.

It is common knowledge that seed cane will sometimes very much deteriorate after it has been windrowed, and that those interested sometimes meet with sad disappointment when the time comes to plant the cane, because of its inferior, and sometimes even worthless, condition.

We leave the question, as relates to the quantity and quality of the seed delivered, with the statement that as to quality plaintiffs have not made out a case which can possibly sustain a judgment on this point.

Plaintiffs sought to sustain the complaint that defendant had not properly planted the seed; that they were taken out of the windrow and left exposed to the sun for three or four days.

We will begin by stating in regard to this point that there was a crevasse at a plantation near by. The defendant sent its hands to the scene of the disaster in order to aid in checking the devastation. During that time, an acre and a fraction of an acre of seed cane was left exposed to the sun a number of days before mentioned.

It was said in evidence that, as to this very limited quantity exposed to the sun, it was not enough to decrease to an extent its value.

Taking the evidence as a whole on this point, we will not charge the defendant with the small quantity of seed that remained thus exposed, especially in the face of the testimony that it was not damaged to any appreciable extent.

Another complaint of the plaintiffs is that the cane was planted too late in the season.

This complaint is answered by the testimony of one of the plaintiffs, who testified that cane may be planted until late in April—a time subsequent to that in which the defendant planted the seed in question.

But plaintiffs say that defendant remained silent, and gave them no notice of any deficiency in the number of acres or as relates to deterioration of the cane.

Although defendant failed to complain to plaintiffs, yet the matter of silence is not ground to deny to the former the right to maintain its position here taken, to wit, that plaintiffs have no ground of complaint, for it returned as good seed as that which was received from them.

It must be borne in mind that the defense is only answering plaintiffs' attack for damages, and is not claiming any damages from plaintiffs on account of deficiency in the seed cane.

We must decline to give to silence a significance the facts and circumstances do not warrant. Comparing the testimony regarding the seed cane as closely as we could, we have not found the difference claimed.

The contract of lease is short. It contains the general outlines of the agreement. Something evidently was left to good will and friendly relations. These continued to be felt to near the end of the term of the lease, and until then no objections were urged—not the least suggestion regarding broken conditions.

A short time before the end of the lease, the plaintiffs and defendant verbally agreed to appoint experts to determine whether or not the place was in about the condition it was when the lessee went into possession.

Plaintiffs did not choose to place reliance on this verbal agreement. A day or two after, they called on officers of the defendant to reduce the agreement to writing. The officers answered, saying that, since their word, verbally given, was not deemed sufficient, they would withdraw entirely from the agreement. They refused to sign.

Since this has been alleged and proven, and is before us, we must state that in our opinion the cause for refusing plaintiffs' request was not sufficient. None the less this does not afford ground to condemn defendant to pay damages, unless the extent of the damages is made clear by the testimony.

Another complaint of plaintiffs is that the land on which the seed cane was windrowed in 1905 was not properly drained.

The contract contains no stipulation in regard to the manner this seed cane was to be laid in windrow. Nothing was said in regard to drainage.

True, that did not relieve the defendant from the necessity of properly doing the work. It, none the less, would have accentuated plaintiffs' right, and would have added certainty to their cause of action.

The deficiency as relates to drainage was not as great as plaintiffs claim, according to the testimony.

The question of drainage of the plantation, and necessarily of the land on which the seed cane was windrowed, will have to be considered later under that head.

The complaint is more particularly directed to seed cane put up by defendant in field cuts 123 and 124: that these cuts were not well drained, and the cane in windrow not properly laid.

Examination of the cane was not thorough. The good cane was not culled out.

It was left in the furrow, and, although not planted, grew up in the furrow in which it was laid, and some of it made seed, thus indicating that there was good cane left.

We are brought to consider the next item claimed as damages, to wit, the value of the peas.

For this item the sum of \$590.62 is claim-

ed, the value of the peas which should have been planted, as plaintiffs urge.

Defendant admits that when it took possession of the place there were 300 acres of land planted in peas, and further admit that it had not planted the peas the last year of its lease. It avers that the weather conditions in 1903 did not permit it to plant. It says that it had the peas on hand; that the continued wet weather and rain, down to and including June, was the preventing cause; that other planters the same year were disappointed in matter of peas.

It seems that in the year 1905 the weather was very unfavorable.

The vendor to plaintiffs, Mr. Emile Legendre, was a successful planter. He was engaged that year in cultivating a plantation near the Ashton. He planted peas. They were destroyed by rain.

"Q. (To this witness). But you saved very few peas? A. Yes, sir; very few peas that year. We lost them by the rain."

Plaintiffs had no right to the value of the peas. That is his claim. Defendant's obligation was to plant the peas, so that the land could be mellow and well prepared. Failure in this, plaintiffs could claim damages. Proof of the value of the peas is not proof of the damages claimed by plaintiffs.

The next ground urged by plaintiffs is that they have a right to compensation for rental of the land rendered useless by the failure to plant peas. For this \$2,100 were claimed. We can only say in answer that planting peas is not the only method of planters for cane planting. Other fertilizers are sometimes used.

The plaintiffs used part of the land.

We are of the opinion that plaintiffs have no right to the rental claimed. To arrive at that conclusion, we would have to give more weight to the problematical than we are inclined to do.

Taking the most favorable view, had peas been planted on the whole area of the land in question, and the rain and consequent dampness of the soil had caused the loss of the peas to an extent of less than 20 per cent., none could say with any degree of certainty in that event that the loss was equal to \$8 an acre, and that is the demand of plaintiffs.

The land could have been used. We understand that part of it, at least, was used in planting cane, corn, and hay, or, at any rate, that it would have been used.

We have not found more certainty as relates to difference of costs between land first fertilized by planting peas and land fertilized with other fertilizers.

This theory, also, was advanced. It does not illuminate the situation. It is in the end inconclusive, and leads to no satisfactory solution.

Fences around the plantation:

Plaintiffs' contention is that the fences

were in good order at the beginning of the lease.

Defendant takes issue with plaintiffs. The defense is that the fence at the end of the lease was about in the same condition as when it went into possession.

As the defendant raised no objection at all to the fence, and no inventory was made, say the plaintiffs, the legal presumption is that the fence was in good order.

Our answer is: Whatever there may be of presumption in this matter, it is not conclusive. While we readily concede that the onus of proof was with defendant, the preponderance of evidence is that the fence was not in the best of condition, although in fairly good condition.

The following is a fair sample of the testimony for defendant:

F. A. Keller, a planter, testified:

"Q. What was the condition of the plantation at the time, say as to the fences on the front road?

"A. Well, fairly good condition; about as they always have been.

"Q. Did you see these fences about January, 1906, three years after?

"A. Yes, sir.

"Q. How did the condition in 1906 compare with the condition in 1902, when Mr. Legendre had the place?

"A. About the same."

This is corroborated by other witnesses of defendant. The testimony, it is true, is contradicted by plaintiffs' witnesses, not, however, to such an extent and in such a way as to overcome the preponderance before stated.

Plaintiffs place reliance upon the expenses which they deemed proper to make on this fence after they had gone into possession. They made repairs at different times during the first two years they went into possession.

How much of these repairs were due by defendant, and how much by plaintiffs, does not appear.

We are not of opinion that the claim for fences is made out.

The manager, Harold, under whose direction these repairs were made, knew nothing of the condition of the fence at the date of the lease. He had a number of new posts put in. Wire fences were substituted to the old fences. In testifying in regard to this fence, he sought to distinguish between repairs and improvements, and left the question in doubt as to whether they were repairs due by defendant.

The defendant cannot be held for all the repairs made on the fence to restore it to a thoroughly good fence; for beyond all question it was not a thoroughly good fence at the end of 1902, when it took charge as lessee.

Drainage:

Plaintiffs claim that the drainage was in good order and condition when the plantation was delivered to defendant, and in very bad condition at the end of the lease.

Of course, defendant challenges the correctness of these propositions. It claims that the condition was quite as good as when it

went into possession. The condition of the drain was not of the best at the beginning of the lease.

One of the witnesses for the plaintiffs, the owner of a plantation at a short distance from plaintiffs' plantation, early in 1906, when plaintiffs had gone into possession, said that it would cost \$10,000 to properly drain the place.

It cannot be that defendant can be held liable for any such amount. We infer that the rental was fair enough. It does not appear that it was ever the intention that it should pay, in addition, such a large amount for drainage.

In portraying the condition of the drainage, witnesses for plaintiffs testified that small trees had grown up in the canals and ditches, ranging in diameter from one inch to six inches.

The lease itself was an original lease in 1902. The plantation was cultivated in 1904 and 1905 under a renewal of the lease. The damages to drainage of a date prior to 1904 cannot be claimed. The renewal of the lease operates as a bar to such a claim.

Some of the witnesses for plaintiffs will have it that in the short period of the lease the small trees grew from one inch to six inches. If that be the case, the land must be quite fertile.

It will not be insisted with any degree of reason that there was such a growth in the trees in question in two years.

We are not inclined to criticise the witnesses. We have no doubt of their sincerity. None the less, when we come to fix the amount of damages, we find it impossible with any degree of certainty and satisfaction to do so.

The drainage machine:

\$848.75 is claimed for damage to this machine.

This machine, it seems, has caused annoyance and expense to both plaintiffs and defendant.

"But it answered the purpose," said Mr. Legendre, the vendor to plaintiffs. "When I left it was doing its work."

The testimony is that defendant had it repaired several times, and that it did some service, but never satisfactorily. The smoke-stack rusted and fell of its own weight.

Plaintiffs claim that it should have been painted every year to save it from ruin.

This requirement and others which plaintiffs now insist upon were not specified in the contract of lease.

Without direct evidence showing to what extent that machine was good in 1902, and to what extent it went in the direction of ruin during the years of the lease, we will not undertake to fix the difference between the two and fix damages upon that basis.

Plantation railroad cars:

All the witnesses for defendant who testified about the cars gave an unfavorable account of their condition. They were old, broken

cars, and "had arrived at their journey's end," is the testimony.

One of the witnesses, P. A. Keller, said:

"I have occasion to recollect it all my life, because I had them in use, and I'll never forget on account of the bad condition. I had to get them out of the ditches, and I had to do the loading myself, not only that year (1902), but the year previous, and that is the reason I recollect so well about the cars being bad. I had to repair them myself."

Another witness, Paul Frederick, testified that they were always in bad condition since the year 1898.

One of defendant's witnesses stated that by repairing them they were in fairly good condition in 1904.

They were returned the next year to the owners. Fifteen or 20 of these cars were never returned. They had gone to ruin; "out of commission as to some of them," said one of plaintiffs' witnesses.

Robert Hanson, another witness, testified that they were in better condition at the end of the grinding season in 1905 than they were in 1902, when the place was sold to plaintiffs.

Bridges:

The contention is that the bridges were all good when the plantation went into the hands of the lessee.

This was met by defendant with the same defense as heretofore made.

These bridges encountered the rough usage, doubtless, to which plantation bridges are subjected. They frequently have to bear heavy burdens. They become dilapidated and worn.

In 1906, after plaintiffs had taken possession, they repaired some of these bridges; made others entirely new.

Repairs and improvements, with the testimony before us, cannot be charged to the lessee under the present contract of lease.

The manager, Harold, under whose superintendence these bridges were constructed, testified that he did not know "what bridges were there, nor the condition of the bridges, beforehand."

He also testified that he put down tiles, instead of rebuilding the plank bridges. True, he added, that it does not cost any more.

We can say in answer that such changes cannot be made and the lessee charged with the expense without the least notice.

The cabins:

The amount of \$3,848.72 is claimed for repairs to cabins.

Here, again, the testimony fails to prove how much was due for actual repairs and how much for improvements.

Mr. Legendre testified that the cabins were not in first-class condition when he owned the place, but "were broken-down cabins; they leaked more or less."

The witnesses for defendant go much further in testifying about their bad condition in 1902.

They required thorough repairs in 1906,

and when they had been thoroughly repaired defendant was not liable therefor. They could not be restored, under the facts, to a tenable state at its expense, as they were barely in that condition when received by it.

The house destroyed by fire:

The evidence regarding this claim was excluded by the judge of the district court, on the ground that the facts and particulars of the negligence charged as ground for the claim were not at all alleged.

We have not found error in the ruling. If there was negligence, it should have been set forth to place the defendant upon its defense.

Platform and scales:

Plaintiffs claim that their large platform and scales, worth \$150, were not returned to them.

The following testimony of Henderson Barkeley, defendant's president, is not contradicted:

One wagon scale broke, owing to wear and tear. The other was never used; never weighed any cane on it at all.

This is the scale for the repair of which plaintiffs claim damages in the sum of \$105.

It appears that this scale was removed from the place where it was originally because it was not strong enough to hold defendant's railroad.

The defendant owed it to plaintiffs not to remove the scale without giving notice. But at most the defendant would owe the costs of returning it to the place from which it was moved and of repairing it so as to restore it to the condition in which it was.

Nothing is said about returning it to the place at which it was, and as to the repairs for which defendant should be charged the testimony does not warrant fixing any amount. We left the matter where we found it.

The next and last claim is for trees and wood. This involves a small amount. There is no ground to change it by adding a few dollars more to it.

Plaintiffs' insistence is that defendant should have had an inventory made, citing article 2720 of the Revised Civil Code, which provides:

"If no inventory is made the lessee is presumed to have received the thing in good order, and should return it in like good order."

We add here, save contrary proof, and there is contrary proof.

The testimony does not create the impression that the plantation was run down and dilapidated. There was a fair return each year, and the place maintained its value throughout, before it was sold to plaintiffs, while it was cultivated by defendant, and subsequently.

We are well aware that tenants seldom comply with the full measure of their obligation. A lessee is not an owner, and does not feel an owner's interest.

For that reason, after having passed upon each item carefully, we do not find it possible to arrive at a different conclusion.

We are constrained, with the facts before us, to affirm the judgment.

It is affirmed.

(123 La. 234)

No. 17,287.

REYNOLDS v. EGAN.

(Supreme Court of Louisiana. October 19, 1908. On the Merits, February 15, 1909. Rehearing Denied March 29, 1909.)

1. APPEAL AND ERROR (§ 14*)—DISMISSAL—GROUNDS.

Plaintiff recovered a moneyed judgment against defendant. The latter obtained an order granting her a suspensive appeal, on her furnishing bond for the amount required for that character of appeal. She executed an appeal bond; but, after the delays for a suspensive appeal had expired, plaintiff, on a rule disposed of contradictorily with the defendant, obtained a decree setting aside the suspensive appeal, which she claimed to have perfected, on the ground that the bond which had been executed was too small for a suspensive appeal, and that plaintiff's right to execution of her judgment had become absolute. So holding, the court ordered a writ of *fi. fa.* to issue in execution of the judgment. The defendant obtained from the district judge an order for a suspensive appeal from his judgment on this rule; the judge fixing the amount for which the appeal bond was to be given. Defendant executed the appeal bond as ordered, but none the less applied for and obtained an order for a devolutive appeal from the main judgment on the merits. Defendant perfected the appeal by executing bond, and has filed the transcript of appeal. Plaintiff has moved to dismiss the appeal on the ground that, having applied for and obtained a suspensive appeal from the judgment on the rule, she had cut herself off from obtaining a devolutive appeal on the merits from the judgment in the main suit until the matter of the appeal taken from the judgment on the rule had been disposed of. The Supreme Court has in the meantime adjudged, on a mandamus taken by plaintiff, that the bond furnished by defendant for a suspensive appeal from the main judgment was too small, and that the attempted perfection of the appeal through the bond she had executed was nugatory, and her right to suspensive appeal had lapsed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 53; Dec. Dig. § 14.*]

2. LANDLORD AND TENANT (§ 133*)—DISTURBANCE OF POSSESSION—LIABILITY OF LESSOR.

Article 2703 of the Civil Code declares that "the lessor is not bound to guarantee the lessee against disturbances caused by persons not claiming any right to the premises, but in that case the lessee has a right of action against the person occasioning such disturbance." The acts referred to are tortious acts of third persons. A lessee is accorded by law a direct action himself against the author of such disturbances, and he should avail himself of that right of action for protection and relief. Failing to do so, he cannot throw upon his lessor the injurious results flowing from such disturbances and make him liable for the same through "an action for damages."

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 466; Dec. Dig. § 133.*]

3. LANDLORD AND TENANT (§ 189*)—RENT—LIABILITY OF TENANT—CHANGE IN CONDITION OF PREMISES.

If, as the result of tortious acts of third parties, the property leased has become entirely unfit for the purposes for which it was leased, and has to be "reconstructed," the lessee has the right to have the lease canceled and himself decreed absolved from payment of the rent stipulated in the contract of lease, as the consideration therefor has failed. The lessee would not be entitled additionally to recover from the lessor damages for profits which (but for such disturbances) plaintiff might have earned during the lease.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 776; Dec. Dig. § 189.*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Thomas C. W. Ellis, Judge.

Action by Margaret Reynolds against M. L. Egan. Judgment for plaintiff, and defendant appeals. Plaintiff moves to dismiss the appeal. Motion to dismiss denied. Judgment reversed.

Charles Lonque and Carleton Hunt, for appellant. Benjamin Rice Forman, for appellee.

On Motion to Dismiss Appeal.

NICHOLLS, J. The present suit is one by the plaintiff for the recovery of damages in the sum of \$5,127.35, with legal interest from judicial demand, which plaintiff alleged she suffered by reason of a breach of contract on the part of the defendant.

The district court rendered a judgment in favor of the plaintiff against the defendant, which was signed on June 28, 1908, for the sum of \$3,250, with legal interest from judicial demand.

On the 1st of July, 1908, the defendant applied for, and on the same day was granted, an order for a suspensive appeal from said judgment.

On the same day she executed and filed in the district court an appeal bond for the sum of \$5,200. On July 10th, on application of the plaintiff, it was ordered by the court that defendant show cause why her appeal should not be dismissed, and why execution should not issue on the final judgment rendered, on the ground, alleged by the plaintiff, that she had not complied with article 575 of the Code of Practice, and had not given a bond or obligation, of a sum exceeding by one-half the amount of the judgment appealed from. After a trial of this rule on July 27th, the court made the same absolute, dismissed defendant's appeal, and ordered and decreed that execution issue on the judgment, declaring that it was of opinion that the appeal bond was not sufficient in amount.

On July 28th the defendant, alleging that she was aggrieved by the judgment rendered by the court making absolute the rule of the plaintiff filed July 10, 1908, to show cause why the suspensive appeal of defendant

should not be dismissed and why execution should not issue on the judgment signed on the 26th of June, 1908, prayed the court for a suspensive and devolutive appeal from the judgment in said rule.

On the same day the court granted the defendant a suspensive and devolutive appeal from the judgment signed on the 27th of July, 1908, making absolute the rule of plaintiff to show cause why the suspensive appeal of defendant should not be dismissed, and why execution should not issue on the judgment signed on June 28, 1908, on her giving bond in the sum of \$5,750.

The bond was ordered executed and filed. In the meantime, on July 23, 1908, defendant filed a petition in which she alleged that she was aggrieved by the judgment, which had been signed on June 26th, condemning her to pay plaintiff \$3,250, with legal interest from judicial demand; that she desired to take a devolutive appeal from the same, and was entitled to such an appeal in addition to the suspensive appeal which had been before granted. She applied for and was granted an order for a devolutive appeal on furnishing bond in the sum of \$200.

This bond was furnished.

On September 12, 1908, a transcript of the record and evidence in the suit of Mrs. Margaret Reynolds v. Miss M. L. Egan, together with the proceedings taken therein in respect to the appeals above referred to, were filed in this court. Mrs. Margaret Reynolds, plaintiff and appellee, moved to dismiss the three several appeals embodied in this transcript, viz.:

First. The appeal taken and filed July 1, 1908, because defendant did not comply with the condition upon which said appeal was allowed, and did not file with the clerk, written 10 days ago, exclusive of Sundays, from the date of the signature of the judgment appealed from July 26, 1908, her obligation, with sufficient surety, in a sum exceeding by one-half the aggregate amount of the judgment, including principal and interest to date of the judgment.

Second. The devolutive appeal taken July 23, 1908, because, having already on July 1, 1908, taken a suspensive appeal, and not having withdrawn or abandoned her appeal taken on July 1st, but still insisting on that, she cannot legally take another appeal from the same judgment until the first is disposed of, no more than she could bring two suits against the same party on the same cause of action and prosecute both at the same time.

Third. The appeal taken on July 28, 1908, from the judgment or order dismissing the first appeal and directing execution to issue, because no appeal lies from such an order. The remedy of the defendant (if error had been committed) was by prohibition, and one who has a judgment not suspensively appealed from and entitled to execution can be tied

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

up by an appeal from an order directing execution to issue; second, because the bond is a bond of appeal from a judgment said to have been rendered and signed on July 23, 1908, when no judgment was rendered and signed on that day. The judgment ordering execution was rendered and signed on July 27, 1908, and no appeal bond has been filed for prosecution of an appeal from that judgment.

On July 31, 1908, Mrs. Margaret Reynolds, plaintiff in the suit of Mrs. Margaret Reynolds v. Miss M. L. Egan, filed a petition in which, after reciting the existence of the said suit and the judgment rendered therein in her favor, the application of the defendant therein for a suspensive appeal, the granting of said application on applicant furnishing a bond for a suspensive appeal, conditioned according to law, averred that she had furnished a bond, sufficient in amount to sustain a suspensive appeal and the delays for the perfecting of such an appeal; that thereupon she obtained from the court a rule on the defendant to show cause why the suspensive appeal should not be dismissed and execution should not issue upon the said judgment; that this rule was tried contradictorily with Miss Egan; that after hearing the rule was made absolute, the suspensive appeal was dismissed, and the execution of the judgment was decreed by the court; that thereupon Miss Egan, defendant in the rule, applied to the court for, and has obtained from it, an order for a suspensive and devolutive appeal from the judgment on said rule, on her furnishing an appeal bond for the sum of \$5,750, which bond was furnished; that said action of the district judge was illegally contrary to the rights of petitioner, and should be reversed by the Supreme Court in the exercise of its supervisory powers. She prayed that a mandamus issue from the Supreme Court, commanding the district judge to vacate his order granting a suspensive appeal from his judgment on the rule and ordering execution to issue on the original judgment. This court, after due proceedings taken on this application, granted the mandamus prayed for, vacated the order for the suspensive appeal complained of, and directed the district judge to order a writ of fieri facias to issue on execution of the original judgment. Application for a rehearing upon this action of the court was refused. The motion to dismiss is submitted to the Supreme Court under these conditions.

Opinion.

The question as to whether the defendant (Miss Egan) legally perfected a suspensive appeal from the judgment rendered against her in favor of the plaintiff (Mrs. Reynolds) through the appeal bond which she executed, and the question whether she was properly granted by the district judge a suspensive appeal from the judgment of this court, holding that, having failed to execute a bond for

the amount required by law to sustain a suspensive appeal, the order for such an appeal which he had granted in her favor had lapsed, and directing that a writ of fieri facias issue in execution of the judgment against her, are not before the court, under the transcript which appellant has filed, for the reasons that they have been finally disposed of by the judgment of this court rendered in the matter of the mandamus obtained by Mrs. Reynolds, which has been referred to.

We do not understand appellant to expect that the issues determined by that judgment should be reopened and passed upon de novo. The only appeal before the court, as matters stand, and to which the motion to dismiss applies, is the devolutive appeal taken by the defendant on July 23, 1908, from the original judgment which had been rendered against her in favor of the plaintiff, and which judgment was signed on the 26th of June, 1908. The grounds assigned for dismissing that appeal are not tenable. At the time application was made by defendant for that appeal, and the order for a devolutive appeal was granted, defendant had lost her right to a suspensive appeal, under the order which had been granted her conditionally (that is, conditioned on her furnishing the bond required by law for such an appeal).

There was at that time no legal obstacle standing in the way of her asking for, and of the court granting her, a devolutive appeal. Her right to a suspensive appeal had then lapsed, and the way was open to a prayer for a devolutive appeal.

It could be more logically urged that the consequence of her applying when she did, and of the court's granting of the same, was the recognition and admission by both herself and the court that the right to the suspensive appeal which she had obtained had then lapsed (which was in fact and law the case, as this court has decided), than that her then legally existing right to a devolutive appeal should be in any way impaired.

There were not, then, two appeals taken from the same judgment. The only two orders of appeal taken from the original judgment were that granted on the 1st of July for a suspensive appeal, which lapsed, and, after the lapsing of the same, the order for the devolutive appeal. There is no legal ground for dismissing the latter, and the application to dismiss is denied.

That appeal is maintained.

Statement of the Case on the Merits.

The plaintiff, in her petition filed November 23, 1906, alleged that Miss M. L. Egan, represented by her agent, John Davidson, owes petitioner \$5,127.35 because the said Miss M. L. Egan is the owner of the house No. 936 Canal street, between Baronne and Dryades streets, and on September 17, 1902, she, through her said agent, John Davidson, leased the said premises to petitioner from the

1st of October, 1902, to the 30th of September, 1903.

And, again the said lease was renewed by writing on the face thereof, dated August 10, 1903, for another year, and from year to year; and again was renewed on the 7th of August, 1906. Another lease was made for the same premises to petitioner from the 1st of October, 1906, to the 30th of September, 1907, at the rate of \$900 per annum, payable monthly at the rate of \$75 per month.

That petitioner had promptly paid her rent and owes no rent; and she annexes hereto the last rent note, No. 12, of the last year, and for the month of October, 1906, due the 1st of November, 1906, and the said lease and rent notes are hereto annexed and made a part of this petition.

That the said premises were leased to petitioner for the purpose of renting rooms and keeping furnished rooms therein, which fact was well known to the said John Davidson, agent for the said Miss M. L. Egan, and in order to make the said premises tenantable and fit for the purpose for which they were leased, and with the authority of the said John Davidson, agent, petitioner put in electric wiring for lighting, paid for partitions, and paid for other carpenter's repairs, and plumbing and papering, costing her \$411.35, as appears by the detailed bill of particulars and memorandum hereto annexed and made a part of this petition.

That petitioner by careful and diligent attention to her business had built up a large and lucrative business, whereby she was making \$6,000 a year, or \$500 a month, and that her expenses in the said business amounted to \$1,284, leaving her a net profit of \$4,716, to which should be added money she expended for partitions, painting and papering, and permanent improvements, which are wholly lost to her by reason of the facts hereinafter stated.

That the said Miss M. L. Egan, through her said agent, guaranteed petitioner against all the vices and defects of the thing which might prevent its being used, and even if said defects and vices had arisen since the lease was made, provided that they did not arise from the fault of the lessee. And the said Miss M. L. Egan is bound to indemnify petitioner from the loss that has resulted from the vices and defects hereinafter named, which have arisen from no fault of petitioner.

That, inasmuch as the said John Davidson, agent of the said Miss M. L. Egan, did not comply with the city ordinance and furnish petitioner with an adequate supply of pure and wholesome water, petitioner had been obliged to make arrangements to get hot and cold water from the Hotel Grunewald and to make pipe connections with the said hotel to convey the water into the premises No. 936 Canal street, in order that her roomers may have the

use of the bath and water for their rooms and the use of the water-closet. That shortly after the said lease was made, on the 7th of August, 1906, the walls of all the rear of the house began to crack and open as the result of the extensive excavations made on the property of the state of Louisiana and leased to the Grunewald Hotel Company, fronting on Dryades street, and adjoining the property No. 936 Canal street in the rear, which cracking and parting of the walls could have been avoided and could have been prevented if the said Miss M. L. Egan and the said John Davidson, her agent, had given the said walls proper and sufficient support.

That your petitioner promptly notified the said John Davidson of the cracking of the walls, and when he came to the premises he was a timid man, and very cautious, and said it was dangerous, and would not even go to look at them.

That petitioner had repeatedly called his attention to the dangerous condition of the said walls and demanded that he put them in order, and he had utterly failed to make any attempt even in that direction; and the cracks had continued to widen until in one of the main walls there was a crack five or six inches wide, reaching from the top to the ground, and the rear end of the building towards Common street was likely at any time to slide into the excavations made by the Grunewald Hotel Company, and as a consequence her entire water supply had been cut off, so that she had no water on the premises to furnish her rooms for baths, toilets, or drinking, and no water for the water-closet, but had been obligated to introduce an earth barrel into the main house and carry water in buckets from the neighbors.

And the dangerous condition of the premises had frightened away all her customers, and it was impossible for her to get or keep roomers, unless she could afford them the accommodations of a decent water-closet, a bath of hot and cold water, and water for ordinary toilet purposes, and the result had been from the breach of the said contract of lease guaranteeing petitioner against vices and defects of the thing which prevented its being used for the purposes for which it is leased; that she had been damaged and lost the sum of \$5,127.35 above named; that it will cost many thousands of dollars to reinstate the building No. 936 Canal street, and make it fit for the purposes for which it was leased. The rear portion would have to be torn down and rebuilt, and at the season of the year, which was the most profitable season for her line of business, she had been entirely deprived of the use and benefit of the premises, and had so been damaged as above set forth.

That she was unable in the neighborhood to find a similar house to carry on her business, and would be obliged to give it up and thereby lose the profits which she

would have made and were in contemplation of the lessor and her agent when the lease was made.

In view of the premises, petitioner prayed that Miss M. L. Egan, through her agent, John Davidson, be cited, and that the said lease be canceled, and that it be decreed that she was under no obligation to pay any more rent, and that she recover from the said Miss M. L. Egan the sum of \$5,127.35, with 5 per cent. interest from judicial demand, and for costs, and for general relief.

Defendant excepted that plaintiff's petition set forth no cause of action. This exception was overruled. She then, under reservation of said exception, answered. She first pleaded a general denial. Further answering, she alleged that if plaintiff suffered any loss, as was by said plaintiff alleged, that same had been caused by the wrongful and tortious acts of the Hotel Grunewald Company, Limited, and their contractor, Charles Sicard, in making the excavations and in doing the other work included in the extension, now being constructed in the rear of defendant's building No. 936 Canal street, of Hotel Grunewald. And defendant charged, in planning and carrying on said work said Grunewald Company, Limited, and their said contractor, Charles Sicard, joining together for the purpose, had made the excavations in question on a scale of magnitude, thereby causing the walls of defendant's said building to crack and sink, and the building itself to be condemned as unsafe, hitherto unheard of in this locality. They had shaken the circumjacent territory by pile driving for foundations, and so disturbed and impaired said building as to compel defendant to reconstruct it. They had exploded dynamite to remove piles wrongfully and negligently put in out of line by themselves, and thereby aggravated and added to the previous damages done by them, and had persisted in carrying on their work and other attendant operations in a reckless and tortious manner, in the face of continued warnings and protest on the part of defendant and to the injury of her said property. That said hotel company and said contractors had combined and confederated for the purposes of said work, and for the injury of defendant, and to damage, impair, and destroy her said property as hereinbefore related, were joint tort-feasors, and as such that they were liable in solido to plaintiff and likewise to defendant; that the full extent of said loss and damage was difficult to prove and defendant was entitled to prove it, and to recover for it in due course.

In view of the premises, defendant prayed that said Hotel Grunewald Company, Limited, by its president, Louis Grunewald, and its said contractor, Charles Sicard, be cited herein to defend this suit, and that defendant be dismissed, with judgment in her favor and costs; but if the court should find,

as between plaintiff and defendant herein, plaintiff had suffered loss or damage, and render judgment accordingly, that such judgment as might be so rendered over again in favor of defendant, and in solido against said Grunewald Hotel Company, Limited, and said Charles Sicard, and that the right of this defendant to proceed against said company and said Sicard for further damages be expressly reserved. Defendant subsequently discontinued the call in warranty without prejudice.

The district court rendered judgment in favor of the plaintiff against the defendant for the sum of \$3,250, with legal interest from judicial demand, and for costs.

Defendant has appealed.

The reasons assigned for judgment were as follows:

"The facts of this case are entirely different from those of any of the cases decided by our Supreme Court, under Rev. Civ. Code, arts. 2697, 2699, 2700, or either of them.

"It is beyond all question that defendant's house, occupied by plaintiff as lessee, was wrecked by the excavation, pile driving, and other disturbances of the soil, by the Hotel Grunewald Company and its contractors, on their adjacent property.

"It was in the power of the defendant, if proper action had been taken, to have stayed said damaging works, at least until all proper safeguards against injury and for proper indemnity had been obtained. Rev. Civ. Code, arts. 857, 864, 865, 867.

"This as a matter of legal right.

"It was in the defendant's power, if it was not deemed proper to stay nor stop said damaging new works on the adjoining property, to have 'shored up' or reinforced or supported the threatened walls of her own building. The evidence establishes that this could have been done, and that it would have prevented the sinking and wrecking of defendant's building. The Grunewald contractors did 'shore up' the walls; but their work was poorly done and proved wholly unavailing. The result of this neglect by defendant was that the rear part of the building was destroyed and had to be rebuilt, and this result was immediate.

"The result, furthermore, was that defendant's entire building, in front and in all its stories, was cracked and damaged, so as to render it unsafe for habitation and to destroy it for all the purposes of a lodging house, and this result was not long delayed. The proofs brought into the case at the trial abundantly establish the foregoing findings of fact.

"For all the objects and purposes of the lease, to wit, the renting of furnished rooms by defendant, which were well known to both parties and in their contemplation when the lease was executed, in renewal of similar leases for past years, the damage to the leased building amounted to total destruction.

"In the suit brought by defendant against the Hotel Grunewald Company et al., No. — of the docket, division B, still pending, the defendant, as plaintiff there, in her original and supplemental petitions, alleged that the damage originally and still continuing to her building was the equivalent of its entire destruction. These pleadings in said suit in division B are in evidence.

"At the inception, when evidences of disturbance from the Grunewald works began to manifest themselves to the plaintiff, in possession of defendant's house, as lessee, she promptly notified the defendant's agent, who took no efficient measures for her protection. This neglect was a breach of defendant's contract as lessor. Soon

after, when forced to vacate and remove all her belongings from the rear of the building, and the front of said building had begun to crack, and all of her tenants had left, fearing to remain in said broken and dangerous building, which the city engineers had condemned, the plaintiff packed her furniture and prepared to quit the premises, and thereupon the defendant's agent forbade her doing so, and threatened a provisional seizure of her furniture if she attempted to move. The result was that plaintiff, whose business was that of keeping a lodging house and renting furnished rooms, which she had been carrying on at a fair profit in that building for several years, was compelled to stay in it, with all her furniture and effects, and to pay the rent, which she did, as it matured, under protest, with her customers or room tenants all gone, because of the dangerous condition of the building, without deriving any benefit whatever from it.

"She was compelled to move her furniture from the rear, a necessary part, of the building, containing the lavatories, closets, etc. She was compelled to supply temporary closets, etc., and to get a supply of water elsewhere, and to pack up and store her furniture, all involving trouble and expense and worry, and for the year's rent, which she paid under protest, she received no consideration. Her enjoyment of the premises and her exercise of her business in it, for the rental year, subject to the inconveniences and losses in the event of disturbance of the building for repairs or from the acts of the neighbor within the limits prescribed by our Code (Rev. Civ. Code, arts. 2697, 2699, 2700), were her legal rights as lessee. Her right was to be maintained in the use and enjoyment of the property by the lessor. Her rights were, if the building became uninhabitable or unfit for its intended use, to leave it and end the lease.

"Of all these rights the defendant lessor deprived her, for she failed to prevent the injury to the building when this was easily within her power, and she forced plaintiff to remain in the house and to pay rent at the contract rate until the term expired.

"Under these conditions, forced upon plaintiff by the negligence of defendant in the outset, and by the conduct of defendant in compelling her to remain in the house by threats of seizure, nothing remained of the contract of lease, except its form.

"The house had become uninhabitable and incapable of use as a lodging house, which, in law, dissolved the lease; but the plaintiff still continued to occupy it, with her furniture all packed and stored and useless to her, because defendant's agent compelled her, by threats of provisional seizure, to remain. The plaintiff still continued month by month to pay the rent, which defendant's agent exacted, at the contract rate; but she did so under protest. With the house destroyed for all the purposes of the lease, with all consent withdrawn, with the plaintiff remaining unwillingly in the premises through the coercion of defendant's agent, and paying rent under protest, when all consideration for such rent had failed, it seems to me that all the substance and reality of the contract of lease had gone, and that nothing remained of it; and this condition of affairs was brought about primarily by the negligence and fault of the defendant, and by the subsequent wrongful conduct of her agent in compelling the plaintiff to personally remain in the house, after its broken condition had destroyed the business for which she had rented it, and in compelling her to pay the rent against her will and under protest, when all consideration for it had failed. It seems to me that this conduct of the lessor was a gross breach of her duty to the plaintiff under the contract, which brings the damage assessment under Rev. Civ. Code, art. 1934, §§ 1, 2.

"This is not a case for the application of article 2700, for it is not a matter of repairs

to the building; nor can article 2699 be applied, because the defendant, lessor here, was in grave fault, and that article provides for a case where the lessor is 'without any fault.' Neither can article 2697, nor the last paragraph of article 2700, be invoked as the rule, because the defendant's agent by threats of seizure coerced the plaintiff to remain in the house and keep her furniture and effects, with which she earned her livelihood and carried on her business, in the house, and exacted the rent against her protest and her will, all of which the defendant had no legal right to do under these articles, which flowed from defendant's neglect of duty as lessor at the beginning of the trouble.

"Defendant's duty as lessor, under Rev. Civ. Code, art. 2692, § 2, was 'to maintain the house in a condition such as to serve for the use for which it was hired,' and this she could have done by invoking Rev. Civ. Code, arts. 857, 864, 865, 867, against the Grunewald Company and their contractor, and by seeing that the rented house, occupied by plaintiff, was properly braced and supported, as the proof abundantly shows; and this duty she did not fulfill, to plaintiff's wrong and injury. The adjudicated cases relied upon by defendant's counsel in his exceedingly able argument, viz., Redon v. Coffin, 11 La. Ann. 695, and Bonnacaze v. Beer, reported in 37 La. Ann. 531, cannot apply, because the facts of those cases were totally different from those of the instant case.

"Without further discussion, I think that Rev. Civ. Code, arts. 2668, 2729, 1930, and 1933, § 3, find application, and justify the plaintiff's demand, as also do Rev. Civ. Code, arts. 21, 1964, 1965; and, considering the rent paid by defendant, without consideration received therefor, the actual expense and trouble, and loss of time, and disturbance in her business, I think that the proof justifies the award of damages that I have made in her favor.

"The defendant, as plaintiff in the suit against the Grunewald Company, now pending in division B, can obtain reparation for all her loss and damage. If she (defendant) is not held in the suit, then are plaintiff's wrongs and injuries without remedy."

Opinion.

The relations of landlord and tenant began between plaintiff and defendant as far back as 1902. The first lease between them was made on September 17, 1902, to commence on the 1st of October, 1902, and end on the 30th of September, 1903. This lease was renewed on August 10, 1903, for another year and from year to year. It was again renewed on the 7th of August, 1906, to commence on October 1, 1906, to end on the 30th of September, 1907, at the rate of \$900 payable monthly at the rate of \$75 per month.

The plaintiff went into possession of the leased premises from the commencement of the first lease. There is no claim or pretense by plaintiff that prior to the 17th of September, 1906, the landlord had not complied with all the obligations which the leases imposed upon her from the nature of the contract under article 2692 of the Civil Code. There is no recital in the leases as to the special purpose and use for which the premises were leased; but it is conceded that plaintiff's business or occupation was that of keeping furnished rooms, and that the premises were leased for the purposes of that business, and that those facts were known to both parties. Plaintiff alleges that after the

making of the lease on the 6th of August, 1906, which was to commence on the 1st of October, 1906, and to end on the 30th of September, 1907, the walls of all of the rear of the house leased began to crack and open as the result of extensive excavations which were made on the property adjacent to it, leased to the Grunewald Hotel Company; that these cracks and openings made the building unfit for the use for which it was leased, and said injuries to the building were continuous in character; that it would cost thousands of dollars to reinstate the building and make it fit for the purpose for which it was leased; that the rear portion would have to be torn down and rebuilt; that she was unable in the neighborhood to find a similar house to carry on her business, and would be obliged to give it up and lose the profits which she would have made, and in contemplation of the parties. The prayer of the petition was that the defendant be cited, that the lease be annulled, that it be decreed that she was under no obligation to pay any more rent, and that she recover from her lessor \$5,127.35, with legal interest from judicial demand. From what has been stated, it will be seen that we have not to deal with a case where from defects inherent in the building itself it had become unfit to carry on the business for which it was leased, nor is it one where its unfitness for the business had been occasioned by any affirmative act of the defendant herself, but that this condition of things arose from the action of third persons by the application of external force in erecting on their own property very heavy buildings (13 or 14 stories high), which required for their construction deep excavations to be made in the earth and pilings 50 or 60 feet long to be driven down therein by steam pile drivers. The driving of the pilings occasioned violent vibrations of the ground, and the great weight of the buildings caused the earth on which the leased building stood to slip and settle to the extent stated, with the results complained of.

There can be no question that, from the nature of the contract of lease, the lessor is bound, without any clause to that effect:

(1) To deliver the thing leased to the lessee.
 (2) To maintain the thing in a condition such as to serve for the use for which it was hired.

(3) To cause the lessee to be in peaceable possession of the thing during the continuance of the lease, for that is the text of the law. Civ. Code, art. 2692. These in general terms are the obligations of the lessor; but different articles of the Code must be read together. As bearing upon the provisions of that article, we should consider the following special articles of the Code on the subject of letting and hiring, coupled with general principles of law as applicable to the particular situation of this case.

"Art. 2697. If, during the lease, the thing be totally destroyed by an unforeseen event, or if it

be taken for a purpose of public utility, the lease is at an end. If it be only destroyed in part, the lessee may either demand a diminution of the price, or a revocation of the lease. In neither case has he any claim for damages."

"Art. 2699. If, without any fault of the lessor, the thing cease to be fit for the purpose for which it was leased, or if the use be much impeded, as if a neighbor, by raising his walls, shall intercept the light of a house leased, the lessee may, according to circumstances, obtain the annulment of the lease, but has no claim for indemnity.

"Art. 2700. If, during the continuance of the lease, the thing leased should be in want of repairs, and if those repairs cannot be postponed until the expiration of the lease, the tenant must suffer such repairs to be made, whatever be the inconveniences he undergoes thereby, and though he be deprived either totally or in part of the use of the thing leased to him during the making of the repairs. But, in case such repairs should continue for a longer time than one month, the price of the rent shall be lessened in proportion to the time during which the repairs have continued, and to the parts of the tenement of the use of which the lessee has thereby been deprived. And the whole of the rent shall be remitted, if the repairs have been of such nature as to oblige the tenant to leave the house or room and to take another house, while that which he had leased was repairing."

"Art. 2703. The lessor is not bound to guarantee the lessee against disturbances caused by persons not claiming any right to the premises; but in that case the lessee has a right of action for damages against the person occasioning such disturbance."

The French text of that article was as follows:

"Le bailleur n'est pas tenu de garantir le preneur du trouble que des tiers apportent par voie de fait à sa jouissance, sans prétendre d'ailleurs aucun droit sur la chose louée; sauf au preneur à les poursuivre en son nom, et à demander, s'il y échet des dommages-intérêts de ces voies de fait."

It was shown on the trial that as a matter of fact that plaintiff continued to occupy herself, up to the end of the lease of 1906 and 1907, some parts of the front building, and that she kept all of her furniture packed therein, ready to abandon the premises.

It will be seen that, while article 2692 of the Civil Code enumerates the rights to which a lessee is entitled, it does not declare therein what effect would follow, should she not, in fact, have obtained them in particular cases. It is left to other articles of the Code to declare what relief should be given and what remedy accorded to a lessee under different circumstances. In view of the fact that peaceable possession of the thing leased is the very object of a contract of lease, it was reasonable and proper to expect that the price the lessee should pay for such possession should be reduced or entirely remitted as that possession should partially or entirely fail; for under these circumstances the contract would have been partially or entirely without cause. It would not follow, however, because the consideration had partially or entirely failed, that the lessee should recover damages from his lessor. The basis for a claim of damages is a fault, and it might well be that in some

given case the lessor would be unable to comply with his obligations and yet be free from fault. The law, therefore, deals equitably with both parties under special circumstances. Under some circumstances it limits the relief of the lessee to a reduction of rent; under others, to remission of the same in entirety and a cancellation of the contract of lease; under others, absolving the lessor from all blame, it requires the lessee to bring his action against third parties troubling or disturbing his rights.

Where the rights of a lessee are disturbed by third parties not claiming any right to the premises, and under circumstances which bring the case under the provisions of article 2703, the lessor is protected from attack by the lessee under its express terms. What we have to determine, therefore, is whether the disturbance of which the plaintiff complains was one for which she can have relief or recourse against her lessor for the same, as she has done in this instance, or whether she has made a mistake and directed her attack against the wrong person; whether, if she has any recourse against her lessor, the relief and remedy which she seeks is that to which she is entitled by law.

Plaintiff's action, as brought, is one against her lessor, asking the cancellation of the lease and that she be decreed absolved from the payment of all rent, coupled with a demand against her lessor for damages, not as the direct author of those alleged to have been suffered by her through any personal act of her own, but as arising from an alleged failure on her part to carry out her obligations of warranty, which required her to cause her lessee to be maintained in peaceable possession of the thing leased during the continuance of the lease.

There can be no doubt that under the circumstances of this case her demand for a cancellation of the lease and a remission of the rent in entirety, under the lease, was well grounded; but with this right on her part was her accompanying duty of vacating the premises. She could not have the lease canceled and at the same time remain in the building, as she did, making no payment whatever to the owner for so doing. Defendant's agent recognized at once, on being informed of the disturbance of her possession, her wish to abandon the premises. He, in fact, advised her to do so, as the premises were in a dangerous condition. In the testimony given by her on her own behalf, she declared that she had intended to leave, and had prepared to do so, but was compelled to remain in the building by reason of a threat from the agent that, if she attempted to leave without payment of the rent, he would seize her furniture under a writ of provisional seizure. We think plaintiff must have been under a misapprehension touching that matter. The agent, we think, may have claimed that the lessor was entitled to rent up to the time of the vacating of the prem-

ises by the plaintiff, and threatened to enforce payment of that rent by provisional seizure; but we question that he did more than this. Be that as it may, his threat to have recourse to judicial proceedings was no ground for her remaining on the premises. She had the legal right to cancel the lease, as matters stood, and vacate the premises, and she should have done so. We say she had the right to cancel the lease, for the reason that the situation was not one calling for "repairs" to the building, but for a "reconstruction" of the same. Quoad the plaintiff's business of renting rooms, the building had become utterly unfit.

The law does not require the lessor to reconstruct buildings at great expense for the benefit of the lessee. The expense of reconstruction may exceed the means of the lessor and be out of all proportion to the rent which he would receive from the lessee. He might not have been willing to rebuild on his own account. He cannot be expected to do so in the interest of the lessee. We will cease further discussion of this subject for the present, and return to a consideration of the article of the Code referred to, and to the effect that the provisions of that article have upon the rights and obligations of the parties.

Article 2703 of the Civil Code is taken from article 1725 of the Code Napoléon. The English translation of the article leaves out a translation of the words "*voies de fait*." The French article itself does not define what is meant by those words. They are placed in the article as having a well understood and known meaning.

We understand those words as applying to disturbances which the lessee has the right himself to resist; disturbances against which the lessee can protect himself by having recourse to legal proceedings. An illegal act is a "*voie de fait*." A legal act is not.

French commentators say that article 1725 of the Code Napoléon does not mean that a "*voie de fait*" is to be found on every occasion where the disturbances are caused by persons claiming no right to the premises leased. It, however, excludes, as not being "*voies de fait*," acts of disturbances which are committed in the exercise of a legal right, as, for instance, the building on one's own premises of a building or wall directly opposite to the windows or openings of the dwelling or house of the next-door neighbor. The disturbances must come from the commission by third parties of a tort "*un acte illegal est 'une voie de fait' or les voies de fait ne donnent pas lieu a garantie contre le bailleur. Le preneur a son action contre l'auteur du trouble,*" says Laurent. "*Des tiers peuvent entraver la jouissance du preneur; le bailleur repond-il de ce trouble?*" (asks the same author). "*Il faut distinguer*" (he answers). "*Si ce sont des voies de fait,*

le bailleur n'est pas garant. * * * Si l'entrave qu'un tiers apporte à la jouissance du preneur est l'exercice d'un droit, l'article 1725 est inapplicable; on ne peut pas dire que celui qui use de son droit commette une vole de fait, laquelle est un délit."

Laurent (volume 25, p. 170, § 180), under the heading of "Trouble de fait," discusses article 1725 of the Code Napoléon as follows:

"Le bailleur n'est pas tenu de garantir le preneur du trouble que les tiers apportent par voie de fait à sa jouissance, sans prétendre d'ailleurs aucun droit sur la chose louée; sauf au preneur à les poursuivre en son nom personnel (article 1725). Pourquoi le bailleur n'est-il pas tenu des troubles de fait? On pourrait dire que peu importe la cause du trouble; le preneur ne jouit pas quand il est troublé, et le bailleur s'est engagé à le faire jouir paisiblement. Telle serait, en effet, la conséquence logique de l'obligation que le bailleur contracte de faire jouir paisiblement le preneur de la chose louée pendant la durée du bail. La loi n'a pas admis cette conséquence, parce qu'elle suppose que les troubles de fait sont dus à une négligence du preneur, qui n'a pas surveillé assez activement la chose louée; ou ils sont dus à des inimitiés personnelles; dans cette supposition, il serait injuste de rendre le bailleur responsable. L'article 1725 indique encore un autre motif: c'est que le preneur a une action personnelle contre les auteurs du trouble. (1) Généralement cette action lui suffit. * * *

In the present case the authors of the disturbance are known, and it is not claimed that they are insolvent. It will be necessary to examine, therefore, whether in this case the Grunewald Hotel Company was acting within the limits of its legal rights, or whether by reason of the manner of its erecting the buildings on its own property, or in the failure on its part to take proper precautions to guard the interests of third parties, it went outside of the limits of its legal rights and subjected itself to an action ex delicto. There existed no contractual relations between that company and either the plaintiff or the defendant in this case. If by its course it made itself liable to third parties for the damages caused, its responsibility extended directly to each of the parties to this litigation. While it violated the rights of the owner quoad property rights, it equally violated the rights of possession of the lessee. It therefore subjected itself to actions against it at the hands of the owner and also of the lessee.

The plaintiff in this case seeks to avoid the legal consequences of article 2703 of the Civil Code by charging her with a fault committed in the premises, and in this position she was sustained by the district court. In thus concluding, we think both were in error. To say in one and the same article that the lessor is not subject to obligations of warranty arising from the acts of third parties under given circumstances, and yet be liable under those obligations for the same acts, is a contradiction in terms. The law having accorded to

the lessee herself the means of protecting her own rights, it was her duty to avail herself of those means, and, failing so to do, she cannot throw the responsibility for the result upon her lessor, who, by the terms of the law, is under that state of facts freed from the obligation of guarding her interests.

We do not think it can be disputed that where a person, being authorized legally to do a certain thing, does it in a way injurious to third parties and regardless of their rights, to the extent of his departure from the legal requirements which attached to the situation he renders himself liable to persons injured by his acts to actions sounding in damages. In this matter one of two things has happened. The Grunewald Hotel Company either acted in strict accord with its rights, or it has passed outside the limits of its rights and subjected itself to actions of damages for tort. If the latter be the case, plaintiff has no action against the defendant under article 2703.

If the former be the case, while the plaintiff might be entitled to relief of some kind at the hands of her lessor, it would not go to the extent of holding her liable to an action for damages for all the consequences resulting from her possession being disturbed partially or entirely. She would be limited either to a claim for a reduction of rent or to a demand for the cancellation of the lease, with the rights flowing from such cancellation.

We do not think, under the pleadings, that we can pass upon and adjust the rights and obligations of the parties as resulting from the fact that plaintiff has paid to the defendant under protest the full amount of the rent during the whole period of the lease, while she has herself occupied (for residential purposes, at least) a part of the leased premises. If the plaintiff has paid unduly and in error more money to the defendant than she was legally called upon to pay under the circumstances, and if the defendant has received more than she was entitled to receive, the law points out the remedy for such a situation, and to that remedy the plaintiff must be relegated.

For the reasons herein assigned, it is hereby ordered, adjudged, and decreed that the judgment appealed from be and the same is hereby annulled, avoided, and reversed, and it is now adjudged and decreed that plaintiff's demand that the lease be declared canceled as of date of the judicial demand be recognized, and the lease is so decreed, and that she be decreed absolved from payment of the stipulated rent from that date, but plaintiff's demand for damages be denied; that defendant pay the costs of the lower court, and the plaintiff pay the costs of appeal, and the right of plaintiff to recover rents paid since judicial demand from her lessor be reserved.

(123 La. 319)

No. 17,404.

I. TRAGER CO. v. CAVAROC CO., Limited.(Supreme Court of Louisiana. March 1, 1909.
Rehearings Denied March 29, 1909.)**1. BANKRUPTCY (§ 20*)—LIEN FOR RENT—VALIDITY AGAINST TRUSTEE.**

The appointment, under a state law, in a state court, of a receiver to a corporation, is valid, and the administration of the receiver continues to be valid until the jurisdiction of the court is ousted by the filing of a petition to force the corporation into involuntary bankruptcy, followed by the adjudication in bankruptcy, and where a lessor has proceeded, in the receivership, to enforce his claim and lien (arising out of a contract of lease, antedating by more than four months the filing of the petition in bankruptcy) for rent, not yet due, against the proceeds in the hands of the receiver of the property found on the leased premises, the jurisdiction of the state court, so long as such claim and lien is not ousted by the filing of such petition, nor does the bankrupt law dispossess the state court of the property upon which the lien bears, though there was no rent actually due at the time that the lessee was adjudicated a bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 20.*]

2. BANKRUPTCY (§ 20*)—EFFECT UPON PROCEEDINGS IN STATE COURT.

The state court having appointed a receiver to a corporation, and the receiver having come into possession of a fund derived mainly from the sale of movables found on premises which had been leased to the corporation, and the lessor having asserted his claim, lien, and right of pledge against such movables and the proceeds thereof, and the receivership then taking the form of "winding up the affairs of an insolvent corporation," which was followed by a petition for involuntary bankruptcy, such court should do no more, with respect to the fund in its possession, than determine, as between the claim of the lessor and claims arising out of the receivership, the question of preference, and enforce the lien and right of pledge of the lessor, after which the balance of the fund, if any, should be turned over to the trustee in bankruptcy, and the other claimants relegated to the bankruptcy court for the further settlement of their demands.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 20.*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Walter Byers Sommerville, Judge.

Action by the I. Trager Company against the Cavaroc Company, Limited, for the appointment of a receiver. Sol Levi was appointed receiver, and from a subsequent order directing him to turn over the property in his hands to the trustee in bankruptcy of defendant, both Levi, individually and as receiver, and plaintiff appeal. Reversed and remanded.

Charles Rosen and Lazarus, Michel & Lazarus, for appellant Levi. Rice & Montgomery, for appellant Pokorny. Dart & Kernan, for appellees City Bank & Trust Company and others.

Statement of the Case.

MONROE, J. Plaintiff, a creditor, filed a petition in the civil district court, alleging that the defendant company was insolvent, that its affairs were being grossly mismanaged, thereby jeopardizing the rights of the stockholders and creditors, and that its stockholders had declared, by resolution, that it was unable to meet its obligations as they matured, and praying that a receiver be appointed. Defendant answered, admitting that plaintiff is a creditor, admitting the adoption of the resolution referred to in the petition, but denying the alleged insolvency and mismanagement, and submitting the question of the appointment vel non of the receiver to the judgment of the court. Sol Levi was thereupon appointed receiver, and, having qualified, caused an inventory to be made and filed, obtained authority to employ counsel and to continue the business of the company as a going concern, and generally discharged the duties incidental to his position. At a later date, he filed a petition setting forth the insolvency of the company, alleging that there was no reasonable ground for believing that its affairs could be so administered as to pay its debts, and praying that he be authorized to sell its property; and, the order having been obtained, the property was sold. Thereafter he filed a provisional account, showing a balance on hand of \$6,000.54, after deducting from the total amount received the money actually disbursed under orders of court, against which were charged as privileged debts certain expenses of administration, such as fees, commissions, insurance premiums, etc. This account was opposed by several of the creditors, including the lessor, and at that stage of the proceeding the receiver presented to the court a motion setting forth that Cavaroc Company, Limited, had been adjudicated an involuntary bankrupt, that he (the receiver) had been elected trustee and had qualified in that capacity, and that the funds in his hands, as receiver, "except such funds as appear on said account as privileged charges of attorneys, receiver, notary public, appraiser, and other preference charges of administration," should be turned over to him as trustee. Service of this motion having been accepted by the counsel representing the parties in interest, the complaining creditors (in the bankruptcy proceeding) and the lessor answered, the latter insisting that the funds in question shall be retained in the state court until his rights with respect thereto shall have been determined, whilst the creditors take the position that the entire amount should be turned over to the trustee in bankruptcy. The court *a qua* gave judgment ordering the receiver to turn over the entire amount, and he, individually and as receiver, and his attorneys, for themselves and the lessor, have appealed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Opinion.

The creditors, who have not appealed, think that the whole fund in the hands of the receiver should be turned over to the trustee, and, hence, that the judgment appealed from should be affirmed.

The receiver and his attorneys think that the court *a qua* should deduct from the fund the expenses of its own administration and turn over to the trustee the balance. The lessor insists that the whole fund be retained by the state court, for the reasons that, in February, 1907, he leased to Cavaroc Company, Limited, the store, recently occupied by it, at a rental of \$350 a month, for a term beginning March 1, 1907, and ending September 30, 1912, and had a lessor's privilege and right of pledge for the aggregate amount due and to become due under his contract upon the property which was contained in said store when the receiver was appointed; that he has the same privilege and right with respect to the fund in question which was derived from the sale of said property; and that his right in the premises should be determined in the court now having the custody of said fund. The receiver was appointed May 14, 1908, the petition in bankruptcy was filed July 17, 1908, and the adjudication in bankruptcy was made on August 11, 1908.

The rent notes were paid, as they matured, up to August 1, 1908, inclusive, so that when the lessee was adjudicated a bankrupt there was nothing actually due, but the lessor claims an amount "to become due" which exceeds that in the hands of the receiver.

Considering whether the fund in question should be transferred to the trustee of the lessee and the lessor compelled to follow it into the bankruptcy court, we conclude that the lessor had a lien and right of pledge and detention, to secure the payment of his rent due and to become due, upon the movables found in the leased premises, which lien and right extend to the fund in the hands of the receiver as the proceeds of said movables; that this lien and right is his property, and not that of the lessee, and was not surrendered in bankruptcy by the lessee; that, prior to the proceedings in bankruptcy the lessor, in the manner provided by law, was prosecuting, in the state court, his claim against the lessee for rent due and to become due, and was seeking to enforce his lien and right of pledge against said movables, and against the proceeds thereof, then in the custody of the court, through its receiver, and that the bankrupt act does not divest the state court of jurisdiction of the case or confer upon the trustee of the bankrupt lessee the right to take away the fund affected by the lessor's lien until his claim has been adjudicated and satisfied therefrom. These conclusions, we think, are sustained by the following provisions of law and rulings of the courts, to wit:

"The lessor has, for the payment of his rent and other obligations of the lease, a right of pledge on the movable effects of the lessee which are found on the property leased." Rev. Civ. Code, art. 2705.

"The right which the lessor has over the products of the estate and on the movables which are found on the place leased, for his rent, is of a higher nature than a mere privilege. The latter is only enforced on the price arising from the sale of movables to which it applies. It does not enable the creditor to take or keep the effects, themselves, specially. The lessor, on the contrary, may take the effects, themselves, and retain them until he is paid." Rev. Civ. Code, art. 3218.

"When the lessor sues for his rent, whether the same be due or not due, he may obtain the provisional seizure of such furniture, or other property, as may be found in the house or attached to the land leased by him." Code Prac. art. 287.

"The plaintiff has proved that he was the lessor of the property, * * * and that the rent claimed was due. He had, therefore, a lien and a right of detention upon the property on the premises, for the security of his rent. That lien was his property and as valuable to him as if he were the owner of the property itself, and no sheriff or marshal, under execution against a third person, had any right to take away the property before paying the landlord." *Robb v. Wagner*, 5 La. Ann. 112.

"The lessor has a privilege as well for rent not due as for rent due, and is entitled to that privilege in preference to a creditor who has made a seizure upon execution." *Robinson v. Staples*, 5 La. Ann. 712; *Conrad v. Patzelt*, 29 La. Ann. 477.

"The syndic may, on proper showing, or proper proceeding, compel the liquidation of the pledge, by sale, so as to ascertain any possible residuum applicable to other creditors, but he does not acquire the right to demand the surrender of the pledged property into his official control and administration and subject to the costs and charge thereof." *Renshaw v. His Creditors*, 40 La. Ann. 37, 8 South. 403.

Quoting from syllabus in *Marshall v. Knox*, 16 Wall. 551, 21 L. Ed. 481.

"(1) The district court had no jurisdiction to compel a lessor and the sheriff, by a rule in bankruptcy, to deliver up possession to the assignee in bankruptcy of goods which were in custody of the sheriff under a writ of seizure from a state court and held for the rent of the lessor; neither the sheriff nor the lessor being party to the proceeding in bankruptcy. * * *

"(3) The lessor and the sheriff had the right, under the law of Louisiana, giving a lien for rent, to the possession of the goods, for the payment of the rent, which had been seized for that purpose, before the proceeding in bankruptcy, and the assignee in bankruptcy could not take them from their possession. Where goods have been sold by the assignee, the lessor may recover of him the full value of the goods, clear of all expenses, whether the assignee realized the value or not (limited to the amount of rent that he is entitled to be paid), and taxable costs."

In the body of the opinion it is said:

"But we think it very clear that the complainant had a right to the possession that he claimed. The fourteenth section of Bankr. Act July 1, 1898, c. 541, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), it is true, vests in the assignee all the property and estate of the bankrupt, 'although the same is then attached on mesne process, as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of such proceeding.' But this clause evidently refers to those cases of orig-

inal process of attachment which only become perfected liens by the judgments which may ensue. The lessor's lien for rent on the goods of his tenant, situate on the premises, is one of the strongest and most favored in the law of Louisiana. * * * When the rent accrues, or even before it is due, if the lessor apprehends that the goods may be removed, he may have a writ of provisional seizure to the sheriff, who, by virtue thereof, takes possession of the goods and sells them, in due course, as soon as the court has recognized the amount of rent for which they are liable."

In the case of *Yeatman v. New Orleans Saving Institution*, 95 U. S. 764, 24 L. Ed. 589, it was said:

"In the case of *Goddard v. Weaver*, 1 Woods, 260, Fed. Cas. No. 5,495, it was well said that the assignee takes only the bankrupt's interest in the property. He has no right or title to the interest which other parties have therein nor any control over the same, further than is expressly given to him by the bankrupt act, as auxiliary to the preservation of the bankrupt's estate for the benefit of his creditors. It would be absurd to contend that the assignee in bankruptcy becomes, ipso facto, seized and possessed, in entirety as trustee, of any article of property in which the bankrupt has any interest or share."

And it was held (quoting the syllabus):

"Where a pledge of property was made in good faith by the bankrupt, and for valuable consideration, and not in violation of the provisions of the bankrupt law, the assignee cannot recover the property except by redeeming it. The assignee in bankruptcy takes the title to the bankrupt's property, subject to all equities, liens, or incumbrances which existed against the property in the hands of the bankrupt, whether created by operation of law or by act of the bankrupt, except such attachments and transfers as the law avoids."

In *Clarke v. Larremore, Trustee*, 188 U. S. 486, 23 Sup. Ct. 363, 47 L. Ed. 555, it appeared that the plaintiff obtained judgment against one Kenny for, say, \$20,000, and issued execution, under which he caused to be seized certain goods and fixtures belonging to his debtor, which were sold by the sheriff, for, say \$12,000; that one Abbet, shortly after the seizure, levied an attachment upon the same property, and, attacking the judgment obtained by Clarke as fraudulent, obtained an order restraining the sheriff from paying over to him the proceeds of the sale. Upon a hearing, however, the court decided that Clarke's claim was just, and set aside the restraining order, and thereupon, before the sheriff had returned the execution or paid over the money collected on it, a petition in involuntary bankruptcy was filed against Kenny, and an order was obtained from the United States court restraining the sheriff from making such payment. Thereafter, Kenny was adjudged a bankrupt, and Larremore, having been appointed trustee, the Judge of the District Court made a further order directing the sheriff to pay over said money to him, which order was affirmed by the Court of Appeals, and the matter was then taken to the Supreme Court, where the ruling complained of was again affirmed. In deciding the case,

however, Mr. Justice Brewer (speaking for the court) was careful to call attention to the fact that the seizing creditor had no other lien to rely on than that resulting from the seizure. He said:

"The judgment in favor of petitioners against Kenny was not, like that in *Metcalf Bros. v. Barker*, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122, * * * one giving effect to a lien theretofore existing, but one which, with the levy of an execution thereon, created the lien; and as judgment, execution, and levy were all within four months prior to the filing of the petition in bankruptcy, the lien created thereby became null and void on the adjudication in bankruptcy."

In the case of *Metcalf Bros. v. Barker*, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122 (thus referred to by Justice Brewer), it appeared that plaintiffs instituted a judgment creditors' action to set aside certain fraudulent transfers of property and a fraudulent receivership, and obtained judgment enforcing the lien, accorded them by law, on the property which was thus uncovered. It was some time, however, before the judgment was affirmed on appeal, and, within four months preceding such affirmation, their debtors filed a petition in bankruptcy. Thereafter the trustee enjoined further proceedings under the judgment so obtained, and the case, having been taken to the Court of Appeals, was certified to the Supreme Court, where it was held (quoting the syllabus):

"(1) Judgment creditors of a bankrupt, by commencing a judgment creditors' action more than four months before the petition in bankruptcy is filed, acquire a lien on the property of the bankrupt, of which they are not deprived by the bankruptcy act of July 1, 1898, c. 541, § 67f, 30 Stat. 564, 565 (U. S. Comp. St. 1901, p. 3450), because the judgment enforcing the lien is recovered less than four months prior to the filing of such petition, although, by that section, all judgments obtained against a bankrupt within that period are avoided, as this provision must be regarded as referring only to judgments granting liens, and not to judgments which enforce an otherwise valid pre-existing lien."

"(2) A court of bankruptcy is without jurisdiction to enjoin further proceedings under the judgment of a state court in a judgment creditors' action commenced before the passage of the bankruptcy act, which set aside, as fraudulent, certain transfers of property made by the bankrupt, and directed the payment of the amount of the judgment out of the proceeds of a sale of the judgment debtor's property under an order of the state court."

In *Schall v. Kinsella*, 117 La. 687, 42 South. 221, property, which had been seized for rent, was in the hands of the sheriff, and the trustee in bankruptcy of the lessee intervened in the suit and claimed it.

It was held that:

"Where a lessor sues his tenant for one month's rent due him under a lease, and simultaneously seizes movables on the leased premises, under the conservatory writ of provisional seizure, the privilege which secures, in favor of the lessor, payment of the rent, does not spring from the seizure, but is a lien granted, as of the date of the lease, by the law itself. Where, pending such a suit, the defendant before judgment is adjudicated a voluntary

bankrupt, * * * the effect of the adjudication is not ipso facto to abate the suit and release the seizure. * * * Should judgment be rendered in favor of the plaintiff, with recognition of the lessor's privilege, the property seized should be sold, and the plaintiffs' debt and costs paid out of the proceeds, the residue of the proceeds being turned over to the trustee."

In the case at bar, the property or the proceeds thereof were in the hands, not of the sheriff, but of another officer of the state court, to wit, the receiver appointed by that court, who held the property, not under a writ of provisional seizure, but under the law and by virtue of his appointment. The lessor, however, appeared in court and asserted the privilege that the law gives him, and that, as the property was already in custodia legis, was all that it was necessary or possible for him to do. *Robinson v. Staples*, 5 La. Ann. 712; *Conrad v. Patzelt*, 29 La. Ann. 477; *Hill & Co. v. Bourcier & Pond*, 29 La. Ann. 844; *Am. & Eng. Enc. of Law* (2d Ed.) vol. 23, pp. 1042, 1056.

We are, therefore, of opinion that the fund in dispute, upon the whole of which the lessor is asserting a privilege and right of pledge, established by law and antedating the commencement of the proceedings in bankruptcy against his lessee, should remain where it is until his (the lessor's) rights with respect thereto are ascertained and determined.

Should it be found that the privilege of the lessor secures only the rent falling due within the year following the filing the petition, or the adjudication, in bankruptcy (as the case may be) against the lessee, there will be more money than will be needed to meet his claim; otherwise there will not be enough, and a question of priority will arise between him and those whose claims are recognized on the account.

His counsel concedes that the recognized claims for certain expenses take precedence of the lessor's, though he and the other counsel differ as to what is to be included in those expenses.

Whatever it may be, if the state court is to determine the rights of the lessor quoad the fund on hand, it will be necessary for it to determine, as between him and the creditors claiming a higher privilege on that fund, as to their rights. The claims of these creditors, however (referring to those whose names appear on the account filed by the receiver), arise out of the receivership, and, as the appointment of the receiver was of itself an act of bankruptcy, we are of opinion that the question of the payment of their claims should be determined in the bankruptcy court. In other words, in arriving at the amount which may be due to the lessor, the District Court should, up to a certain point, deal with the matter as though it were gov-

erned by the state law (since, in our opinion, the bankruptcy act does not affect the lessor's rights); but, after making allowance for such claims as the state law prefers to that of the lessor, and after the demands of the lessor are (if possible) satisfied, the question of the right of the receiver, and of the others whom he has placed on his account, to be paid, or to be paid by preference, quoad the other creditors of the estate, together with the balance of the fund on hand, should be relegated and turned over to the bankruptcy court and the trustee. *Randolf & Randolph v. Scruggs*, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165, and note.

We have carefully considered, in this connection, the following language (to which we have been referred by counsel) used by the Supreme Court of the United States in *Re Watts*, 190 U. S. 35, 23 Sup. Ct. 727 (47 L. Ed. 933), to wit:

"We do not understand it to be contended that the passage of the bankruptcy act, in itself, suspended the statute of Indiana in relation to the appointment of receivers, but only that, when the proceedings for such appointment took the form, as they did here, of winding up the affairs of the involved corporation, the proceedings in bankruptcy displaced those in the state court and terminated the jurisdiction of the latter. * * * It has already been assumed that the bankruptcy proceedings operated to suspend the further administration of the insolvent estate in the state court, but it remained for the state court to transfer the assets, settle the accounts of its receiver, and close its connection with the matter. Errors, if any, committed in so doing, could be rectified in due course and in the designated way."

But we do not deduce from it that in a case such as this, where the receivership (itself an act of insolvency) began with an admission that the corporation was unable to pay its debts as they matured, which was followed by proceedings which unmistakably took the form of "winding up the affairs of the insolvent corporation," it would be proper for a state court to undertake, in view of the subsequent proceedings in bankruptcy against the corporation, to do more, with respect to any fund in its possession arising from the sale of the property of the corporation, than to enforce pre-existing valid liens, the holders of which were asserting them when such proceedings were begun, after which the balance, if any, should be turned over to the trustee in bankruptcy.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that the case be remanded to the district court, to be there proceeded with according to law and to the views expressed in this opinion, the costs of this proceeding to be paid from the fund in the hands of the receiver.

(123 La. 330)

No. 16,467.

ANSLEY v. STUART.

(Supreme Court of Louisiana. March 18, 1908.
On the Merits, March 1, 1909.)

1. APPEAL AND ERROR (§ 377*)—BOND—SUFFICIENCY.

Where an appeal is granted to the defendant, who is sued individually and as executor, the order is broad enough to include him in both capacities, and, where the appeal bond is executed in his name, it will suffice at least to maintain the appeal by him individually.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2017-2021; Dec. Dig. § 377.*]

2. APPEAL AND ERROR (§ 361*)—PETITION—SUFFICIENCY.

Attorneys, in moving for an appeal, act in a representative capacity, and it would require very clear and convincing recitals to show that they, in so moving, were acting for themselves and not in behalf of their client, especially when the attorneys are no parties to the judgment appealed from.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 361.*]

3. APPEAL AND ERROR (§ 361*)—MOTION FOR APPEAL—VERBAL ERROR.

Where the motion for appeal recites that the defendant "is informed and verily believes there is error to his prejudice in the final judgment rendered herein against him, and in favor of the defendant," it is patent that the word "defendant" was intended for "plaintiff," in whose favor the judgment was rendered.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 361.*]

On the Merits.

4. APPEAL AND ERROR (§ 663*)—RECORD—RECITALS IN CLERK'S CERTIFICATES—MINUTE ENTRY OF JUDGMENT.

The minute entry on the day on which a judgment by default was confirmed showed "that certain persons were sworn and testified on behalf of the plaintiff, and that documentary evidence was also introduced on his behalf." This statement was corroborated by the declaration made by the judge in the judgment in the case that the judgment by default was confirmed "on plaintiff's producing due proof of his demand."

The recital in the clerk's certificate that the transcript lodged in the Supreme Court "contains all the evidence adduced on the trial of the cause" yields to the minute entry.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2853-2855; Dec. Dig. § 663.*]

5. APPEAL AND ERROR (§ 928*)—RECORD—DUTY OF APPELLANT.

It does not follow from the fact that the documentary evidence adduced by the plaintiff in confirmation of a judgment by default was not marked "filed" by the clerk that it was not considered and acted upon by the judge. The nonfiling of the same was not a fault imputable to the appellee. It is the duty of the party desiring to appeal from a judgment to see that the record for use in the Supreme Court be properly made out. Code Prac. arts. 601, 602.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 928.*]

6. APPEAL AND ERROR (§ 907*) — PRESUMPTIONS.

An appellant seeking to have a judgment of the lower court reviewed must meet and overcome a presumption that the conclusions of

the trial judge are correct and based on good and sufficient evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3673; Dec. Dig. § 907.*]

7. APPEAL AND ERROR (§ 481*)—STAY OF PROCEEDINGS—MINUTE ENTRY.

There was no "stay of proceedings" ordered by the court in this case. The minute entry relied on by appellant as such was a mere transcription in the minute book of the rule to show cause itself, which the party asking for the rule sought to have acted on.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 481.*]

8. NAMES (§ 16*)—IDEM SONANS.

There was no uncertainty as to defendant in the case. The misspelling of the name could mislead no one, under the doctrine of idem sonans. The identity of defendant was also fixed by the pleadings.

[Ed. Note.—For other cases, see Names, Cent. Dig. §§ 12-14; Dec. Dig. § 16.*]

9. APPEAL AND ERROR (§ 485*)—SUSPENSIVE APPEAL FROM ORDER—EFFECT.

A suspensive appeal from an order of the trial judge pendente lite requiring defendant to deliver under a writ of sequestration certain certificates of stock to the sheriff does not suspend until that appeal is disposed of proceedings being carried on in the main suit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2264-2274; Dec. Dig. § 485.*] (Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Fred Durieue King, Judge.

Action by M. E. Ansley against C. D. Stuart. Judgment for plaintiff, and defendant appeals. Motion to dismiss overruled, and judgment affirmed.

See, also, 121 La. 629, 46 South. 675.

Dinkelspiel, Hart & Davey, for appellant. Lazarus, Michel & Lazarus, for appellee.

On Motion to Dismiss.

LAND, J. This is a suit against C. D. Stuart, individually and as executor of the estate of William H. Stuart, to recover 2,450 shares of the capital stock of the Ansley Land Company, Limited. The petition represented that 1,000 shares of said stock were pledged as collateral security for the payment of a note for \$525, delivered to the late William H. Stuart; that 950 shares were delivered to C. D. Stuart to secure a loan of \$200; and that 500 shares were transferred to C. D. Stuart, without any consideration, to be by him held in trust for the plaintiff. The petition represents that plaintiff had deposited in the registry of the court a sum of money sufficient to discharge both of said debts, principal and interest, and was therefore entitled to the return of all of said shares of stock. The petition charged that the said C. D. Stuart, as secretary and treasurer of said company, was about to have the said 1,950 shares of stock transferred to himself on the books of the concern, with the intent to defraud the plaintiff, and that petitioner feared that said

Stuart might make use of his possession of the certificates of stock to send them out of the jurisdiction of the court, and might conceal, part with, or dispose of the same during the pendency of the suit. Plaintiff prayed for a writ of injunction directed to C. D. Stuart, individually and as secretary and treasurer of the Ansley Land Company, Limited, restraining him from transferring said shares of stock on the books of said company, and for a writ of sequestration directing the seizure of the certificates representing said shares of stock.

The petition prayed that C. D. Stuart, individually and as executor of William H. Stuart, be cited, and for judgment against him in both of his said capacities, decreeing that plaintiff is the owner of all of said certificates of stock, and is entitled to the possession of the same, and maintaining and perpetuating the writs prayed for, and for costs and general relief.

The writs issued as prayed for, and the sheriff notified the defendant of the seizure in his hands of the certificates described in the petition, and demanded possession of the same. The defendant declined to deliver the certificate. Thereupon the plaintiff ruled the defendant to compel him to deliver the said certificates to the sheriff. This rule was tried and made absolute, and at the same time all the rules and exceptions filed by the defendant were discharged and overruled. This judgment was signed on May 2, 1906, and a suspensive appeal was granted therefrom on May 4, 1906. This appeal was perfected, and is now pending in this court, under No. 16,149.

On May 4, 1906, a judgment by default was entered against the defendant, C. D. Stuart. On May 7, 1906, the defendant moved to set aside the default on the ground that the suspensive appeal taken on May 4, 1906, had divested the jurisdiction of the court during its pendency. On May 10, 1906, the judgment of default was confirmed. On May 11, 1906, the defendant moved to set aside the judgment on various grounds. On November 30, 1906, defendant moved the court to order the plaintiff to give new security on the injunction and sequestration bonds. On January 4, 1907, the motion for a new trial was overruled, and the judgment was signed. The defendant thereupon obtained an order for a suspensive appeal, and executed bond in the sum fixed by the court.

The motion and order for appeal reads as follows:

"M. E. Ansley vs. C. D. Stuart. No. 73,166. Civil District Court, Division B.

"On motion of Dinkelspiel, Hart & Davey, attorneys for the defendant, and on suggesting to the court that he is informed and verily believes there is error to his prejudice in the final judgment herein rendered against him, and in favor of the defendant, and that he is desirous of appealing therefrom.

"It is ordered by the court that mover be allowed a suspensive appeal from said judgment, returnable to the honorable the Supreme Court

of the state of Louisiana on the third Monday of January, 1907, upon his furnishing bond in the sum of thirty-seven thousand five hundred dollars, conditioned according to law."

The bond recites that Charles D. Stuart as principal, and W. O. Hart as surety, are held and firmly bound, etc.; that the said Stuart had filed his motion for an appeal from a final judgment rendered against him in said suit, on May 10, 1906, and signed January 4, 1907; and that the condition of the obligation is such that the above-bound C. D. Stuart shall prosecute his said appeal and shall satisfy whatever judgment may be rendered against him, or that the same shall be satisfied by the proceeds of his estate, real or personal, if he be cast in the appeal, otherwise that the surety shall be liable in his place. The bond is signed C. D. Stuart by his attorneys of record, and by W. O. Hart.

We will consider the grounds of the motion to dismiss in their order:

1. That it does not appear on whose behalf or in whose interest the appeal herein sought to be effected was obtained, whether in favor of C. D. Stuart individually, or the estate of William H. Stuart, of which C. D. Stuart is the testamentary executor.

The term "defendant," used in the motion for an appeal, is broad enough to include C. D. Stuart in both of his capacities. It is to be noted that the default was entered against "the defendant, C. D. Stuart," and that he appears as the defendant in the title of the suit.

2. The contention that the appeal was granted to the attorneys and not to the defendant needs no discussion. Logically and grammatically, the defendant was the "mover" on the face of the record. The attorneys appeared merely as his representatives.

3. The contention that C. D. Stuart furnished no bond for the prosecution of the appeal is refuted by the bond itself.

4, 5. These grounds assume that the attorneys took the appeal in their own behalf. The appeal was taken from the final judgment rendered "against the defendant." The addendum in the motion that this judgment was in "favor of the defendant" is manifestly a clerical error, as shown by the judgment itself.

6. The bond shows on its face that it was executed by Charles D. Stuart, and it is at least sufficient to support an appeal by him individually. The bond recites the date of the judgment appealed from, and its conditions are in due form.

The motion to dismiss is therefore overruled.

Statement of the Case—On the Merits.

NICHOLLS, J. This case has been before this court upon several occasions on incidental questions, as will be seen by reference to the decisions reported in 119 La. 1, 43 South.

892; 119 La. 250, 44 South. 294; and 121 La. 629, 46 South. 675.

The issues between the parties on the main demand are concisely stated in the opinion pronounced by Justice LAND on the motion made to dismiss the present appeal. It is unnecessary to repeat them here.

The matters we have to deal with at the present time are the issues raised in the main action on the appeal taken by the defendant from the judgment rendered by the district court on May 10, 1906, and signed on January 4, 1908, confirming a judgment by default entered on the 4th of May, 1906.

On April 14, 1904, defendant excepted that plaintiff's petition disclosed no cause of action, and that there was an improper joinder of parties and a misjoinder of parties defendant. On the same day defendant filed a motion to dissolve the attachment, and also a motion to dissolve the sequestration on the same grounds—that plaintiff's petition disclosed no ground of action, and that there was a misjoinder of parties defendant. The only exceptions filed by the defendant to the main action seem to have been those referred to above.

On June 23, 1904, a rule was taken on the defendant to compel him to deliver forthwith to the sheriff the certificates of stock described in said rule and ordered to be sequestered on the 23d of March, 1906. This rule, together with the exceptions filed to the main demand and the several rules to dissolve the attachment and sequestrations, were tried and submitted. On May 2, 1906, the court rendered judgment making the rule of 23d of January, 1904, to compel delivery of the certificates of stock to the sheriff, absolute, and discharged the exceptions to the main action and the motions and rules to dissolve the attachment and sequestration. On May 4, 1906, a suspensive appeal was granted the defendant from this judgment. On the same day (May 4, 1906) a judgment by default was entered against defendant.

The judgment so rendered was as follows:

"The rule herein taken by plaintiff filed June 23, 1904, upon C. D. Stuart, to compel him to deliver forthwith to the sheriff the certificates of stock described in said rule and sequestered in the above-entitled suit, having been submitted to the court, and the court considering the law, for the reasons orally assigned:

"It is ordered, adjudged, and decreed that said rule be made absolute, and that accordingly C. D. Stuart be and he is hereby ordered to deliver to the civil sheriff for the parish of Orleans, the certificates of shares of the capital stock of the Ansley Land Co., Limited, viz., certificate No. 13 for 950 shares, certificates Nos. 31 and 32, each for 500 shares, certificate No. 28 for 100 shares, certificate No. 29 for 50 shares, certificate No. 30 for 50 shares, certificate No. 34 for 100 shares, certificate No. 35 for 100 shares, and certificate No. 36 for 100 shares.

"It is further ordered that the rule herein taken on May 4, 1904, by Louis Winson upon Thomas Connell, Esq., clerk of civil district court for this parish, to pay to the constable of the First city court five hundred and seventy-two dollars and costs deposited with said clerk in above-entitled suit, is discharged.

"It is further ordered that the rule herein taken June 7, 1904, by Louis Winson upon the clerk of this court to the same effect, is also discharged. It is further ordered that the rules herein taken April 14 and April 21, 1904, by the defendant to set aside the injunction issued herein, are discharged.

"It is further ordered that the rule herein taken by the defendant April 14, 1904, to set aside the writ of sequestration, is dismissed.

"It is further ordered that the exceptions herein filed by defendant on April 14, 1904, and June 24, 1904, are overruled. It is further ordered that all the rules herein taken to set aside the writ of sequestration herein issued are dismissed. Judgment read and rendered in open court Tuesday, April 24, 1906. Judgment signed in open court May 2, 1906."

On May 4, 1906, a suspensive appeal was granted defendant from this decision (under No. 16,149). On the same day (May 4, 1906) a judgment by default was entered against the defendant.

On May 7, 1906, on the suggestion of plaintiff's attorney that a default had been taken in the cause on May 4, 1906, that it had been improperly taken because a suspensive appeal had been asked for, granted, and perfected to the Supreme Court from the judgment overruling the exception and in other matters, which judgment was regularly written out and signed, and therefore the court was without jurisdiction pending the appeal, plaintiff was ruled to show cause on May 11, 1906, why said default should not be set aside pending said appeal, and that until said matter was disposed of proceedings be stayed.

This rule does not seem to have been reached and disposed of, for on May the 10th the judgment by default was confirmed. The minute entry of that date states that:

"The cause having been taken up on confirmation of default after hearing pleadings, counsel, and the testimony of Myrick E. Ansley and W. B. Murphy, sworn on behalf of plaintiff, and documentary evidence introduced on behalf of plaintiff, the court ordered the following judgment to be entered."

The judgment so referred to was as follows:

"On motion of Henry L. Lazarus, attorney for plaintiff, Myrick E. Ansley, and on producing due proof in support of plaintiff's demand, the law and the evidence being in favor of plaintiff, it is ordered, adjudged, and decreed that the default entered herein on the 4th day of May, 1906, be now confirmed and made final; and it is further ordered, adjudged, and decreed that plaintiff, Myrick E. Ansley, is the owner of the following certificates of stock in the Ansley Land Company, now in the possession or subject to the control of C. D. Stuart, defendant herein: Certificate of the Ansley Land Company No. 13, for 950 shares; certificate of the Ansley Land Company 31 for 500 shares; certificate of the Ansley Land Company 32 for 500 shares; certificate of the Ansley Land Company 28 for 100 shares; certificate of the Ansley Land Company 29 for 50 shares; certificate of the Ansley Land Company 30 for 50 shares; certificate of the Ansley Land Company 34 for 100 shares; certificate of the Ansley Land Company 35 for 100 shares; certificate of the Ansley Land Company 36 for 100 shares.

"It is further ordered, adjudged, and decreed that the sum of seven hundred and fifty dollars tendered by said Myrick E. Ansley to C. D.

Stuart, individually and as testamentary executor and consigned for the account of said defendant, and presently in the possession of the clerk of the civil district court, holding the same under the tender made by said Myrick E. Ansley to the late William H. Stuart, of whose estate C. D. Stuart is executor, and to C. D. Stuart individually and representative capacity, paid over by the clerk of this court to said C. D. Stuart, which payment is adjudged and decreed to be the estate of William H. Stuart and C. D. Stuart, the said indebtedness having been secured by the pledge of the stock certificates hereinbefore enumerated, and which stock is herein decreed to be the property of said Myrick E. Ansley and the said Myrick E. Ansley entitled to the possession thereof, the indebtedness for which said stock was pledged, having been paid and discharged by said Myrick E. Ansley by the tender and deposit of the amount of said indebtedness with accrued interest, deposit of the same having been duly made by the said Myrick E. Ansley with the clerk of the civil district court, as hereinbefore recited.

"It is further ordered, adjudged, and decreed that the writ of sequestration issued herein be perpetuated and that the said C. D. Stuart, in accordance with the terms of said writ, deliver into the possession of the civil sheriff of the parish of Orleans the certificates of stock enumerated and described in this decree, and the civil sheriff is directed to deliver to the plaintiff, Myrick E. Ansley, who is decreed herein to be the owner thereof, the stock certificates delivered into his possession by C. D. Stuart as aforesaid. It is further ordered, adjudged, and decreed that the injunction herein issued be made perpetual, and that the said C. D. Stuart be perpetually enjoined from making any entries on the books of said corporation affecting the status of the stock standing in the name of Myrick E. Ansley, and which stock as hereinbefore recited is decreed to be the property of said Myrick E. Ansley; and C. D. Stuart is further enjoined from changing the status of said stock on the records of said corporation as it appeared thereon at the date of the issuance of the writ of injunction.

"It is further ordered, adjudged, and decreed that all costs of these proceedings be paid by the defendant, C. D. Stuart. Judgment read and rendered in open court May 10, 1906.

"Judgment read, rendered and signed in open court January 4, 1907."

On May 11, 1906, the defendant filed the following motion to annul and set aside the judgment:

"It is ordered by the court that the plaintiff do show cause on Friday, May 18, 1906, at 11 o'clock a. m., why the judgment herein rendered on May 10, 1906, should not be annulled and set aside and a new trial granted on the following grounds:

"First. Said judgment is contrary to the law and the evidence.

"Second. Said judgment was rendered without any testimony being on file as required by law.

"Third. Said judgment was rendered in violation of an order of this court staying proceedings until the furnishing of bond for costs by the plaintiff.

"Fourth. Said judgment was rendered in violation of an order of this court staying proceedings pending the trial of the rule to set aside the default improperly taken.

"Fifth. Said judgment was rendered pending an appeal taken and perfected which of itself suspended all further proceedings herein.

"Sixth. That the judgment overruling defendant's exception was rendered without said exception having been tried.

"Seventh. The deposit made by defendant cannot be paid to mover because under seizure.

"Eighth. There is no proper defendant named in the judgment."

This application and application for a new trial was overruled.

Defendant appealed suspensively from this judgment.

Opinion.

The clerk's certificate to the transcript declares that:

"The foregoing thirty-one pages do contain a true, correct and complete transcript of all the proceedings had, documents filed and evidence adduced upon the trial of the cause wherein M. E. Ansley is plaintiff and C. D. Stuart is defendant, instituted in this court and now in the records thereof under No. 73,168 of the docket thereof, division B, the Hon. F. D. King, judge, from the 7th day of May, 1906, to the 15th day of January, 1907, both inclusive, and said transcript, together with that heretofore forwarded to the honorable the Supreme Court in this matter, comprises a complete transcript of this cause."

The extract from the minutes of May 10, 1906, shows, as we have seen, that:

"When the case was taken up for confirmation of default, Myrick E. Ansley and W. B. Murphy were sworn on behalf of plaintiff, and documentary evidence introduced on behalf of plaintiff (the court ordered the following judgment to be entered):"

Article 601 of the Code of Practice provides that either party may require the clerk of court to take down the testimony in writing, which shall serve as a statement of facts if the parties should not agree to one, while article 602 declares that, when the deposition of witnesses has not been taken down in writing in the inferior court, the parties intending to appeal, or their advocate, must require the adverse party, or his advocate, to draw, jointly with him, a statement of the facts proved in the cause, and this statement thus drawn and signed either by the parties or their advocates, shall be annexed to the records, and a transcript of the same transmitted to the Supreme Court. The clerk was not requested in this case by the parties to take the testimony which was adduced on the trial in writing, and it does not therefore appear in the transcript. Succession of Moore, 42 La. Ann. 335, 7 South. 561. The clerk's minute entry shows that evidence, both testimonial and documentary, was introduced in behalf of the plaintiff. This statement is borne out additionally by the declaration in the judgment of the court that the judgment by default was confirmed "on plaintiff's producing due proof in support of his demand."

The statement in the clerk's certificate that the transcript "contained all the evidence adduced" is not correct. It does not follow from the fact that the documentary evidence which was adduced was not marked "Filed" by the clerk that it was not considered and acted upon by the judge. The nonfiling of that evidence, if a fault, was imputable to the clerk, and to the party desiring to appeal,

whose duty it was to see that the record was prepared properly for the use of the Supreme Court. *Cooley v. Broad*, 29 La. Ann. 71; *Magloire v. Barbin*, 25 La. Ann. 677; *Johnson v. Spearing*, 15 La. 232.

The grounds assigned in the third and fourth paragraphs of defendant's rule to show cause are not borne out by the record. We do not find that there was at any time a "stay of proceedings" ordered by the judge. The minute entry relied on was a mere transcription in the minutes of the rule to show cause itself. The court did not act on the rule. In the application for relief through rules of court, the order of court which is asked for is attached thereto by anticipation by counsel who presents the application. In order to make good the complaint urged by him as the first ground for setting aside the judgment, defendant has to meet and overcome the presumption that the conclusions reached by the trial judge were correct and based on good and sufficient evidence. This the defendant has not done. *Parham v. Ogle's Estate*, 22 La. Ann. 73; *Citizens' Bank v. Bringer*, Id. 118; *Graham v. Rice*, 23 La. Ann. 393; *Simmons v. Howard*, Id. 504; *Smith v. City of New Orleans*, 24 La. Ann. 20; *Hefner v. Hesse*, 26 La. Ann. 148; *State v. De Monasterio*, Id. 734; *Verges v. Gonzales*, 33 La. Ann. 415; *Nugent v. Stark*, 34 La. Ann. 631.

The seventh ground assigned for setting aside the judgment has no basis to rest upon. The seizure therein referred to has been set aside, and the money deposited is subject to defendant's order. The eighth ground assigned has nothing to rest upon. The judgment as rendered needed no correction. The error in spelling of defendant's name was a matter of little moment. It could stand as a valid judgment under the doctrine of *idem sonans*. The pleadings, besides, fixed the identity of the defendant with certainty.

The sixth ground of complaint we do not think is maintained. The exceptions filed by defendant to the main action were to be decided, and were decided, on the face of the papers. They were fixed together on defendant's application, and were taken up together. Defendant's counsel were present when they were taken up together, and made no objection thereto.

Defendant's fifth ground for setting aside the judgment now appealed from is that he had appealed suspensively from the judgment rendered in plaintiff's favor on the 2d of May, 1906, which appeal was still pending when the judgment now appealed from was rendered (that until the suspensive appeal was disposed of the district court was without authority to take any action on the main demand). Defendant's suspensive appeal which he refers to was that lodged in this court on May 26, 1906, under the number "16,149." This suspensive appeal was passed upon and decided in April, 1907, reversing

the judgment against the defendant which had been rendered on the 2d of May, 1906.

At the date that judgment was reversed the present appeal was already lodged in this court under the number "16,467." This court, in passing upon the appeal in No. 16,149, used the following language:

"The plaintiff ruled the defendant to show cause why he should not be ordered to deliver under the writ of sequestration to the civil sheriff the hereinbefore mentioned certificates. On hearing, the rule was made absolute, and the defendant appealed suspensively from the judgment. In this court the plaintiff, instead of moving to dismiss the appeal, contented himself with suggesting that we dismiss the appeal on our own motion as one improperly taken from an interlocutory order working no irreparable injury. In the opinion heretofore handed down we discussed the question thus suggested, but postponed its determination until after a consideration of the merits. The judgment on the rule ordered the defendant to deliver the certificates in question to the sheriff. The judgment was signed by the judge as in case of final judgments. It was executory by the process of contempt.

"The judge, however, granted a suspensive appeal to the defendant. The case is also before us on a suspensive appeal from the judgment on the merits. It is evident that the issue raised herein is also raised by the other appeal. Hence no useful purpose would be subserved by considering the suggestion that the judgment appealed from does not work an irreparable injury. We are not bound to consider such a suggestion where no motion to dismiss has been filed."

The court declared that:

"The law did not fix absolutely, to an order granting incidentally in the progress of a case before the ultimate judgment sought in the case should be rendered, the character of nonappealability, but, on the contrary, it allows such orders under certain circumstances to be appealed from in the exercise of judicial discretion in the presiding judge."

We considered the order of the defendant to deliver the certificates of stock to the sheriff to have reached the point of "finality" so far as to subject the defendant to liability to punishment for contempt of court for disobedience thereof, unless by judgment of the Supreme Court the trial judge should be decreed to have exceeded his power and authority in giving such an order. We held under such circumstances that the defendant was justified in appealing suspensively from that order. Although interlocutory, it was one which under the decisions of this court would cause "irreparable injury."

The appeal under the number "16,149" was not considered as having been taken from the judgment of the district court on the subject of the exceptions to the main action. They were not alluded to, discussed, or passed upon when this court rendered final judgment on the appeal taken under that number. Appellant in the matter of the judgment rendered on the 2d of May, 1906, appealed from so much of it as had the character of finality, as appeared from the recitals of the bond executed by him. That judgment, in so far as it had passed on defendant's "exceptions

to the main demand," was an "interlocutory" judgment "working no irreparable injury." The fact that the district judge signed that judgment did not carry with it as a consequence that that portion of the question was susceptible of being suspensively appealed from, nor that it was in fact suspensively appealed from by the defendant. The suspensive appeal taken by the defendant from the order to deliver to the sheriff, *pendente lite*, the certificates of stock which were involved in the main demand of stock, did not have the effect of staying action by the plaintiff upon the main demand.

For reasons herein assigned, it is ordered, adjudged, and decreed that the judgment appealed from be, and it is, affirmed.

(123 La. 344)

No. 17,316.

DREYFUSS v. S. GUMBLE & CO., Limited.
(Supreme Court of Louisiana. March 15, 1909.)

FACTORS (§ 23*)—POWER TO SELL—EFFECT OF ADVANCES.

Commission merchants, who agree with a shipper to make such advances on cotton as the shipments justify, have power to sell in a proper market the cotton shipped and pay the advances from the proceeds.

[Ed. Note.—For other cases, see *Factors*, Cent. Dig. § 23; Dec. Dig. § 23.*]

Appeal from Civil District Court, Parish of Orleans; John St. Paul, Judge.

Action by Jules Dreyfuss, trustee, against S. Gumble & Co., Limited. From a judgment for defendant, plaintiff appeals. Affirmed.

Clegg & Quintero and Louis A. Hubert, for appellant. Hall & Monroe, for appellee.

PROVOSTY, J. O. M. McCain, a planter and country merchant, agreed to consign the cotton he would make and control in his business, in the season 1904-05, to the defendants S. Gumble & Co., cotton factors and commission merchants, in the city of New Orleans, and the latter agreed to make him such advances on the cotton as his shipments would justify. In accordance with this agreement, and in due course of business, McCain consigned to defendants 389 bales of cotton, and defendants advanced him, by the payment of drafts annexed to the bills of lading, \$22,433.08. Two hundred bales of this cotton had been sold and proceeds credited to the open account of McCain for the advances, leaving a balance of \$6,694.91 due on the account, when McCain went into bankruptcy, and surrendered as part of his assets the 189 bales remaining in the hands of the defendants, and notified defendants of his having done so, and instructed them not to sell the cotton, but to deliver it to the trustee in bankruptcy. Defendants claimed the right to sell the cotton and apply the proceeds to the pay-

ment of the advances made by them, and accordingly did so. The trustee of the bankruptcy brings this suit to compel the payment of these proceeds to him. He contends that Gumble & Co. agreed to hold the cotton until McCain should give them notice to sell it, and that by this agreement Gumble & Co. waived the right which they otherwise would have had, under act No. 66, p. 114, of Laws 1874 and Act No. 44, p. 58, of Laws 1882, to sell the cotton and attribute the proceeds to the payment of their advances. Defendants contend that the cotton was to be held, not until McCain should give them notice to sell it, but until they should give McCain notice that they were going to sell it. The issue of fact here raised is not necessary to be decided, as, in either case, the agreement, under all the circumstances of the matter, was nothing more than the usual and customary one between commission merchant and shipper of cotton to hold the cotton to await a better market in the course of the season, and there is no complaint of the cotton having been sold at an unpropitious time. To construe the agreement into one by which Gumble & Co. waived the substantial rights by which their advances were secured would be to give it a scope far beyond the occasion or necessity that brought it about, and certainly outside of the contemplation of the parties.

Judgment affirmed.

(128 La. 346)

No. 17,276.

KARSTENDIEK v. JACKSON BREWING CO.

(Supreme Court of Louisiana. Feb. 15, 1909.
Rehearing Denied March 29, 1909.)

1. MUNICIPAL CORPORATIONS (§ 705*) — STREETS—LEAVING MULES UNHITCHED.

There was imprudence on the part of the driver in leaving a pair of mules harnessed to a beer wagon on one of the public streets in the populous part of the city while he was away in a restaurant near by taking lunch on a day of general rejoicing.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1515-1517; Dec. Dig. § 705.*]

2. TEAM FRIGHTENED.

The crowded street, the procession, and the music were enough to disturb the equanimity of gentle mules, frighten them, and cause them to run away.

3. TEAM NOT HELD NOR HITCHED.

They were not hitched, as they should have been.

4. WHEEL NOT SECURELY FASTENED.

The inference is that the front wheel was not chained as securely as the driver imagined.

5. MASTER AND SERVANT (§ 300*)—INJURIES TO THIRD PERSONS—LIABILITY OF MASTER—ON PUBLIC OCCASIONS PARTICULARLY.

Those who drive mules or horses on the streets must control them; else their employers may become liable in damages.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1200; Dec. Dig. § 300.*]

(Syllabus by the Court.)

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Civil District Court, Parish of Orleans; Walter Byers Sommerville, Judge.

Action by Harry S. Karstendiek against the Jackson Brewing Company. Judgment for defendant, and plaintiff appeals. Reversed and rendered.

Benjamin Rice Forman, for appellant. Foster, Milling & Godchaux and Alexis Brian, for appellee.

BREAUX, C. J. Plaintiff and his wife complain of injuries received by the latter and their children, for which they ask judgment in the sum of over \$3,000.

Plaintiff's wife and their children were riding in a surrey on Shrove Tuesday of last year. The horse they were driving was old and safe, and was moving at a slow gate out of Saratoga street into Tulane avenue. At this place they saw mules hitched to a beer wagon coming toward them. They veered to the left. It did not enable them to avoid the collision. The defendant's wagon struck their surrey, broke it to pieces, knocked over their horse, and Mrs. Karstendiek and her children were thrown to the ground.

The mules hitched to the wagon started from the Chinese restaurant on Rampart street.

The driver of the wagon had delivered the kegs of beer to the customers of defendant. He was on his way, when he concluded to stop at the restaurant and take lunch.

To assist him in handling the kegs of beer and in delivering them he hired a helper on his own account.

The driver and the helper alighted from the wagon and went into the restaurant for lunch. When they stopped, the mules were facing Canal street. They were not hitched when the men left the wagon and went inside.

The contention is, on the part of defendant, that one of the wheels was locked.

To this we will again refer later.

There was a procession passing on Canal street, music, and the usual excitement incident to a crowded street.

The mules became frightened. They turned around, took the neutral ground at Elk Place, and started for Tulane avenue.

The collision was not far from the corner at Saratoga street on the avenue.

Mrs. Karstendiek received a blow on her head in the fall, inflicting a wound which caused considerable pain, but was not dangerous.

The daughters were shocked, their dresses soiled by the dust of the street in which they fell, the little sons, one of them the driver, were bruised in the fall, and the clothing of one of them badly torn.

They walked over to the Ear, Eye, Nose and Throat Hospital near by, invited by a physician connected with the hospital, who kindly gave them medical attention needed. They returned to their home.

To return to the driver: He testified that

he ran after the mules, but could not make his way freely in the crowded street; that he fell to his knees in crossing, and in consequence could not catch up with them, although, after recovering from his slight fall, he continued to run after them.

He stated as a witness that he locked the wagon, using the chain for the purpose; that he was careful every time he stopped to take out the chain and lock one of the front wheels.

There was a chain produced in court, measuring a little over three feet in length and about three-fourths of an inch in thickness. It was found, as stated by the driver, after the accident in the street.

The two ends of this chain were held together by a snapper of galvanized iron, which disappeared, or at any rate never was found. The chain was not broken at all. Only the snapper was missing.

The driver produced another, similar, he said, to the one that could not be found.

This chain, in the locking process of the front wheel, extended from the center piece of the wagon to the wheel between the spokes, thereby stopping the wheels from turning.

This driver had been in the employ of the defendant for about two years and a half. The mules were bought about a month before the accident. They were broken mules, bought from one of the local dealers in mules, who testified that they were broken.

We must say that in reviewing the facts we found that it was out of the ordinary, if the front wheel was securely locked, as stated by the driver, that the mules could wheel around to an opposite direction from that at which they had just been facing.

The driver says that after they turned they were only about 20 feet from him when he came out of the restaurant, and they were not running fast.

It is strange that he did not catch up with them. It is also strange that in such a short distance the snapper could not be found. There was great need of corroboration.

Inquiry was made during the examination about the helper—where he lived. The reply was that he did not know his name, although he had made some inquiry for him.

If those who drive wagons, lock the wheels, or any one of them, they should be ready to prove that they used all due precautions. They must be certain, and make it appear certain that the locking was entirely secure and safe.

It was imprudent, we think, to leave the mules without hitching or securing the wheels, so that it would have been impossible for the mules to run away.

On the day that the accident happened, in the bustle and noise of the crowded street, as the purpose was to go and take lunch, this could have been done by one going in after the other, if it was not possible to securely hitch the mules or lock the wheels.

The mules had not been in defendant's

service very long. They had not been trained to stand. But, even then, it would not have been sufficient.

The testimony does not satisfy us that these mules were sufficiently checked or placed under control against possible accident.

This court has repeatedly decided that those who have animals in their charge must exercise due care in order to prevent them from committing injury.

The following are cases in point: *Damonte v. Patton*, 118 La. 530, 43 South. 153, 8 L. R. A. (N. S.) 209, 118 Am. St. Rep. 384; *Zambelli v. Johnson*, 115 La. 483, 39 South. 501; *Westerfield v. Levis Bros.*, 43 La. Ann. 63, 9 South. 52; *Maus v. Broderick*, 51 La. Ann. 1153, 25 South. 977.

There was negligence in leaving these mules, which is not explained away by the testimony.

Something was said in argument by learned counsel, and it was also alleged in the pleadings, about contributory negligence on the part of the family of plaintiff. It is averred that they were driving on the left of the street.

We have not found that they had yet arrived on that side of the street, although they were directing their course to that side of the street. In their movement to avoid the oncoming wagon, it may be that they turned to the left side of the avenue. There was no intention, as we infer, to violate the law of the road. It was an attempt at escaping.

In any event, the mere fact that one is driving on the left side of the street, when he should be on the right, is not ground sufficient to justify a collision such as the one

the facts of which we have considered in this case.

The jury, in regard to the collision and its cause, arrived at a different conclusion. We have examined into this case bearing that in mind. We have been unable to arrive at the same conclusion.

If in all instances the appellate court must arrive at the same conclusion as the jury, it would be useless to appeal.

We must state, before concluding, that it does not appear that the defendant or those in charge of its management were in any way negligent. They are only held liable because of the indifference and imprudence of the driver; it being the provision of the law that employers must answer for the negligence and imprudence of their employes, if any one be injured on that account.

We have considered the detailed items claimed by plaintiff. We do not think that we should pass upon every item and decide to what extent clothing was soiled or torn. No one was seriously injured save Mrs. Karstendiek, and plaintiff's surrey was broken to pieces. Fortunately for her, although the fall must have been severe, the result, as we understand, was not.

This is not a case of great injury, and for that reason we fix the amount of damages at \$700 as covering all damages—personal injury, broken surrey, and torn clothing.

For reasons stated, the verdict of the jury and judgment of the district court are avoided, annulled, and reversed. The law and the evidence being for plaintiff, it is ordered, adjudged, and decreed that plaintiff have and recover judgment in the sum of \$700, with legal interest from the date of this judgment.

(95 Miss. 432)

DAVIS v. WOODS. (No. 13,872.)

(Supreme Court of Mississippi. April 5, 1909.)

1. LIBEL AND SLANDER (§ 80*)—INSULTING WORDS—QUESTION FOR JURY—DEMURRER.

Under Code 1906, § 10, declaring actionable all words which, from their usual construction and common acceptance, are considered as insults and calculated to lead to a breach of the peace, and providing that a demurrer shall not be sustained, to preclude a jury passing thereon, who are the sole judges of the damages, the jury are judges, not only of the damages, but also of whether the words used were insulting and calculated to lead to a breach of the peace—that is, whether they were actionable—so that, the declaration averring that at a certain time defendant used the following abusive language, setting it out, and that the words, from their usual construction and common acceptance, are considered insulting, and calculated to lead to violence and a breach of the peace, and that the words were spoken contrary to the statute, with a view to insult, and to lead plaintiff to commit violence and breach of the peace, is not demurrable.

[Ed. Note.—For other cases, see *Libel and Slander*, Dec. Dig. § 80.*]

2. APPEAL AND ERROR (§ 884*)—WAIVER OF ERROR—REQUEST FOR DISMISSAL.

Plaintiff is not precluded from complaining of the sustaining of a demurrer to his declaration, because he thereupon asked for a dismissal of the declaration; it being manifest it was because he considered it stated a good cause of action, and that there was no necessity for further pleading.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 884.*]

Appeal from Circuit Court, Lauderdale County; Jno. L. Buckley, Judge.

Action by J. W. Davis against Edgar Woods. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Wyatt Easterling, for appellant. Amis & Dunn, for appellee.

MAYES, J. This is a suit under section 10, Code of 1906, which provides that "all words which, from their usual construction and common acceptance, are considered as insults, and calculated to lead to a breach of the peace, shall be actionable; and a plea, exception or demurrer shall not be sustained to preclude a jury from passing thereon, who are the sole judges of the damages sustained; but this shall not deprive the courts of the power to grant new trials, as in other cases." The declaration substantially alleges that about the 9th day of October, 1907, Davis was approached by Woods, and Woods then and there addressed the following abusive language to Davis, to wit: "What in the God damn hell are these infernal lies you have been circulating on me?" It is averred that the words, from their usual construction and common acceptance, are considered insulting, and calculated to lead to violence and a breach of the peace. It is further alleged that the words were spoken contrary to the statute, with a view to insult, and to lead Davis to commit violence

and breach of the peace. A demurrer was interposed, the several grounds of which we do not deem it necessary to state, since it is our view that none of them should have prevailed. The court sustained the demurrer, and, the plaintiff declining to amend, the declaration was dismissed.

The declaration states a cause of action in the very words of the statute, and the court should have overruled the demurrer to the declaration. It is stated in the declaration what the words were, and it is further alleged that, from their usual construction and common acceptance, they were considered insulting and calculated to lead to a breach of the peace. Whether the words were such as are usually considered insulting and calculated to lead to a breach of the peace is expressly required by the statute to be submitted to a jury. Under this statute the jury judge, not only of the amount of the damages sustained, but they are also the judges of whether or not the words used were insulting and calculated to lead to a breach of the peace—in other words, whether the words were actionable, and under the allegations of the declaration it was beyond the power of the court to take away from the jury the consideration of these questions. *Crawford v. Melton*, 12 Smedes & M. 328; *Scott v. Peebles*, 2 Smedes & M. 546. A cursory examination of the case of *Dedeaux v. King* (Miss.) 45 South. 466, will readily differentiate the opinion in that case from any holding here. The words charged to have been said by King to Dedeaux were: "You cannot vote, because you are a convict. I say you are a convict, and convicts cannot vote here." It is to be remembered under our laws that a convict is deprived of the right of suffrage, and at the time King made this statement to Dedeaux he was acting as an election manager, charged with the duty of challenging every vote believed by him to be illegal. The court held in that case that the declaration was demurrable, because it did not allege that King used the words with malice, or that the statement of the election manager was not true. In other words, the declaration did not show that, although the words were spoken to Dedeaux as alleged, King was not acting in the lawful discharge of a duty required of him in making this statement. The case here presents quite a different question.

But it is argued by appellee that, since the judgment sustaining the demurrer recites that plaintiff declined to amend and requested the declaration to be dismissed, he cannot now complain. We do not understand that the plaintiff asked for a dismissal of the declaration for any other reason than that it was his view that the declaration stated a good cause of action, and that there was no necessity for any further pleading.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Therefore, instead of asking the court to allow him to amend when the demurrer was sustained, it was manifestly the intention to decline to amend, and let the judgment show that the declaration was dismissed because plaintiff believed that the declaration stated a good cause of action. We think there is no merit in this contention on the part of appellee, and that we would not be justified in distorting the record to mean that which the whole case shows that it was manifest that the appellant never intended. We treat this judgment as just what it is—a judgment of the lower court sustaining a demurrer, with leave to the appellant to amend the declaration, which he declined to do, and thereupon a judgment was taken dismissing the declaration. We think any other construction of the action of the court below would be too technical, and would subvert, and not promote, the ends of justice. We would have to close our eyes to the true action of the parties, did we not so decide.

The case is reversed and remanded.

(93 Miss. 797)

ALABAMA & V. R. CO. v. TIRELLI BROS.
(No. 13,907.)

(Supreme Court of Mississippi. April 12, 1909.)

CARRIERS (§ 91*)—GOODS—REFUSAL TO DELIVER—DEFENSES—QUARANTINE.

A carrier was excused for refusing to deliver a shipment of bananas to the consignee, where, upon its arrival, the carrier was notified by the chief of police that the shipment must not be delivered, and that the consignee would not be allowed to unload and distribute it, if delivery were made; the chief of police acting under instructions from a sanitary commission created by an ordinance establishing a quarantine against all bananas from New Orleans, though the particular shipment was made from Mobile.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 91.*]

Appeal from Circuit Court, Warren County; John N. Bush, Judge.

Action by Tirelli Bros. against the Alabama & Vicksburg Railroad Company. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

McWillie & Thompson, for appellant. Bryson & Dabney, for appellees.

FLETCHER, J. In 1905, the city of Vicksburg was in the throes of a yellow fever panic, and the city council had by ordinance established a quarantine against all bananas from New Orleans. The ordinance further created a sanitary commission, composed of the regular sanitary committee of the board, the mayor, and city physician, and this commission was given power to enforce the quarantine regulations of the city. Appellee purchased a car load of bananas in Mobile, against which city no quarantine had been

established, and the fruit reached Vicksburg over the line of appellant's railway. Upon the arrival of the bananas at Vicksburg, the railroad company was notified by the chief of police, both verbally and by formal written notice, that the bananas must not be delivered to appellee, and that appellee would not be allowed to unload and distribute the bananas, even if delivery were made. It was shown that the chief of police was acting under specific instructions from the sanitary commission as to this particular shipment. The railroad company, under these circumstances, declined to deliver the bananas; and, appellee refusing to direct any other disposition, the car was attempted to be returned to the shipper, who, however, declined to receive same. Ultimately the car was sent to New Orleans, and the fruit was wholly destroyed and lost. Tirelli Bros. brought this suit against the railroad company for the value of the bananas, and, the case being submitted to the court upon an agreed statement of facts, recovery was had for the amount sued for. Hence this appeal.

Both sides rely upon the case of *Wilson v. Alabama Great Southern R. R. Co.*, 77 Miss. 714, 28 South. 567, 52 L. R. A. 357, 78 Am. St. Rep. 543. In that case the railroad was held liable for damages in forcing a passenger to disembark at the Mississippi state line on account of a void ordinance of the Mississippi State Board of Health. In this case no actual force was employed by the Mississippi authorities to compel obedience to their orders. The ordinance had been adopted, and notice given to the railroad companies; but it does not appear that any officers were present to enforce the orders. The only compulsion under which the railroad company acted was constructive, and not actual—such compulsion as arose from the mere promulgation of the order. But in the case at bar the chief of police at Vicksburg and his cohorts, backed by the sanction of the city authorities, were there physically and actually present, prepared to enforce obedience to their orders, and the company would have inevitably been brought into collision with them, had it persisted in its purpose to deliver the car. In our opinion, the case falls precisely within the rule laid down in the *Wilson Case*: "The railroad company must take the risk, as all citizens do, as to the validity of such orders, when it yields to the order alone; and when its defense is, not that it yielded obedience because only of the order, but because also of vis major—a shotgun quarantine, for example—its defense will be maintained if it shall appear that such vis major, such uncontrollable necessity, was the real cause of its action. It need not go to the extent of actual collision with force marshaled by necessity; but it must show its action was due to such

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

force existing and capable of controlling its actions."

It is no answer to this language to say that no ordinance of the city prohibited the importation of bananas from Mobile. This is true; but the company is not bound to maintain an armed force to resist and overpower the marshaled hosts of the city police, acting under instructions from the executive department of the city government. We think the judgment should have been for the appellant.

Reversed and remanded.

(95 Miss. 238)

TILLMAN v. HEARD et al. (No. 13,918.)
(Supreme Court of Mississippi. April 12, 1909.)
INJUNCTION (§ 148*)—BONDS—NECESSITY FOR GIVING.

An injunction to stay proceedings at law was properly dissolved, where plaintiff did not give a bond in double the amount of the debt sought to be collected, as required by Code 1906, § 609.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 148.*]

Appeal from Chancery Court, Washington County; M. E. Denton, Chancellor.

Suit by J. F. Tillman against Frank A. Heard and others. From a decree dissolving an injunction, plaintiff appeals. Affirmed and remanded.

Hugh C. Watson, for appellant. Shields & Boddie and Percy, Moody & Percy, for appellees.

MAYES, J. The question presented by this record is confined to whether or not the action of the court in dissolving the injunction was correct.

On examination of the record, we find that there was never a valid injunction issued. The proceeding was one to stay proceedings at law, and by the express provision of section 609, Code 1906, the party applying for such an injunction is required to enter into bond in double the amount of the debt sought to be enjoined. This bond was not given when the injunction was issued, and, although a decree of the court has since required complainant to execute the bond, no such bond is yet to be found in the record.

We are bound, therefore, to affirm and remand.

(95 Miss. 130)

STATE v. MITCHELL (No. 13,746.)
(Supreme Court of Mississippi. April 12, 1909.)

1. INDICTMENT AND INFORMATION (§ 133*)—PLEAS IN BAR—QUASHING INDICTMENT.

Under Code 1906, § 1426, requiring objection to a defect on the face of an indictment to be taken by demurrer, and under section 1427, requiring defects dehors the indictment to be taken by motion to quash, it was improper to

quash an indictment on a plea in bar alleging facts properly shown under a plea of not guilty.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 454-468; Dec. Dig. § 133.*]

2. CRIMINAL LAW (§ 269*) — DEMURRER TO PLEA—EFFECT AS ADMISSION.

A demurrer to a plea in bar to an indictment admitted the facts alleged by the plea only for the purpose of testing the legal question raised by it.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 269.*]

Appeal from Circuit Court, Jackson County; W. H. Hardy, Judge.

Edmund Mitchell was indicted for knowingly receiving deposits in an insolvent bank, and the state appeals from a judgment overruling a demurrer to a plea in bar and quashing the indictment. Reversed, indictment reinstated, and cause remanded.

May & Sanders, B. P. Harrison, Dist. Atty., and Geo. Butler, Asst. Atty. Gen., for the State. W. D. Bullard and Fitts & Leigh, for appellees.

MAYES, J. Sections 1426 and 1427, Code of 1906, provide the only way of raising objections to the legal sufficiency of indictments. By section 1426, if the defect appears on the face of the indictment, the objection must be raised by demurrer. By section 1427, if the defect is dehors the face, the objection must be made by motion to quash. Since the indictment was not challenged in either of the modes required by the statutes above referred to, the quashing of the indictment was wholly unauthorized. The legal sufficiency of the indictment could not be called in question under the pleading filed by the defendant, as the plea was addressed to a wholly different question. The so-called plea in bar was not such in any true sense, and the demurrer thereto should have been sustained, and the plea stricken out. The allegations of fact contained in the so-called plea in bar are, at most, mere allegations of fact which the defendant relies on to prove his innocence of the crime charged; but if it is conceded that the facts alleged in the plea, if true, should acquit defendant, such facts must be proven, as would any other fact showing innocence, and would not invalidate the indictment as a matter of law. If it be conceded that, on the establishment of the facts alleged in the plea, the innocence of the party would follow as a matter of law, the court below, on overruling the demurrer filed thereto by the state, should not have discharged the prisoner and quashed the indictment for the double reason that the demurrer only admitted the facts for the purpose of testing the legal question raised by it, and the indictment itself stood unchallenged. If the defense sought to be established by the facts of the plea constitute a valid defense in law, all

that is alleged in it is admissible under a general plea of not guilty, and the plea was therefore bad. In section 742, Bishop on Criminal Procedure, is clearly defined the function of a plea in bar, and the circumstances authorizing this plea to be interposed are pointed out.

Such plea as is here sought to be given the effect of a plea in bar is a novelty in criminal procedure, as far as we can discover, and amounts to no plea. The court below found, as a matter of law, that the facts alleged in the plea constituted a defense to the charge. It further proceeds to declare, after so finding, that the demurrer filed to same admits the facts, and, the demurrer being overruled, that these unproven allegations of fact contained in the plea entitle the prisoner to a discharge; and the court then extends the effect of the plea still further, and gives it the effect of a demurrer or motion to quash, and directs that the indictment be quashed. In other words, on a plea of which the most that can be said is that it is in effect a plea of not guilty, the defendant is acquitted and discharged on the mere allegations in the pleadings, and the indictment held legally insufficient. Such a result as this, if sanctioned, would introduce into the criminal law a new and dangerous practice, not approved of by any authority that counsel has cited us to or that we can find.

The judgment is reversed, the indictment reinstated, cause remanded, and prisoner held to await further action of the court.

(95 Miss. 50)

SKIPWORTH et al. v. MOBILE & O. R. CO.
(No. 13,830.)

(Supreme Court of Mississippi. April 12, 1909.)

1. RAILROADS (§ 313*)—OPERATION OF TRAINS—SIGNALS AT CROSSINGS.

A railroad company failed to give the statutory signals at a crossing, and its train came suddenly on a team near the track, causing the team to become frightened and unmanageable, resulting in injury to it and to the wagon. *Held*, that the company was liable for the injuries sustained; a traveler having the right to demand the giving of the signals.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1002; Dec. Dig. § 313.*]

2. TRIAL (§ 143*)—ISSUES—QUESTION FOR JURY.

Where there is a conflict in the evidence, the issue is for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 342; Dec. Dig. § 143.*]

Appeal from Circuit Court, Lowndes County; R. F. Cochran, Judge.

Action by Jesse Skipworth and another against the Mobile & Ohio Railroad Company. From a judgment for defendant, plaintiffs appeal. Reversed and remanded.

Appellant was driving to town in a two-horse wagon. When, according to his wit-

nesses' testimony, he had driven on an embankment of the railroad company and was very close to the track, a train came suddenly upon them, without ringing the bell, or blowing the whistle, or giving any other alarm. His team became unmanageable, and plunged in front of the engine, and one of the horses was killed, the other injured, and the wagon demolished. Appellant was unhurt, and he brings suit to recover for the damages to his wagon and team. Defendant denied that it did not give the proper signals on approaching the crossing, and pleaded contributory negligence on the part of the plaintiff. After the testimony was in the court gave a peremptory instruction for the defendant, and plaintiff appeals.

James T. Harrison, for appellants.

FLETCHER, J. This case in its essential aspects is controlled by the case of *L. & N. R. R. Co. v. Crominarity*, 86 Miss. 464, 38 South. 633. If the plaintiff and his witnesses are to be believed, the accident in this case was due to the negligence of the engineer and fireman in failing to blow the whistle and ring the bell at the crossing, as by statute it was their duty to do. Travelers on the highway have a right to insist that these signals be given, not only that they may keep off the track, but that they may not drive their teams so near the track that fright will certainly follow. In this case the fright led to the killing of the horse by the train. It is true the defendant's servants denied that there was any negligence; but this conflict was for the jury, not for the court.

The peremptory instruction was improper, and the case is therefore reversed and remanded.

(95 Miss. 124)

McCLENDON v. WHITTEN et al. (No. 13,890.)

(Supreme Court of Mississippi. April 12, 1909.)

LIMITATION OF ACTIONS (§ 35*)—TAX SALES—DEFAULT OF CLERK—FAILURE TO NOTIFY OWNER—ACTION FOR DAMAGES.

Code 1906, § 4333, requires the clerk of the chancery court, prior to the expiration of the period of redemption from a tax sale, to notify the owner of the land by a written notice, and makes him liable, upon failure to perform that duty, in the penal sum of \$25, besides the actual damages sustained. Section 3101 provides that actions for a penalty or forfeiture on any penal statute shall be commenced within a year after the offense was committed. *Held* that, the clerk having failed to give the prescribed notice, he was liable to the defaulting taxpayer for actual damages resulting to him, in the absence of a showing of waiver of the notice, and the right of recovery was not barred after one year by section 3101; the damages being no part of the penalty provided by the statute, but being damages for breach of official duty.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 85.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Circuit Court, Tallahatchie County; Sam C. Cook, Judge.

Action by T. M. McClendon against A. L. Whitten and others. Judgment of dismissal, and plaintiff appeals. Reversed and remanded.

Broome & Woods, for appellant. Dinkins & Caldwell, for appellees.

MAYES, J. The agreed facts of this case show that a certain tract of land assessed to Mitchell & McClendon, a mercantile firm engaged in business in Tallahatchie county, was sold for taxes on the first Monday of March, 1905. At the date of the sale, and until the 31st day of December, 1907, A. L. Whitten was the chancery clerk of the county. Though the property was assessed to, and sold as the property of, Mitchell & McClendon, the tax title was allowed to mature without the chancery clerk serving the notice as required by section 4333, Code of 1906, though it is agreed that one Marshall, the deputy clerk of Whitten, gave to P. L. Mitchell, a member of the firm of Mitchell & McClendon, verbal notice of the sale at some time during the year 1906, the exact date at which this verbal notice was given not being specified, and at the time that Marshall gave this verbal notice it is agreed that he was looking after the business interests of the firm. It is agreed that the failure of the chancery clerk to notify McClendon damaged him in the actual sum of \$75, and if he had notice of the tax sale he would have redeemed the lands. On these facts being agreed to, McClendon brought suit to recover from the clerk his actual damage; the suit being filed in November, 1908, more than one year after the failure of the clerk to serve the notice. The penalty provided by section 4333 is not claimed; it being conceded that McClendon is barred as to this under section 3101, Code of 1906. The court below held the clerk not liable and dismissed the suit, from which action an appeal is prosecuted.

Section 4333 of the Code of 1906 requires the collector of taxes to "make a list of lands sold to individuals, in the same manner as required of lands sold to the state, which he shall file with the clerk of the chancery court, who shall record the same in a book to be kept for that purpose; and the clerk of the chancery court shall, within ninety days and not less than sixty days prior to the expiration of the time of redemption, if the owner of the land sold, either to individuals or to the state, be a resident of this state and the address known to said clerk, be required to issue notice to such owner, in effect following, to wit: 'State of Mississippi, County of _____. To _____. You will take notice that _____ [here described lands] _____ lands assessed to you or supposed to be owned by you, was, on the _____ day of _____, sold to _____, for the taxes of _____ [year] _____, and that the title to said land

will become absolute in _____ unless redemption from said tax sale be made on or before _____ day of _____.'. And if said owner be a nonresident and his post office address be known, or can be ascertained after diligent inquiry, the chancery clerk shall mail to him a copy of the above required notice and note the mailing thereof upon said list, for which he shall be allowed fifty cents, and the sheriff shall be required to serve such personal notice as summons issued from court are served, and make his return to the chancery clerk. * * * If the clerk or sheriff shall fail to perform the duties herein prescribed, he shall be liable to the party injured by such default in the penal sum of twenty-five dollars, besides the actual damages sustained."

It is not pretended that the clerk attempted any sort of compliance with the requirements of this statute. Of course, it was not necessary for the clerk to make an investigation of the records to find out who, in truth, was the real owner of the property; but he was only required to notify the persons assessed with the property at the time of its sale. But the clerk did not do this. Section 4333 imposes a very important duty on the clerk. It is designed to bring positive and direct notice to a defaulting taxpayer, within a short time before the maturing of the tax title, that it is outstanding and will soon mature into a perfect title, so as to enable him to redeem. The statute is a most wholesome one, and should be strictly observed. The statute provides when the notice shall be issued, how it shall be served, and what kind of notice shall be given. No verbal notice answers the statute, unless accepted in lieu of the statutory notice, and there is no pretense that such was the case here, or that the notice verbally given by Marshall was intended as the notice required under the section. On the contrary, as to this, it appears that Marshall was not acting for the clerk, but was an employé of Mitchell & McClendon in looking after their interests. Liability under this statute for actual damages can be escaped only by a compliance with the statute, by giving written notice as required, unless the defaulting taxpayer waives the notice.

There is but one penalty provided by the statute, and that is for the recovery of the "penal sum of twenty-five dollars" for a failure to perform the duty required, and as to this "penal sum" there can be no recovery after one year, because of section 3101; but not so as to the recovery of actual damage. The right to sue for the recovery of actual damage is not affected by the one-year statute, since this is not in any true sense any part of the penalty provided by the statute. The actual damage is for the breach of official duty, and the statute warrants a recovery for this, though the penalty be barred.

Reversed and remanded.

(94 Miss. 780)

A. & S. SPENGLER v. STILES-TULL LUMBER CO. et al. (No. 13,540.)(Supreme Court of Mississippi. Oct. 28, 1908.
On Suggestion of Error, April 12, 1909.)**1. CONTRACTS (§ 161*)—CONSTRUCTION.**

To construe a contract all its provisions must be considered.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 743; Dec. Dig. § 161.*]

2. CONTRACTS (§ 170*)—CONSTRUCTIONS—CONTEMPORANEOUS CONSTRUCTION.

The contemporaneous construction placed on an instrument by the parties thereto is entitled to much weight in reaching the intent and purpose of the instrument.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 753; Dec. Dig. § 170.*]

3. MECHANICS' LIENS (§ 114*)—ASSIGNMENT OF PRINCIPAL CONTRACT—EFFECT.

Where a building contractor transferred to a third person the balance due under the contract to secure advancements to aid in the construction of the building, and thereafter the owner paid the sums due under the contract to the assignee, the transfer was an assignment of the funds due and to become due under the contract, but not of the contract, and the assignee occupies no relation towards persons furnishing materials and labor in the construction of the building.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 149; Dec. Dig. § 114.*]

4. MECHANICS' LIENS (§ 114*)—ASSIGNEE OF CONTRACTOR—CLAIMS OF SUBCONTRACTORS, MATERIALMEN AND LABORERS.

Under Code 1906, § 3074, giving to subcontractors, laborers, and materialmen a lien on the amount due by the owner to the contractor on their giving notice to the owner, an assignee of the principal contractor has the prior right to the fund as against subcontractors, materialmen, and laborers subsequently serving notice of lien.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 149; Dec. Dig. § 114.*]

5. ASSIGNMENTS (§ 10*)—CLAIMS ASSIGNABLE.

A building contractor has the common-law right to assign the balance due and to become due from the owner.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 17; Dec. Dig. § 10.*]

6. MECHANICS' LIENS (§ 114*)—RIGHTS OF MATERIALMEN AND LABORERS—ASSIGNMENT OF PRINCIPAL CONTRACT.

That an assignee of a building contractor of the balance due and to become due from the owner consented to materialmen and laborers furnishing materials and labor in the construction of the building did not affect his rights under the assignment.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 149; Dec. Dig. § 114.*]

7. MECHANICS' LIENS (§ 114*)—LIENS OF MATERIALMEN AND LABORERS—RIGHTS OF ASSIGNEE OF CONTRACTOR.

The right of a subcontractor, materialman, or laborer, under Code 1906, § 3074, to a lien on the amount due from the owner to the principal contractor on giving notice to the owner, is defeated by a bona fide assignment by the contractor of the balance due and to become due under the contract, made before the service of such notice of lien, though the assignee does not give the lien claimants notice of the assignment.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 149; Dec. Dig. § 114.*]

8. MECHANICS' LIENS (§ 114*)—LIENS OF MATERIALMEN AND LABORERS—RIGHTS OF ASSIGNEE OF CONTRACTOR.

An assignment by a building contractor of the balance due and to become due under the contract for a debt due to the assignee from the assignor, not growing out of the construction of the building, is good as against subcontractors, materialmen, and laborers subsequently serving notice of lien on the owner.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 149; Dec. Dig. § 114.*]

9. ASSIGNMENTS (§ 58*)—ASSENT OF DEBTOR—NECESSITY.

The assent of the owner to an assignment by the contractor of the balance due and to become due under the contract is not essential to give effect to the assignment.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 121; Dec. Dig. § 58.*]

Mayes, J., dissenting.

Appeal from Circuit Court, Madison County; Wiley H. Potter, Judge.

Action by the Stiles-Tull Lumber Company and others against A. & S. Spengler and others. From a judgment for plaintiffs, defendants A. & S. Spengler appeal. Reversed and remanded.

Brunini & Hirsh, for appellants. H. B. Greaves and W. H. Powell, Huber & Powell, for appellees.

WHITFIELD, O. J. The case of Peck-Hammond Company v. Williams, 77 Miss. 824, 27 South. 995, controls this case perfectly. The court erred, therefore, in holding the contrary view. The judgment should have awarded the appellants the whole of the value of the amount furnished by them; and the other parties, as correctly held by the court, so far as priority is concerned, would be entitled to the balance in the order in which they served notice upon the owner, as shown by the pleadings and the agreed statement of facts.

Reversed and remanded.

MAYES, J., dissents.

On Suggestion of Error.

WHITFIELD, C. J. The case made by the record is briefly this: A. P. Cameron contracted with J. H. Jaffray, who was doing business under the firm name of J. H. Jaffray Construction Company, to build him a residence in the city of Canton, Miss. Jaffray proceeded to carry out his contract. When he completed the foundations, he executed the following assignment to appellants, A. & S. Spengler, of Vicksburg, Miss.: "In consideration of the sum of \$1,000 heretofore advanced us by A. & S. Spengler, of Vicksburg, Miss., and the further consideration that the said A. & S. Spengler have agreed to advance us certain materials in their line for the construction of the house, or residence, we are building for A. P. Cameron, at Canton, Miss., and the further con-

sideration that they have agreed to extend us a cash credit, not exceeding at any one time of fifteen hundred dollars, for labor, we, the undersigned, J. H. Jaffray and R. B. Howard, composing the firm of J. H. Jaffray Construction Company, do hereby transfer and assign, to secure said sum of \$1,000, the amount of said material, and said cash advances, unto the said A. & S. Spengler the balance due us under said contract with the said A. P. Cameron for the construction of said building as aforesaid, and direct the said Cameron to pay over the said balance to the said A. & S. Spengler as the payments become due; the duplicate of said contract being herewith attached. Any balance, after paying what may be due the said A. & S. Spengler, shall be paid over to us. Witness our signature on this the 13th day of December, 1906. [Signed] J. H. Jaffray Construction Company." Notice of the assignment was given by appellants to Cameron, the owner, on the day of the assignment. Appellants continued to advance Jaffray material and cash money under said assignment for use in the construction of said building, and Cameron made payments under his contract from time to time to appellants. When the residence was completed, appellants claimed there was due them \$3,600 or \$3,700, as shown by the pleadings and exhibits.

Appellees, who are various subcontractors or materialmen, not knowing of the assignment to appellants by Jaffray, furnished material and labor to Jaffray in the construction of said buildings, and, not receiving payment therefor, served "stop" notices on Cameron under section 3074 of the Code of 1906, but long after the assignment. It is agreed, for the purpose of this appeal, that the notices are all in proper form, and served in conformity with the provisions of said section. It is also agreed that Jaffray remained throughout in the possession of the work as contractor, and that all the "stop" notices were served upon Cameron, the owner, by appellees subsequent to the execution of said assignment by Jaffray to appellants, and subsequent to the service upon Cameron by appellants of notice of said assignment. When said building was completed, Cameron owed a balance of \$5,210.62 under his said contract with Jaffray. Appellants claimed \$3,600 or \$3,700 of this amount under their assignment, and appellees' claims on said fund aggregate \$3,600, so that Jaffray's total indebtedness to appellants and appellees reached a sum total of about \$7,200 or \$7,300, not enough to pay all in full. Hence this lawsuit, in which appellants contend that they should first be paid in full.

The Stiles-Tull Lumber Company and others filed their suits in the circuit court of Madison county for the purpose of enforcing their rights under section 3074 of the Code of 1906. A. P. Cameron answered, and paid over into court what he claimed to be due

under his contract, \$5,210.62, and asked that all parties in interest be brought in as parties to the said proceedings. The cases were thereupon all consolidated, and an issue made up between appellants and appellees. A jury was waived, and the case heard by the court. It was further agreed that there was more due appellants by Jaffray under said assignment than the difference of what was due the other appellees and the amount paid by Cameron into the court. This admission had the effect of removing all question that had theretofore been raised as to the correct amount due appellants under the assignment.

When the appellants sought to introduce said assignment in evidence, appellees objected to its introduction on the following grounds: (a) Because "said assignment is no more or less than a mortgage, which has never been acknowledged or filed for record in Madison county, or anywhere else, as required by law." (b) Because "no notice was given to the other parties (appellees) of appellants' assignment." (c) Because "it is irrelevant, incompetent, and immaterial, so far as it may affect any rights or interests of appellees to the funds in controversy." (d) Because "no claim can be made thereunder, by virtue of the lien they claim, under the mechanic's lien law of the state." (e) Because "it is not signed and acknowledged, and has not been filed for record." (f) Because "none of the appellees had any knowledge of it." (g) Because "it is purely and simply a mortgage, and, in order to have been valid, should have been recorded, or other actual notice given the other creditors." (h) Because "the action of appellants in allowing Jaffray to stay in possession of the job and contract bills, after all improvements were made, prevents them from contesting the claims of appellees."

Upon the foregoing exceptions the court made the following ruling: "The court holds, on the motion to exclude the assignment, that the assignee is entitled to whatever was due on the building to the builder at the time the assignment was made; that after that time the assignee stood in the shoes of the builder, and was only entitled under the assignment to such additional amount as might have been earned by the builder under his contract. The court, however, is of the opinion, further, that the assignment shown to have been served on the owner was sufficient notice of an indebtedness of \$1,000, and as to whatever sum the evidence may show was earned by the builder at the time of the execution of the assignment Spengler would be entitled to the amount of the said contractor's labors or material, and as to the other money in court it should be paid to the other parties in the order in which they served notice upon the owner, as shown by the pleadings and by the agreed statement of facts, and that any balance in the court should be paid to Speng-

ler under his assignment. For these reasons, the court overrules the motion to exclude the assignment, and allows it to remain in evidence for the purpose above stated."

Appellants then and there excepted to the ruling of the court. Appellants next admitted that there were no profits in said contract at the time of said assignment, or at the completion of the job. Appellees thereupon moved the court for a judgment for the amount of their claims, to be paid in their priority, with 6 per cent. interest, to the exclusion of the claim of appellants, and admitted, for the purpose of the motion, that the balance was not sufficient to pay appellants' claim under said assignment in full. The court sustained the motion and gave judgment accordingly.

The purpose of both parties in making the agreed statement of facts, which was made in an irregular sort of way, from time to time, in the course of the trial below, was manifestly that, after such agreed statement of facts had been made, further testimony would be adduced by appellants and appellees. But the court's ruling on the effect of the assignment to the appellants had the practical effect of destroying entirely the contention of appellants as to their prior right to the funds in court, and made, of course, the introduction of further testimony unnecessary, especially, when it was admitted that there was more due appellants by Jaffray under said assignment than the difference between what was due the other appellees and the amount paid by Cameron into court. Really the ruling of the court left nothing to be determined in the case except to settle the correctness of the ruling in construction of the assignment, and accordingly the appellant's appeal to this court was taken, the object of the appeal being plainly to have this assignment construed, since, as must be obvious, the true construction of this assignment is the pivotal point in the case.

It will be noticed, from the objections made by appellants to the introduction of said assignment, that almost their sole ground of objection was that this instrument was not an assignment, but a mortgage; and, indeed, the chief contention made by learned counsel for appellees in this court, in the oral argument and in their briefs, is that the instrument must be held to be a mortgage, and that consequently, since it was not recorded as mortgages must be to affect the rights of third parties, the appellees here must prevail over this so-called unrecorded mortgage, of which the appellees never had any actual or any constructive notice. This is a totally erroneous view of this instrument. It is plainly nothing else than an ordinary simple assignment. Learned counsel for appellees segregate from the assignment one particular clause in it, to wit, "The balance due as under said contract with the said A. P. Cameron for the construction of said building as

aforesaid," without looking to the other provisions of the assignment. Of course, this is not the proper way in which to construe the assignment. All its provisions must be taken in one view, and the purpose of the assignment worked out from the whole instrument, and not a part of it. Counsel for the appellants well say: "The fact that appellants were to continue furnishing material and money for labor; the fact that Mr. Cameron was directed to pay over to appellants the balance 'as the payments became due'; the fact that the balance, after paying what might be due appellants, should be paid over to Mr. Jaffray; the fact that no particular payments were assigned, and others reserved, and many other features about the assignment might be cited to show that the intention of the parties was not to transfer only what was then due, but what was to become due."

Again, it is a well-settled canon of construction that the contemporaneous construction placed upon an instrument by the parties thereto is entitled to very great weight in reaching the intent and purpose of the instrument. At page 45 of the record we find this: "It is agreed that since the assignment A. & S. Spengler went on furnishing material to the Jaffray Construction Company under said assignment as shown by the record, and that A. P. Cameron, from time to time after the date of said assignment, paid to A. & S. Spengler the aggregate sum of \$14,000." This demonstrates that Cameron authorized and acted under this construction of the assignment by paying from time to time to appellants said aggregate sum of \$14,000, that Mr. Jaffray acquiesced in said payments made to appellants by Cameron, and that consequently all parties to the instrument put one and the same construction upon the assignment, to wit, that it transferred to the assignees the funds due and to become due. The contention that this instrument, either by its terms alone, or in connection with the contemporaneous construction thus put upon it by all parties to the instrument, constituted a mortgage, is not worthy of serious consideration. It will be further noted that the court below held this instrument to be an assignment, since it overruled all the objections made to its admission on the ground that it was a mortgage, and allowed the assignment to go in evidence. The court below expressly calls it, in its ruling, "an assignment," and refers to the appellants as the "assignees." The error of the court below consisted in holding that the assignees were only entitled to the sum due on the building at the time the assignment was made, to wit, as alleged, \$1,000, but that the assignment was invalid to transfer to the appellees any sum thereafter to become due after such assignment. The fact is that the appellants, the assignees, went on furnishing material and money for labor to the extent of \$14,000. When the contest arose, the appellants had a

just claim for some \$3,700, and the appellees had a just claim for some \$3,600.

So far as any equities are concerned as to the real merit of these claims, one is just as meritorious, in all respects, as the other, and all that is so earnestly insisted on by the learned counsel for appellees, to the effect that the appellants, the assignees, ought not to be allowed to prevail here under their assignment, because of some supposed higher right, moral or equitable, on the part of appellees to said fund, is entirely without foundation. Let it be specially noted that the appellants were not the assignees of the contract, as held by the learned judge below. This assignment was not an assignment of the contract of Jaffray, but an assignment of the funds due and to become due under that contract. The language of the instrument places this beyond controversy. It says that in consideration of \$1,000 heretofore advanced, etc., and the further consideration that appellants have agreed to advance certain materials, etc., and the further consideration that appellants have agreed to extend a cash credit, not exceeding at any one time \$1,500, for labor, therefore Jaffray transferred and assigned, to secure all these things, what? His obligation as contractor, with its rights and liabilities? Not at all; but "the balance due us under said contract with the said Cameron, as the payments become due," etc. A plain, manifest transfer of the funds due under the assignment, but no assignment of the contract in any legal sense. All therefore, that is said in the brief of counsel for appellees about the Spenglers not having any higher right than Jaffray, on the notion that the appellants stood in the same relation to the subcontractors and materialmen, the appellees, that Jaffray stood in to them, is obviously beside the mark. The assignees had nothing on earth to do with Jaffray's contract to build the house, nor his duties and obligations arising out of that contract; and hence they occupied no relation towards these appellees such as Jaffray the contractor did. They assert a claim under this assignment to the funds due and to become due, and that is the whole extent of this assignment. What, then, is our mechanic's lien law, and what are the respective rights of the appellees and this assignee under that law, and our decisions interpreting that law?

First of all, let it be noted that, in determining any question as to the rights growing out of the mechanic's lien, the court is to be critically careful to notice the various statutes of the different states, and the wide differences between them; indeed, the wide differences, at different times, existing between the statutes of the same state on this subject. It is said in 27 Cyc. pp. 89, 90, on this subject: "The protection of the subcontractor and materialman, with a just regard to the rights of the owner of the property, has been the subject of much solicitude with

most of the Legislatures. Two systems seem principally to have been adopted—one known as the 'New York system,' the other as the 'Pennsylvania system.' The one in Pennsylvania, which was the first, where the mechanic who did the work and the materialman who supplied the articles used were deemed entitled to protection, rather than a mere builder or undertaker of contracts, made provision that the subcontractor and materialman should have a lien for whatever sum might be due to him directly on the building and land upon which it stood, and subordinated the lien of the contractor thereto. The other was the plan adopted in New York, which did not secure to any one, except the original contractor, an absolute lien on the property for the whole sum due, but by a species of equitable subrogation allowed the subcontractor and materialman to give written notice to the owner of his unpaid claim, requiring the owner thereupon to retain such funds as were in his hands, belonging to the contractor, to answer the suit of the subcontractor, and securing the same either by lien upon the interest of the owner in the property or a right of action against him; the payment of this sum to operate as a valid set-off against any demand of the contractor. The prominent distinction between the two systems is this: Under the New York system the subcontractor cannot recover more than is due from the owner to the contractor; while under the other system the original contract, or payment to the original contractor, is no defense to a claim of a subcontractor. A clear conception of the distinction between these two systems is necessary to an understanding of the cases, for not only have different systems prevailed in different states, but in some instances the legislative history of a single state shows that each of the two systems mentioned has prevailed therein at some period; and many propositions of law laid down with reference to one system are totally inapplicable (or would even be incorrect) where the other system prevails. It seems, however, that the plan of conferring on subcontractors and materialmen a right of lien for all sums which may be due them, irrespective of payments already made by the owner to the contractor, is passing out of favor, and the tendency in later legislation is to confine their right to what may be owing by the owner to the contractor at the time of notice to him of their claims."

There then follows in this text a very careful consideration of the laws of the different states and the changes made, it being pointed out that in California the Pennsylvania system was first adopted in 1858, but that in 1862 that system was repealed and the New York system adopted, and that this New York system was in turn repealed in 1868, and the Pennsylvania system restored, and that finally the present California statute (Code Civ. Proc. § 1183 et seq.) restored again the salient features of the New York

system. It will thus be seen that this court must determine this case, not by the statutes of other states, but by the statutes of its own state. Now, what is that statute? It is contained in section 3074, Code of 1906, so far as this case is concerned, which is as follows: "When any contractor or master workman shall not pay any person who may have furnished materials used in the erection, construction, alteration, or repairing of any house, building, structure, fixture, boat, watercraft, railroad, railroad embankment, or the amount due by him to any subcontractor therein, or the wages of any journeyman or laborer employed by him therein, such person, subcontractor, journeyman or laborer may give notice, in writing, to the owner thereof of the amount due; and thereupon the amount that may be due by such owner to the contractor or master workman shall be bound and liable in the hands of such owner for the payment of the sum so claimed; and if, after notice, the contractor or master workman shall bring suit against the owner, the latter may pay into court the amount due on the contract; and the person giving notice shall be summoned to contest the demand of such contractor or master workman; and the court may cause an issue to be made up and tried, and direct payment of the amount claimed by the person giving notice out of the money so paid into court; or, in case the person giving the notice shall sue the contractor or master workman he shall make the owner a party to the suit, and thereupon the owner may pay into court the amount due on the contract, or sufficient to pay the sum claimed, and costs, and the court shall award the same to the person who may be entitled thereto; and in neither case shall the owner be liable to pay costs; but if the owner, when sued with the contractor or master workman, shall deny any indebtedness sufficient to satisfy the sum claimed, and all costs, the court, at the instance of the plaintiff, may cause an issue to be made up to ascertain the true amount of such indebtedness, and shall give judgment and award costs according to the justice of the case. In case judgment shall be given in favor of the person giving the notice, as hereinbefore provided for, against the owner, such judgment shall be a lien from the date of such notice, on the building, house, structure, fixture, boat, watercraft, railroad or railroad embankment in or upon which the material or labor mentioned in such notice was used or done, and may be enforced as in case of liens in other cases provided for in this chapter."

The mere reading of this statute shows that the New York system, and not the Pennsylvania system, is the one which this state has adopted, and which is now in force in this state. See 27 Cyc. p. 101, upon the New York system. The courts of New York have made their system perfectly clear. Un-

der that system it is only the original contractor who has any absolute lien. The subcontractor and the materialmen have no lien, except from the date on which they give written notices of their claims to the owner, from which date the owner is required to retain such funds as were in his hands belonging to the contractor at that time. Under the Pennsylvania system, subcontractors and materialmen were entitled to a direct lien in all respects equal to the lien of the contractor. The difference between the two systems is as wide as the distance between the poles on this vital point. In *New York, in Stevens v. Ogden et al.*, 130 N. Y. 182, 29 N. E. 229, that court said on this subject: "The order drawn by the contractor on the owner in favor of E. H. Ogden & Co. for \$909.94, being by its terms payable out of a particular fund specified in the order, operated as an assignment, pro tanto, of that fund. *Brill v. Tuttle*, 81 N. Y. 454, 37 Am. Rep. 515; *Conseleya v. Blanchard*, 103 N. Y. 222, 8 N. E. 490; *Lauer v. Dunn*, 115 N. Y. 405, 22 N. E. 270. In *McCorkle v. Herrman*, 52 Hun, 610, 5 N. Y. Supp. 881, reversed 117 N. Y. 297, 22 N. E. 948, several persons had performed labor and furnished materials for a building erected by a contractor for the owner. After the work had been done and the material supplied, but before any lien was filed, a judgment creditor of the contractor began supplementary proceedings to collect his judgment, which did not arise out of, and had no connection with, the building contract, and procured the appointment of a receiver. Subsequently the laborers and materialmen duly filed their liens, and the question arose whether they or the receiver had the prior right to the sum due from the owner to the contractor. It was held at the General Term that the lienors had the prior right. In discussing this question the court said: "The statute gives a creditor a lien against a particular fund upon his doing certain things, and that lien is superior to the claim of any other creditor who has not taken the steps designated by the statutes to secure a lien. The plaintiff, by his appointment as receiver, undoubtedly became vested with all the right, title, and interest of his judgment debtor in and to this fund as of the time when the preliminary order was served. But he gets no greater right than he would have had if his judgment debtor had assigned the same to him on that day, and he cannot enforce any other or greater rights than his judgment debtor could enforce. His creditors, by the permission of the statute, have been enabled to assert a claim upon his debt due to the judgment debtor, and by reason of the statute, having taken those steps, they have a superior claim upon this debt due to him; and by the transfer of this debt to another person, whether by operation of law, or by a voluntary assignment, the plaintiff's debtor could not de-

prive the creditors of the right which the law conferred upon them.' The Court of Appeals reversed the judgment, and in discussing the question, said: 'The real question presented by the demurrer relates to the priority of lien between a judgment creditor of a contractor, who has duly commenced supplementary proceedings on his judgment, terminating in the appointment of a receiver, and laborers and materialmen, who, subsequent to the commencement of the supplementary proceedings and within the time allowed by the law, filed notices of lien to reach the debt owing to the contractor under a contract with the owner of a building for its construction. The section of the lien law (chapter 342, p. 585, Laws 1885) which governs the rights of the lienors in this case prescribed that upon "filing the notice of lien" a lien shall be acquired, etc. The filing of the notice originates the lien. Anterior to this act the laborer or materialman has no preferential right to be paid for his labor or material out of the sum which is due from the owner of the building to the contractor, but stands in the same position as other creditors. He may subject the debt to a lien in his favor on filing the notice and taking the proceeding prescribed by the act. But if, before this has been done, other creditors, pursuing the usual remedies for the collection of debts, have acquired a legal or equitable right to have the debt applied in satisfaction of their claims, the right is not overreached by liens subsequently filed under the act, unless priority is given by the provisions of the act itself. * * * Which of the claimants have the prior right? We think the plaintiff, as receiver, has the superior claim. He stands as the assignee of the claim of the contractor against the defendant, by a title which antedates the filing of the notices of lien. When the liens were filed there was a debt owing by the defendant. If the proceeding instituted by the creditor, whom the plaintiff represents, has been abandoned, the lien would have had priority. But not having been abandoned, and the equitable lien existing when the liens were filed having been converted into a legal title as of a time anterior to the filing of the liens, the right to the debt, as between the plaintiff and the lienors, vested in the former. The plaintiff, we think, stands in as good a position, at least, as if, prior to the filing of the liens, the contractor had in good faith assigned his claim against the defendant to the creditor in the supplementary proceedings as security for his debt. The assignee under such an assignment, according to the general current of authorities, would take precedence over lienors under liens subsequently filed.' The case cited, like the one at bar, arose under chapter 342, p. 585, Laws 1885, and is decisive of the question presented. There is no provision in the statute forbidding a contractor to pay his creditors out of the money due or to

become due him from the owner, to the exclusion of laborers and materialmen who have not filed liens. This may be an omission; but, if so, it can only be supplied by the Legislature, for the courts cannot extend these purely statutory rights beyond the terms of the statute by which they are created. The judgment of the General Term should be reversed, and the judgment entered on the decision of the Special Term, with costs."

The same doctrine precisely is laid down in the case of *Bates v. Salt Springs National Bank of Syracuse et al.*, 157 N. Y. 322, 51 N. E. 1033, in which case the facts are in all respects practically the same as in this case, with the additional fact that there was a clause in the contract by which the contractor was required to retain a certificate from the county clerk that no liens were unsatisfied of record, etc. The Supreme Court held that this clause was a protection to the subcontractors, and defeated the assignment. The appellate court reversed this finding of the Supreme Court, and held as follows: "The opinion held that under the mechanic's lien law (Laws 1885, p. 585, c. 342) the laborer or materialman has no preferential right to be paid out of the sum due the contractor until he files his notice of lien. In the absence of anything to the contrary in the contract, and before any notice is filed, the contractor may assign to his creditor, in payment of his debt, the whole or any portion of the moneys due or to become due under the contract, and the assignee acquires a preference over a subsequent lienor. This view was based on abundant authority, and is indisputable. *Brill v. Tuttle*, 81 N. Y. 454, 87 Am. Rep. 515; *Lauer v. Dunn*, 115 N. Y. 405, 22 N. E. 270; *McCorkle v. Herrman*, 117 N. Y. 297, 22 N. E. 948; *Stevens v. Ogden*, 130 N. Y. 182, 29 N. E. 229; *Beardsley v. Cook*, 143 N. Y. 143, 38 N. E. 109. The principle to be extracted from the cases is that a lienor obtains no greater right to the moneys payable by the owner than the contractor has, and if the latter has assigned to a creditor pro tanto the assignee gains a preference over subsequent liens. * * * Under the doctrine of equitable assignments, it is of no consequence to the relative rights of assignees and lienors that the money may not be immediately payable. Concluding, therefore, as I think we are bound to do under the authority of *Lauer v. Dunn*, that this clause in the contract was for the benefit of the trustees only, it follows that the assignment by the contractor to the Salt Springs Bank of the last payment upon the contract, executed upon the making of the contract, operated as an equitable assignment of the moneys remaining unpaid upon the contract when notice of it was given to the trustees, and gave to the assignee a preference over liens subsequently filed. There is no question as to there being an indebtedness from the contractors to

the bank, and, upon notice of the assignment to the trustees, the effect was to bind the moneys remaining unpaid upon the last installment in favor of the bank's claim. There had been an equitable assignment of the moneys, which only required for its enforcement a fund to fasten upon and a notice to the holder of the fund. The bank acquired the right of the contractors, who lost their interest in and dominion over the fund, and its assignment was subject to no other equities than such as the trustees may have had against the contractors at the time they had notice of the assignment. It follows, from the view expressed, that the judgment appealed from should be reversed, and a new trial ordered, with costs to abide the event."

Identically the same doctrine is announced with great clearness in the case of *Binns v. Slingerland*, 55 N. J. Eq. 55, 36 Atl. 277. In that case the contractor gave orders or assignments to the various creditors, and the owner did not accept them. *Slingerland*, a subcontractor, afterwards served "stop" notices upon the owners, and the court said: "It was not seriously contended but that the drawing of the orders worked an equitable assignment of so much of the last payment as they covered, and that they thereby gained, in equity, a priority over the notice served by the defendant herein. Superintendent, etc., v. Heath, 15 N. J. Eq. 22; *Lanigan's Adm'r v. Bradley*, 50 N. J. Eq. 201, 24 Atl. 505. And it is equally clear that the rights of such equitable assignees could have been enforced in this court. And if the complainants herein had, as soon as the building was completed and the payment of \$1,400 became due from them, deposited the same in this court, and filed a bill of interpleader against the several parties, the holders of those orders would have prevailed over the defendant, *Slingerland*, claiming under his stop notice of September 12th. They were first in time, and therefore prior in right. * * * The practice of contractors making such preferences by giving orders to materialmen has become so thoroughly familiar to everybody, and has been so frequently before the courts, and their right so to do so thoroughly established, that I must conclude that, if the Legislature had intended to restrict this right on the part of contractors, they would have done so by express language." So in *Tollhels v. James*, Wkly. Law Bul. (Ohio) 277; *Hall v. Banks*, 79 Wis. 299, 48 N. W. 385; *Copeland v. Manton*, 22 Ohio St. 398; *Board of Education v. Duparquet*, 50 N. J. Eq. 234, 24 Atl. 922.

Indeed, this view is announced by 27 Cyc. p. 231, as the generally accepted doctrine. At page 231 of 27 Cyc. it is said: "It has been held that if, before the notice or claim of lien is served on the owner or filed, the contractor assigns his claim against the owner, the assignee has the prior right to the fund, and an order given by the contractor on

the owner, payable out of what is due or to become due under the contract, operates as an assignment pro tanto of the fund, even without any acceptance of the order by the owner." Authorities are cited in support of this view from California, Iowa, New Jersey, New York, Ohio, and Wisconsin, an overwhelming array of authorities. We will not burden this opinion by citing them in detail, as they are set out in 27 Cyc. p. 231, note 93. We have verified these citations, and they fully support the text. On page 232, at the end of this citation of authorities, the editors of Cyc. cite, as contra, *Carter v. Brady*, 51 Fla. 404, 41 South. 539, *Beardsley v. Brown*, 71 Ill. App. 199, *Simpson v. New Orleans*, 109 La. 897, 33 South. 912, and *Bourget v. Donaldson*, 83 Mich. 478, 47 N. W. 326; and we remark, in passing, that these authorities cited as contra on this page 232 of Cyc. are the very cases cited by learned counsel for appellees, and on which they rely chiefly for support of their view.

Let us look carefully at these authorities a moment. In the case in 83 Mich. 478, 47 N. W. 326, it very clearly appears that the materialmen under that law had a lien equal to the contractor's lien, and it is expressly set out on page 482, 83 Mich., and page 328, 47 N. W., that the statute provided that the materialman or subcontractor had to file his written lien for record in the office of the register of deeds. That case, of course, has no application here, where the materialman has no lien, and where the claim for the lien is not required to be recorded. In the case in 71 Ill. App., at page 201, it is expressly stated that section 24 of the lien law provided that any materialman should have the lien, and on page 202 the court says: "The section provides: (1) That any person furnishing material or labor to the contractor shall have a lien upon the money, bonds, or warrants due or to become due the contractor for the improvement, provided the proper notice is given. (2) There shall be no priority between persons serving such notices. Comparison of this section with others of the act will show a clear purpose to give the subcontractor a lien equal to that of the contractor in all respects." This last sentence disposes entirely of this last case as having no sort of application in this state. In the case of *Simpson v. City of New Orleans*, 109 La. 897, 33 South. 912, it also clearly appears that the materialman was given a lien under the statute, and that Kent, who furnished the materials and had this lien, recorded his claim under the statute. This case, also, has no application to our statute. In the case of *Carter v. Brady*, 51 Fla. 404, 41 South. 540, it appears that Brady, the owner of the land, accepted an order in favor of one W. C. Spencer, on account of the contract of building the house for Brady, on condition, however, that Spencer should complete the building; Brady agreeing, on this condition

alone, that he would then pay to Spencer the balance then unpaid on the contract. By section 5 of the lien law of the state of Florida (Laws 1903, p. 78, c. 5143), set out plainly in the opinion, it is expressly provided that liens should exist in favor of "any person who shall furnish any building material used in construction," etc. The court said, toward the close of the opinion: "Our statute cannot be subject to the construction that the contractor can at any time during the progress of the building under his contract assign the balance due for such building to a third party, and upon the acceptance of such assignment by the owner, a materialman, to whom a lien is given under the statute, will be deprived of all the benefits which the statute has intended to confer upon him." It is too obvious for discussion that, the Florida statute giving the materialman the direct lien, the decision of the Florida court was eminently correct on its statute, but is wholly inapplicable to our statute, which gives no such lien.

Surely it ought to be accepted after this citation of authorities, and this analysis of those cited as holding contra, which do not hold contra, but only hold that, where a lien is given the materialman by the statute, such materialman would prevail over an assignee, that under our statute, which does not give any such lien, the assignee must of necessity prevail over the materialman, who has acquired no lien until after the assignment has been executed and delivered. Out of great deference to the very learned counsel for appellees, and their extreme earnestness in urging their view, an examination will be made now, wholly unnecessary, however, of other authorities cited by them. One of these cases is *Newport Wharf & Lumber Co. v. Drew*, 125 Cal. 585, 58 Pac. 187. What was held there? Just this: "If the contractor is still entitled to demand payment of installments already matured at the time of the notice (that is, notice by the materialman), payment to him is intercepted by the notice; but, if he has already assigned them to a third party, the notice will be inoperative to prevent their payment to such party." This is a square authority for the appellants. Another case cited by appellees is *Board of Education v. Duparquet*, 50 N. J. Eq. 234, 24 Atl. 922. What does that case hold? "An assignment, in language operating in present, of money due and to grow due from a third person, effects an immediate and present transfer to the assignee of a right to demand and receive the money assigned without notice to the debtor; and after such assignment the debtor no longer owes the assignor, but does owe and will owe to the assignee what he would otherwise owe to the assignor." Another square authority for appellees, and, let it be noted, holding that these appellees were not entitled to any notice of this assignment, a thoroughly well settled proposition. Learned counsel for ap-

pellees say that in this case, and in several other cases, the building was completed before the assignment was made. But what earthly effect that fact could have upon the validity of this plain common-law assignment, we are unable to see; nor in this case is that fact counted on in the least.

In several cases cited by learned counsel for appellees, to wit, to group them and dismiss them, *Wimberly v. Mayberry*, 94 Ala. 240, 10 South. 157, 14 L. R. A. 305, *Glass v. Freeborg*, 50 Minn. 386, 52 N. W. 900, 18 L. R. A. 335, and *Farmers' Loan & Trust Company v. Canada R. Co.*, 127 Ind. 250, 26 N. E. 784, 11 L. R. A. (O. S.) 740, the common principle is announced—all these cases being mortgage cases, and not cases of an assignment at all—that where no railroad is in existence, or where no house is in existence, and a mortgage is given on the railroad or on the land, and the labor, materials, and money of the materialmen and subcontractors gave all there was of value to the property claimed under the mortgage, the mortgagee ought to show a clear and strong superior right in order to defeat the claims of those who in reality brought the claims into existence; the principle being that the mortgage on the railroad in one case, and the mortgage on the land in the other, could not prevail over mechanics and materialmen whose money created in one case the railroad, and in the other the house on the land. In the case of *Bohn Mfg. Co. v. Kountze*, 12 L. R. A. 33 (30 Neb. 719, 48 N. W. 1123), the holding was, as set out at page 36, bottom of second column: "Where a vendee, owning the equitable title, contracts for the erection of a building, upon the express authority of the owner of the legal title, it is but just that the lien of the mechanic should attach to the interest of both vendor and vendee in the premises and be paramount to the lien of the vendor." That is obviously correct, because of the agreement of the owner of the legal title, the vendor. But, besides, the case is from the state of Nebraska, in which, as shown in this very opinion, section 1 of the mechanic's lien law provides that the materialman should have a lien—another case, therefore, wholly inapplicable under our statute.

Apply to the situation our section 3074, and the general principle of law as to the right to make a common-law assignment, and what do we have? Why, manifestly the assignees here, and appellees, were, prior to the assignment, mere creditors at large, without any lien under this statute given to either. That being the situation, and our statute giving the materialman a lien only from the service of the stop notices, as expressly held in *Herrin v. Warren & Mobley*, 61 Miss. 509, what was there in the law to prevent the contractor from assigning the balance due and to become due to him to the appellants? Why, most manifestly, he had the common-law right to make the as-

signment, and, if that assignment was duly executed and delivered to the appellants prior to the time when these appellees secured any lien by the service of the stop notices, it is too clear for argument that the assignees must prevail over these appellees, because of the universal equitable doctrine that he who is first in time is first in right. That is this whole case, stripped of all the confusion which has been thrown around it, growing out of the misconception that in some way, or somehow, or somehow else, these materialmen should be preferred to these assignees—exactly why, no one can tell. They had no lien until they served the stop notices. Long prior to that the appellants had the assignment. Both were general creditors, and he who, in the race of diligence to secure himself, first got a claim by their assignment, being first in time, is first in right. That absolutely is this whole case, stripped of all the clouds and darkness which has been thrown about it.

We will, however, because we desire as far as possible to satisfy the learned counsel for appellees themselves of their erroneous view, notice a few other of their contentions. It is complained that the assignees gave these appellees no notice of their assignment. None was necessary. The doctrine is stated thus in *Hall v. Banks*, 79 Wis. 229, 48 N. W. 385: "The lien of a subcontractor is defeated by an assignment of the claim due from the owner of a building erected under contract to the original contractor, made in good faith before the notice of the lien is served, although the owner knew when he paid the assignee that the subcontractor held unpaid claims." So in *Copeland v. Manton*, 22 Ohio St. 398, and in *Board of Education v. Duparquet*, 50 N. J. Eq. 234, 24 Atl. 922. The truth is, the case of *Herrin v. Warren & Mobley*, 61 Miss. 509, is absolutely decisive of this case in favor of appellants under our statutes. If, as said by the New York Court of Appeals, the Legislature intended to forbid assignments in cases of this sort, or to prohibit their obtaining priority as in this case, nothing was easier than for the Legislature to put in the mechanic's lien law that sort of prohibition provision. There is nothing like that in our section 3074, and until the Legislature does put it there the contractor has the common-law right to make the assignment, such as was made in this case, and it will be enforced by this court according to the principles governing same.

There are a great many inaccuracies, inadvertent, of course, in the statement of facts by learned counsel for appellees. For example, to run hastily over them, the amount for extras was not \$2,300, but \$1,463.85; the \$9,000 paid by Cameron before any notices were served was paid directly to the Spenglers, not by Jaffray, and by him to the Spenglers. Cameron was notified of this as-

signment the very day it was made. There is no clear evidence in this record that appellees furnished material with the knowledge and consent of appellants. This is sought to be worked at in a very vague way, from certain checks; but, if it had been clearly proven, it would make no sort of difference as to the rights of appellants. It was the business of the appellees to give notice themselves to Cameron, and not negligently and supinely furnish these materials without the exercise of any sort of diligence on their part. They have only themselves to blame for what they may lose. There is nothing that we can find in the record to show that \$2,020 were paid to the assignees on an old account. We do not know how this is worked out. It seems pretty clear to us, from the record, that about \$55 was the only amount paid on such old account, and that the balance was for material furnished for this very building. What is shown on page 35 of the record seems to make this pretty clear; but what difference could it make if it were true? Learned counsel for appellees seem to be of the opinion that an assignment would not have been good as against appellees for a debt due the assignee by the assignor, if that debt did not grow out of the construction of this building. This is a wholly erroneous view; and there are other minor inaccuracies which we will not protract this opinion by setting out.

Another proposition of learned counsel for appellees is that Cameron did not assent to this assignment. We think the fact is shown otherwise by the record, at page 45, where it is agreed that Cameron had paid appellants, since the assignment and under the assignment, \$14,000. This \$14,000 was for money and materials; but what if Cameron had not assented to the assignment by Jaffray to the appellants? Such assent of the debtor, Cameron, was not necessary to give effect to the assignment executed and delivered by Jaffray to the appellants. *Knapp v. Elridge*, 83 Kan. 106, 5 Pac. 372; *Newby v. Hill*, 59 Ky. 530; *Roger Williams Ins. Co. v. Carrington*, 48 Mich. 252, 5 N. W. 303; *Garland v. Harrington*, 51 N. H. 409; *Mourton v. Robertson*, 8 La. 439.

We have thus most patiently, carefully, and in detail gone over this case, both as to the facts and law applicable thereto. Out of the very great deference we feel for all the very learned counsel for appellees, it certainly ought to be clear, even to them, after this review, that they have fallen into what is, perhaps, a popular misconception of the effect of section 3074 of our Code, under our decisions. This section might have provided, if the Legislature had preferred the Pennsylvania system, that no assignment should be made by the contractor which would be good against the materialmen; but it did not so provide. It might have expres-

ly given the materialmen and the subcontractors, as the Pennsylvania system does, direct liens, equal in all respects to the lien of the original contractor; but it expressly refused to do that. There is nothing in the contract between Jaffray and Cameron stipulating that any such assignment should not be made. In short, this whole case is completely and perfectly disposed of under the statute, by the decision in this state of *Herrin v. Warren & Mobley*, 61 Miss. 509, which has stood from that day till this as the unquestioned law of this state, in construction of our mechanic's lien laws. The learned counsel for appellees certainly did not overlook this case; but it is equally certain that they have wholly failed to give it its full effect and force. To hold any other view than we have in this opinion, on our particular statute, would be to squarely overrule that case. It is idle to indulge in the loose view, in which counsel for appellees seem to indulge, that there is some sort of general spirit or purpose pervading this statute which gives to the appellees a prior right under the statute, under the facts of this case. We apprehend that the Legislature, in this carefully drawn section 3074, have fully and explicitly and plainly enacted just the law they wanted—the New York system; and to do what appellees ask us to do in this case would be to read into the section, by judicial legislation, something not only not in it, but something which is in direct conflict with its express provisions, and its declared policy. This, of course, we decline to do.

It follows that the judgment of the court below was erroneous, and it is accordingly reversed, and the cause remanded.

JOHNSON v. MARSHALL. (No. 13,430.)

(Supreme Court of Mississippi. April 12, 1909.)

Appeal from Circuit Court, Tallahatchie County; Sam O. Cook, Judge.

Action between Albert J. Johnson and W. T. Marshall. From the judgment, Johnson appeals. Affirmed.

See, also, 48 South. 182.

Boatner & May, for appellant. Dinkins, Caldwell & Ward, for appellee.

PER CURIAM. Judgment affirmed.

MCLENNAN v. TAYLOR. (No. 13,899.)

(Supreme Court of Mississippi. April 12, 1909.)

Appeal from Chancery Court, Quitman County; M. E. Denton, Chancellor.

Action between Matt McClellan and William Taylor. From the judgment, McClellan appeals. Dismissed.

PER CURIAM. Appeal dismissed.

OUTTEN v. PERRY et al. (No. 13,849.)

(Supreme Court of Mississippi. April 12, 1909.)

Appeal from Chancery Court, Panola County; I. T. Blount, Chancellor.

Action between W. C. Outten and A. V. Perry and others. From the judgment, Outten appeals. Dismissed.

L. F. Rainwater, for appellant. Shands & Montgomery, for appellee.

PER CURIAM. Appeal dismissed.

CRAWLEY v. WARD. (No. 13,127.)

(Supreme Court of Mississippi. April 12, 1909.)

Appeal from Circuit Court, Coahoma County; Sam O. Cook, Judge.

Action between W. A. Crawley and H. L. Ward. From a judgment, Crawley appeals. Affirmed.

J. W. Cutrer, for appellant. Mayes & Longstreet, for appellee.

PER CURIAM. Affirmed.

McLAUREN et al. v. ALLEN. (No. 13,932.)

(Supreme Court of Mississippi. April 12, 1909.)

Appeal from Circuit Court, Chickasaw County; E. O. Sykes, Judge.

Action between Lula McLauren and others and J. H. Allen. From the judgment, McLauren and others appeal. Affirmed.

W. S. Bates, for appellants. Allen & Robins, for appellee.

PER CURIAM. Affirmed.

ORMOND v. MAYOR, ETC., OF CITY OF MERIDIAN. (No. 13,873.)

(Supreme Court of Mississippi. April 12, 1909.)

Appeal from Circuit Court, Lauderdale County; Jno. L. Buckley, Judge.

Action between J. W. Ormond and the Mayor and Boards of Councilmen and Aldermen of the City of Meridian. From the judgment, Ormond appeals. Affirmed.

McBeath & Miller, for appellant. Williamson & Gilbert, for appellees.

PER CURIAM. Affirmed.

CLARK GROCERY CO. v. MILLS.

(No. 13,940.)

(Supreme Court of Mississippi. April 12, 1909.)

Appeal from Circuit Court, Alcorn County; E. O. Sykes, Judge.

Action between the Clark Grocery Company and P. G. Mills. From the judgment, the grocery company appeals. Affirmed.

Anderson & Long, for appellant. Lamb & Johnston, for appellee.

PER CURIAM. Affirmed.

PENNSYLVANIA CASUALTY CO. v. MESSONIER. (No. 13,903.)

(Supreme Court of Mississippi. April 12, 1909.)

Appeal from Circuit Court, Warren County; J. N. Bush, Judge.

Action by Louis H. Messionier against the Pennsylvania Casualty Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Bryson & Dabney, for appellant. N. Vick Robbins, for appellee.

PER CURIAM. Affirmed.**BANK OF INDIANOLA et al. v. COOPER.** (No. 13,879.)

(Supreme Court of Mississippi. April 12, 1909.)

Appeal from Chancery Court, Sunflower County; M. E. Denton, Chancellor.

Action between the Bank of Indianola and others and Tim E. Cooper. From the judgment, the Bank of Indianola and others appeal. Affirmed.

Mayes & Longstreet and Percy, Moody & Percy, for appellants. Tim E. Cooper, pro se.

PER CURIAM. Affirmed.

(57 Fla. 50)

HILLSBOROUGH COUNTY et al. v. STATE ex rel. CITY OF ST. PETERSBURG.

(Supreme Court of Florida. March 2, 1909. Headnotes Filed April 12, 1909.)

1. MANDAMUS (§ 163*)—DISPOSITION OF TAXES COLLECTED—SUFFICIENCY OF WRIT—DEMURRER.

Where it appears from an alternative writ of mandamus that the county commissioners of a county levied and collected a special tax of three mills for the year 1906, and five mills for 1907, on all the real and personal property in the county subject to taxation for public roads and bridges, under and by virtue of the law contained in section 850 of the General Statutes of 1906, an incorporated city in said county can compel said county commissioners by mandamus to draw a warrant on the county treasurer for the city's proportion of said tax, as provided for in said section; and said alternative writ is not subject to demurrer because it alleges that the county commissioners declined to audit the claim of said city upon the ground they had spent the money, when said writ alleges that there is sufficient money in the treasury to pay the claim of the city, nor is said writ subject to demurrer on the theory that it shows affirmatively the claim was not presented within 12 months from the time it became due, when it does not so appear.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 342; Dec. Dig. § 163.*]

2. QUESTION NOT DECIDED.

Whether the claim mentioned in this proceeding is embraced in section 785, Gen. St. 1906, providing that every claim against a county shall be presented to the board of county commissioners within one year from the time said claim shall become due, is not decided.

3. HIGHWAYS (§ 149*)—TAXATION—DISPOSITION OF TAXES COLLECTED—PAYMENT TO CITY.

Under the statutes of this state, when special taxes for road and bridge purposes are

levied and collected under section 850, Gen. St. 1906, it is the duty of the county commissioners to draw a warrant on the treasurer of the county for the proportion of said special tax belonging to an incorporated city.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 149.*]

(Syllabus by the Court.)

In Banc. Error to Circuit Court, Hillsborough County; Joseph B. Wall, Judge.

Mandamus by the State, on the relation of the City of St. Petersburg, against the County of Hillsborough and others. A peremptory writ issued, and defendants bring error. Affirmed.

Donald C. McMullen, for plaintiffs in error. Walter Robertson Howard, for defendant in error.

HOCKER, J. The defendant in error obtained an alternative writ of mandamus, directed to the plaintiffs in error, in the circuit court of Hillsborough county, which is in the following words and figures:

"To the County of Hillsborough, W. L. Parker, A. C. Turner, B. F. Waters, E. J. Devane, and J. L. Hackney, as and constituting the Board of County Commissioners for the County of Hillsborough, in the State of Florida—Greeting:

"Whereas, the city of St. Petersburg, Florida, by petition has made it appear that under and by virtue of section 850 of the Revised Statutes of the State of Florida the said board of county commissioners deemed it advisable and for the public good and at the time for levying county taxes for county purposes for the years 1906 and 1907, respectively, levied a special tax of three mills for the year 1906 and five mills for the year 1907 for public roads and bridges on all the real and personal property in Hillsborough county subject to taxation, and which was assessed and collected as other taxes of the county and paid into the county treasury as a special fund as required by law;

"And whereas, it did further appear from said petition that a large amount of said special tax levied for the year 1906 and collected and paid into the county treasury, amounting to \$2,014, was assessed, levied, and collected on property in the said city of St. Petersburg, and that the amount so assessed, levied, and collected for said year was not fully ascertained until the month of January, 1908;

"And whereas, it further appears from said petition that the amount of said special tax levied for the year 1907 and collected and paid into the county treasury, amounting to more than \$3,000, was assessed, levied, and collected on property in the said city of St. Petersburg;

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"And whereas, it further appears from said petition that the said city of St. Petersburg has caused demand to be made upon said board of county commissioners that one-half of the amounts so collected as aforesaid, amounting to the sum of more than \$2,500, be turned over to the municipal authorities of said city, pursuant to said section 850 of the Revised Statutes, and that the said commissioners account to the said city for the amount realized from property in the said city, which they declined to do, and declined to admit the claim of said city, upon the ground that they had spent the money;

"And whereas, it further appears from said petition that there is in the treasury of said county a sum of money exceeding in amount the claim of said city;

"And whereas, it further appears from said petition that said city is in urgent need of the moneys so payable to be used in the repairing, working, improving, and laying out of the streets of the said city as prescribed by ordinance, and that a necessity exists for resorting to this proceeding, in that ordinary legal remedies are inadequate to afford petitioner relief:

"Now, therefore, we, willing that speedy justice should be done in this behalf to it, the city of St. Petersburg, do command and enjoin you that on or before the 25th day of October, A. D. 1908, you do order a warrant drawn on the roads and bridges fund of said county in favor of the city of St. Petersburg for the sum of \$2,500, said warrant to be signed by the chairman and countersigned by the clerk of the circuit court, under the seal of said court, or that you show cause to the contrary before this honorable court in the city of Tampa, Florida, at 10 o'clock in the forenoon on the 26th day of October, A. D. 1908, and how you shall execute this our writ make known to this honorable court in the city of Tampa, Florida, at 10 o'clock in the forenoon on the 26th day of October, A. D. 1908, as hereinbefore named; and have you then and there this writ.

"Witness the Honorable Joseph B. Wall, judge of the circuit court of the Sixth judicial circuit of the state of Florida, in and for Hillsborough county, this the 15th day of October, A. D. 1908, and the seal of said court.

J. B. Wall, Judge."

The respondents demurred to this alternative writ on the following grounds:

"First. Because said petition and writ fail to show sufficient facts to entitle the petitioner to the relief asked for.

"Second. Because it appears by said petition and writ that the money has already been spent by the county.

"Third. Because it appears by said petition and writ that demand for the taxes assessed for the year 1906 was not made for

a period of more than one year after said taxes were collectible, and therefore said claim, if any existing, is barred under section 785 of the General Statutes of the state of Florida.

"Fourth. Because under section 850 of the General Statutes of the state of Florida it is the duty of the tax collector to turn over money collected under the provisions of the said section to the municipal authorities of cities and towns."

This demurrer was overruled, and the respondents given until November rules to answer, and, having failed to answer, a peremptory writ issued on the 9th of November, 1908. The case is here for review on writ of error.

Section 850, Gen. St. 1906, provides for the levy by the county commissioners of a special tax for public roads, bridges, and river crossings, and, among other things, that the money arising from the levy shall be paid into the county treasury, and also as a proviso that "one-half of the amount realized from said special tax on property in incorporated cities and towns shall be turned over to the municipal authorities of said cities or towns to be used in the repairing, working and improving and laying out of the streets thereof as may be provided by the ordinances of said cities and towns."

Section 781, Gen. St. 1906, provides how warrants shall be issued by the county commissioners, and that "no money for any purpose whatever shall be drawn from the county treasury except upon a warrant issued and attested" as therein provided for.

Section 782, Gen. St. 1906, requires that in issuing a warrant on the county treasurer they shall state specifically therein the fund on which it is drawn, and no warrant shall be drawn upon any fund except that for which said fund was raised.

Section 783, Gen. St. 1906, provides, among other things, that the county commissioners shall furnish the county treasurer with a receipt book and stubs to correspond, which shall designate separately each fund for which county taxes are collected, from the collector.

Section 784, Gen. St. 1906, provides that the county treasurer shall enter in a book the fact of his refusal to pay or nonpayment of any warrant which may be presented to him, and his reasons for such refusal or nonpayment; that he shall also, at the request of the party presenting the same, indorse on back of the warrant the fact of such refusal or nonpayment, and the reasons therefor; and that he shall pay such warrants in the order of their presentation.

Section 785, Gen. St. 1906, provides that every claim against any county shall be presented to the board of county commissioners within one year from the time said claim shall become due, and the same shall be barred if not so presented.

The facts of this case are unlike those of the case of *City of Sanford v. County of Orange*, 54 Fla. 577, 45 South. 479. That was the case of a suit in equity for an accounting against the county on account of special road taxes which it appeared had been collected and spent on the public roads during several years previous to the filing of the bill. This court applied to the facts of that case the doctrine of laches. Here no such ground is invoked. It is true the alternative writ states that the county commissioners had declined to admit the claim of the city of St. Petersburg upon the ground that they had spent the money; but it also appears from the alternative writ that there was in the treasury of the county a sum of money exceeding the claim of said city. This fact is admitted to be true by the demurrer.

It will be observed the demurrer does not raise the question that the alternative writ should have distinctly set forth that the claim was presented to the county commissioners within 12 months from the time it became due; but the demurrer is based on the theory that the alternative writ affirmatively shows it was not presented within 12 months from the time it became due. This contention is not sustained by the allegations of the writ, and the demurrer was therefore properly overruled. Whether the claim described in the alternative writ is of such a character as to be embraced in section 785 of the General Statutes of 1906, or whether it is simply a claim against officers who by statute have the custody of money belonging to the city, as distinguished from a claim against the county, we do not feel called upon to determine in this case.

The contention that under section 850, Gen. St. 1906, it is the duty of the tax collector to turn over the money collected under its provisions to the municipal authorities, we do not think is tenable. Under section 783, Gen. St. 1906, above referred to, it is the duty of the collector to pay over to the treasurer the money collected by him of every fund. Section 850, supra, does not require him to divide the special tax between a city and a county. He is required to pay over all taxes collected to the county treasurer, and the latter can only pay it out on warrants properly drawn by the county commissioners. It is the function of the latter to ascertain the amount due a city and to draw a warrant for that amount. The facts alleged and admitted show that at least \$2,500 is due the city. The peremptory writ is for that amount.

We discover no reversible error in the record, and, therefore, the judgment of the circuit court is affirmed. All concur, except PARKHILL, J., absent on account of illness.

(57 Fla. 393)

DRAKE v. BRADY et al.

(Supreme Court of Florida. March 9, 1909.
Headnotes Filed April 12, 1909.)

SPECIFIC PERFORMANCE (§ 22*)—PURCHASE OF PROPERTY WITH NOTICE OF SALE.

One purchasing property with notice that the grantor had contracted to convey it to another may be compelled to perform the contract in the same manner and to the same extent as his grantor would have been liable to do, had he not transferred the legal title.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 50-53; Dec. Dig. § 22.*]

(Syllabus by the Court.)

In Banc. Appeal from Circuit Court, Dade County; Minor S. Jones, Judge.

Bill by Gaston Drake against Edward L. Brady and others. Decree for defendants, and complainant appeals. Reversed and remanded.

Alex St. Clair-Abrams, for appellant. Geo. M. Robbins, for appellees.

WHITFIELD, C. J. On May 1, 1906, Gaston Drake filed in the circuit court for Dade county a bill of complaint, alleging in effect the purchase by him of certain described land from J. C. Henderson, through his agent, E. A. Waddell, and the payment to Waddell of the entire purchase price, and the subsequent conveyance of the land by Henderson to Brady as the result of fraud participated in by Brady with knowledge of Drake's rights in the premises. The prayer is that a trust in favor of complainant be decreed, for a conveyance and accounting to complainant, and for other appropriate relief. A demurrer to the bill of complaint was overruled. Brady answered, and testimony was taken by an examiner. The bill of complaint was dismissed on final hearing, and the complainant appealed.

It appears that the land was owned by J. C. Henderson, of Troy, Ala., and is located in the city of Miami, Fla., and that Brady was a tenant from month to month, and conducted a store in the building on the land. Henderson, by letter of February 1, 1904, authorized Waddell, of Miami, to sell the property for \$3,000 net. It was offered to Brady by Waddell at the named price. Brady expressed a desire to own it, but did not accept the offer. The property was offered to others. Drake agreed to purchase at the stated price, and on December 3, 1904, paid Waddell \$100 to bind the sale. Henderson was that day notified by wire of the sale, and of the payment of \$100 thereon. This was confirmed two days later by letter inclosing a deed to be executed by Henderson to Drake. On December 13, 1904, Drake paid Waddell \$2,900 in full for the property, taking a receipt, stating the sale of the particular land to him. Brady heard of the

sale on December 8th, and endeavored to procure a deed to the property for himself. He had been in communication with Henderson as to the purchase of the property, but had not agreed to take it. After hearing of the sale made to Waddell, as Henderson's agent, Brady visited Henderson at Troy and paid \$3,500 for a deed to the property. Henderson sent a deed, with authority to fill in the name, and to deliver to either Brady or Drake, as Waddell may determine, but recalled the deed before delivery, and afterwards sent one deed to be delivered to Brady, on condition that he would enter into a written contract to hold Henderson harmless against any claim by Drake, and one deed to be delivered to Drake, if Brady did not execute the contract. Brady declined to enter into the contract, and could not get the deed to him. Drake regarded the deed to him as being not a full warranty deed, and asked for time to examine the title. This was refused, and the deeds were returned to Henderson about December 28, 1904. Counsel for Drake prepared a deed and forwarded it to Henderson for execution; but it was not executed. On January 10, 1905, Drake wired Henderson's attorney in Troy, Ala., to return the deed he had previously declined, stating that the full purchase price had been paid nearly a month before. On January 13, 1905, a deed conveying the property, dated December 10, 1904, was delivered to Brady at Miami; the deed containing a qualification of the warranty as follows: "Except as to any claim which may be set up against said property by Gaston Drake."

The agreement of Drake to purchase the property, and the payment of \$100 to Henderson's authorized agent to bind the sale, and the subsequent payment to the agent of the full purchase price, gave Drake a right to a conveyance of the property; and as Brady took title from Henderson with full knowledge of Drake's rights, and with an express reservation of Drake's claim against the property, Brady is bound to comply with Drake's demands within his rights. Brady stands in Henderson's place, and holds the legal title subject to Drake's equity. Drake's failure to take the deed offered to him was not, under the circumstances, an abandonment of his rights to a conveyance of the property. Drake admits that when he paid the purchase price he "was satisfied with the title," but that was two weeks before; and in view of the unusual verbiage of the deed Drake was clearly entitled to a reasonable time to examine the deed and Henderson's title, particularly as Henderson's agent had receipted for the full purchase price two weeks before. The deed was really a full warranty conveyance, and upon examination Drake asked for it to be returned to him. This was reasonable, under

the circumstances, and should have been complied with. If Brady had any equities, they were not superior to Drake's; and Brady took title with full knowledge of, and expressly subject to, the rights and claims of Drake in the property.

One purchasing property with notice that the grantor had contracted to convey it to another may be compelled to perform the contract in the same manner and to the same extent as his grantor would have been liable to do, had he not transferred the legal title. *Wilkins v. Somerville*, 80 Vt. 48, 66 Atl. 893, 11 L. R. A. (N. S.) 1183.

The decree is reversed, and the cause is remanded, with directions to enter a decree in accordance with the principles herein announced.

TAYLOR, COCKRELL, and HOOKER, JJ., concur.

SHACKLEFORD, J., dissents.

PARKHILL, J., absent on account of illness.

(57 Fla. 433)

HUCKLEBY et al. v. STATE et al.

(Supreme Court of Florida. March 9, 1909.)

1. TAXATION (§§ 508, 512*)—LIEN—JUDICIAL SALE—EFFECT.

The lien of the state for taxes upon property attaches by and from the date of the assessment of the property, and cannot be divested by a subsequent judicial sale of such property in any proceeding in which the state is not a party.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 942, 950; Dec. Dig. §§ 508, 512.*]

2. TAXATION (§ 514½*)—LIEN—INTERVENTION BY STATE.

The state has the right to intervene by petition in a suit for the purpose of enforcing its lien for taxes due it on property involved therein, and obtaining an order for the payment thereof out of proceeds arising from a judicial sale of such property; and such petition, if properly framed, is not open to attack by demurrer. If any of the parties wish to question the legality of the tax imposed, the validity of the tax imposed, or to make any defense along that line, it would have to be done by way of an answer.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 514½.*]

(Syllabus by the Court.)

In Banc. Appeal from Circuit Court, De Soto County; Joseph B. Wall, Judge.

Bill by E. B. Cornell against the Consolidated Ice Manufacture, Refrigerator & Fish Company and others. The State of Florida asked leave to intervene. From an order granting the petition, Nancy J. Huckleby and others appeal. Affirmed.

Treadwell & Treadwell and J. W. Burton, for appellants. Park M. Trammell, Atty. Gen., and H. S. Phillips, State's Atty., for the State.

SHACKLEFORD, J. In a suit in equity pending in the circuit court for the county of De Soto, wherein E. B. Cornell was complainant and the Consolidated Ice Manufacture, Refrigerator & Fish Company and others were defendants, the state of Florida sought leave of the court to file the following petition of intervention:

"Now comes the state of Florida and asks leave of the court to file this its petition of intervention. Therefore your petitioner shows that in November, 1904, at the instance of certain creditors, upon a creditors' bill duly filed, your honor appointed a receiver of all and singular the property of the Consolidated Ice Manufacture & Fish Company of Punta Gorda, Florida, and that said receiver at once took possession thereof. Your petitioner further shows that taxes were duly and legally assessed against the said property of said defendant corporation for the state of Florida and the county of De Soto for the years A. D. 1903, 1904, 1905, and 1906, and that neither the receiver nor any one else has paid said taxes, or any part thereof; that said taxes aggregate about \$1,000 each year; and that said taxes, with interest, are now due your petitioner. Your petitioner further shows that said taxes at the time of levy were and still are a first and prior lien upon the property of the said fish company; that in November, 1906, under a decree of this court the property of said fish company was sold, and that the lien of said taxes was the first and prior lien upon the proceeds of said sale; that said property was sold for the sum of \$71,500.

"Your petitioner further shows that the purchaser of said property at the sale in November, 1906, failed to pay the purchase price within the time required by law, and that thereupon said property was readvertised and again sold at public outcry at Arcadia, Florida, on March 4, 1907, and that at said sale the property brought the sum of \$26,500.

"Your petitioner further shows that the lien of said taxes is a first and prior lien upon the proceeds of said sale. Wherefore your petitioner prays that the matter herein set forth may be referred to a master to assess the amount due for taxes, and the amount thereof when ascertained shall be a first and prior lien upon the proceeds of said property, and that the master or receiver in said cause be directed, out of the proceeds of sale, first to pay said taxes. And your petitioner will ever pray."

Notice was given to the complainant of the time and place of calling up the petition, and on the 18th day of March, 1907, an order was made allowing the same to be filed, and giving the defendants until the 28th day of April to answer the same. To this petition the appellants, who were defendants below, interposed a demurrer upon the following grounds:

"First. Said petition is so vague, uncertain, and indefinite in statement of facts, and the facts so stated are so vague, indefinite, and uncertain, as they do not constitute a cause of action of the state of Florida and county of De Soto for said taxes.

"Second. Because said petition does not set forth the necessary facts to entitle the said petitioner to intervene.

"Third. Said petition shows on its face that at the time of the filing of said petition this court did not have in or under its control or custody the property mentioned in said petition, and that this court did not have in its care, or under its custody or control, anything upon or against which the state of Florida or the county of De Soto held a lien for taxes.

"Fourth. Said petition shows upon its face that the same is filed too late, and that this court has no jurisdiction over the subject-matter of said petition, and that petitioner's only remedy, if any it has, is against the property therein described and set forth.

"Fifth. There is no equity in said petition. Therefore defendants pray that they may be dismissed, with their reasonable cost in this behalf sustained."

Upon this demurrer the court made the following order:

"The court being convinced, from a careful examination of the authorities, that the state has the right to intervene for the collection of taxes due it, it is ordered that the demurrer to the petition of intervention be overruled, and defendants allowed until the November rules to answer the petition."

From this interlocutory order an appeal was entered to this court, and the sole point presented to us for determination is whether the court erred in overruling the demurrer. No extended discussion is necessary, since, as we understand it, this point has already been decided adversely to the contention of the appellants by this court in *Bloxham, Comptroller, v. Consumers' Electric Light & Street R. R. Co.*, 36 Fla. 519, 18 South. 444, 29 L. R. A. 507, 51 Am. St. Rep. 44, and we content ourselves with referring to the reasoning and the authorities cited therein. It is elementary that a demurrer admits as true all the matters which are well pleaded in the pleading against which it is directed. If the appellants wish to question the legality of the taxes alleged to have been imposed, the validity of the assessment, or to make any defense along that line, it would have to be done by way of an answer. We would also refer generally to 17 Amer. & Eng. Ency. of Law (2d Ed.) 180, and 11 Ency. of Pl. & Pr. 494.

It follows that the interlocutory order appealed from must be affirmed. All concur, except PARKHILL, J., absent on account of illness.

(159 Ala. 145)

CENTRAL OF GEORGIA RY. CO. v. ASHLEY.

(Supreme Court of Alabama. Feb. 11, 1909.)

1. EXCEPTIONS, BILL OF (§ 40*)—TIME FOR FILING—EXTENSION BY COURT.

Where the time for filing a bill of exceptions is extended by the court, instead of by the presiding judge, the bill is void.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 58; Dec. Dig. § 40.*]

2. EXCEPTIONS, BILL OF (§ 40*)—TIME FOR FILING—EXTENSION.

Where, on overruling a motion for a new trial on December 29th, 30 days were given in which to perfect a bill of exceptions on the motion, and on January 28th the presiding judge as such extended the time to February 7th, which was in the succeeding term of court, and signed the bill on February 6th, the bill was valid; circuit court practice rule 30 (Code 1896, p. 1200) merely forbidding the extension by agreement of counsel of the time for signing the bill into a succeeding term, and not inhibiting the extension by the presiding judge to the limit of 6 months, expressly allowed by Code 1896, § 620.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 58; Dec. Dig. § 40.*]

3. JUDGMENT (§ 525*)—CONSTRUCTION OF ENTRY—DEMURRER TO COMPLAINT.

A demurrer recited as follows: "Comes the defendant by attorney and demurs to the complaint, * * * and separately to each count thereof, and assigns as grounds of demurrer the following," etc. The several counts, from 1 to 5, inclusive, were separately assailed; the grounds of objection to each count being directed there against immediately after the statement "To the first count," "To the second count," and so on through the other three. After dealing with the five counts, the demurrer concluded: "To the complaint as a whole, and separately to each count thereof," followed by two grounds alleging that the damages claimed were remote and that they were speculative. A separate demurrer was separately filed to count 7. The judgment recited that "defendant's demurrer to the complaint being argued, * * * it is the judgment of the court that the said demurrer to the complaint be * * * overruled." *Held*, that the recital of the judgment showed only a ruling on demurrer to the whole complaint, asserting the damages claimed to be remote and speculative, and not upon demurrers covering separable parts of the complaint.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 968; Dec. Dig. § 525.*]

4. APPEAL AND ERROR (§ 917*)—REVIEW—PRESUMPTIONS—CORRECTNESS OF LOWER COURT'S ACTION.

To show reversible error the presumption of the correctness of the lower court's action must be affirmatively overcome by recitals in the transcript, and to acquit the trial court of error it will be presumed, in the absence of an unequivocal ruling on demurrer, that the demurrant abandoned it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3709; Dec. Dig. § 917.*]

5. PLEADING (§ 187*)—DEMURRER—SCOPE—REMOTENESS OF DAMAGES CLAIMED.

While, if the complaint is not sufficiently definite to apprise defendant of the character of the injury flowing from the wrong, it may be tested by demurrer, objections that damages claimed are remote and speculative must be taken by motion to strike or by special charges.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 400; Dec. Dig. § 187.*]

6. CARRIERS (§ 269*)—CARRIAGE OF PASSENGERS—DUTY TO NOTIFY PASSENGERS OF TRANSFER POINTS.

Carriers, having power within proper limits to make schedules, create routes, and prescribe transfer points at which passengers traveling beyond must change cars, owe the duty to advise passengers by reasonable means of such regulations.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1063; Dec. Dig. § 269.*]

7. APPEAL AND ERROR (§ 714*)—RECORD—MATTERS NOT APPARENT OF RECORD.

On appeal, evidence not in the record, but only in a brief, cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2962; Dec. Dig. § 714.*]

8. CARRIERS (§ 275*)—CARRIERS OF PASSENGERS—ACTIONS—PLEADINGS—MATERIALITY OF ALLEGATIONS.

In an action by a passenger against a carrier for damages from failure to notify her where to change cars, an allegation that the motive power used on the train was steam was wholly immaterial, and unnecessary to be proved.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1076; Dec. Dig. § 275.*]

9. CARRIERS (§ 277*)—CARRIAGE OF PASSENGERS—EXCESSIVE DAMAGES—NEGLIGENCE OF CARRIER.

Where a woman passenger, as a result of the carrier's failure to notify her where to change cars, was deflected in her journey and compelled to bear added travel and sojourn in hotels, resulting in annoyance, illness, anxiety, and some expense, a recovery of \$500 was not excessive.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1084; Dec. Dig. § 277.*]

Appeal from City Court of Montgomery; A. D. Sayre, Judge.

Action by F. E. Ashley against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The only counts that are referred to in the opinion and necessary to be here set out are the fifth, sixth, and seventh counts, which are as follows:

"(5) Plaintiff claims of the defendant the sum of \$1,999 as damages, for this: That heretofore, on, to wit, the 15th day of September, 1904, the defendant was engaged in operating by steam a railway as a common carrier of passengers from the city of Montgomery, in the state of Alabama, to various points in the state of Georgia and in the state of Alabama. And plaintiff avers that she bought a ticket at the Union Station in the city of Montgomery, Ala., to Andalusia, Ala., and that she was unfamiliar with the road of the defendant, and that the servant, agent, employé, or conductor of the defendant called upon her for her ticket; that she showed the said servant, agent, employé, or conductor her said ticket; and that the servant, agent, or conductor, after inspecting the said ticket, did negligently fail to inform plaintiff that she would have to change cars at the town of Union Springs, in the state of Alabama, and take another car, so that she might reach her destination, and by reason

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of said negligence on the part of the said conductor, servant, agent, or employé of the defendant as aforesaid she was greatly injured, in this: It was in the nighttime, and plaintiff was put off at a strange place, to wit, Cuthbert, Ga., where she had to remain until the next day, so that she might take passage to said Union Springs, and there change cars that she might reach her destination. And plaintiff avers that she was made sick and was greatly frightened, she suffered great mental anguish and physical pain, that it prevented her from filling an engagement she had at Andalusia, and that she was prevented from reaching her destination, all to her great damage as aforesaid of \$1,999. And plaintiff avers that the damages claimed in this count are for the same cause of action that is claimed in the first, second, third, and fourth counts of this complaint."

(6) Same as count 1, down to and including "the city of Montgomery," where it first occurs therein, and adds: "To Cuthbert, in the state of Georgia; that along its said lines was the station in said state of Alabama called Union Springs; that from said Union Springs, Ala., ran another railway line operated by defendant to Andalusia, Ala., and that on said day and date plaintiff bought a ticket at Montgomery, Ala., to Andalusia, Ala., and became a passenger on one of the cars of the defendant; that in order to go from Montgomery, Ala., to Andalusia, Ala., on said ticket, plaintiff should change cars at Union Springs, Ala., and the defendant so negligently conducted its said business that by reason thereof plaintiff did not change cars at said Union Springs, Ala., but was carried beyond Union Springs, Ala., and by reason of said negligence she was greatly damaged, in this to wit: [Here follows catalogue of her special injuries and damages, same as in count 6.]"

(7) Same as count 6, except that it alleges that it was the duty of defendant, its servant, agent, or employé, to notify plaintiff that she should change cars at said Union Springs, Ala., for said Andalusia, Ala.; but, notwithstanding this duty, the defendant, or its servant, agent, or employé, did negligently fail to so notify plaintiff, and by reason thereof the plaintiff was carried beyond Union Springs, etc.

There was judgment for plaintiff in the sum of \$500, which judgment was rendered on October 15, 1906. On Wednesday, November 14, 1906, and on December 14, 1906, an order was granted by the court extending the time for signing the bill of exceptions—in the first instance 30 days, and in the second instance 20 days; 30 days having been granted from the day of the judgment. On Saturday, December 29, 1906, the motion for a new trial was overruled, and the presiding judge of the court granted an order extending the time for filing the bill of exceptions

30 days, and a further order was entered by the presiding judge extending the time to and including February 7th.

Charles P. Jones, W. F. Thetford, Jr., and J. B. Jones, for appellant. Hill, Hill & Whiting, for appellee.

McCLELLAN, J. The necessary continuity of the time, from the main trial to the date of the attempted authentication of the purported bill of exceptions for that trial, within which it should, to be effective, have been signed, was broken by the effort of the court, instead of the presiding judge, to extend it. *Scott v. State*, 141 Ala. 39, 37 South. 366; *Arnett v. Western Ry. (Ala.)* 39 South. 775; *Western Ry. v. Russell*, 144 Ala. 142, 39 South. 311, 113 Am. St. Rep. 24. Hence, so far as the main trial is concerned, the paper purporting to be a bill of exceptions thereon is valueless.

Counsel for appellant insist that this paper is at least a valid bill of exceptions to bring up for review the action of the court below in overruling the motion for a new trial. The motion was regularly retained on the proper docket of the court until December 29, 1906, on which date it was overruled. In the order overruling the motion the defendant (appellant) was granted 30 days in which to perfect its bill of exceptions on the motion for a new trial. On January 28, 1907, the presiding judge, as such, undertook to extend the time to February 7, 1907. The paper was in fact signed by the judge on February 6, 1907. By the act approved December 6, 1900 (Acts 1900-01, p. 122), three terms of the city court of Montgomery are provided for. One of these terms commences on the first Monday in February. Rule 30 of circuit court practice (Code 1896, p. 1200) merely forbids the extension, by agreement of counsel, of the time for signing the bill of exceptions into a succeeding term of the court, but does not inhibit the extension, by the presiding judge, of the time for signing to the limit of six months. Code 1896, § 620. There is a field of operation for both the rule and the statute cited. *Cooley v. U. S. L. Ass'n*, 132 Ala. 590, 31 South. 521. The extension in *Abercrombie v. Vandiver*, 140 Ala. 228, 37 South. 296, was by agreement of counsel. The bill here was signed within the time extended by the presiding judge; and hence became a part of the record for service in respect of a review of the action of the trial court upon the motion for a new trial. *Ala. Mid. Ry. v. Brown*, 129 Ala. 282, 29 South. 548.

The rulings on the pleadings will be first considered. The judgment, as here important, recites: "This day came the parties by their attorneys, and by leave of the court first had and obtained the plaintiff amends her complaint by interlining count three (3) and by adding thereto counts numbered six (6) and seven (7). And the plaintiff with-

draws count four (4) of the complaint, and the defendant's *demurrer to the complaint* being argued by counsel and understood by the court, it is considered and ordered by the court, and it is the judgment of the court that the *said demurrer to the complaint* be and the same is hereby overruled." (Italics supplied.) The only demurrers we find in the transcript are thus framed: The caption reads: "Comes the defendant, by attorney, and demurs to the complaint filed in this cause, and separately to each count thereof, and assigns as grounds of demurrer the following: * * *." The several counts, from 1 to 5, inclusive, are separately assailed; the grounds of objection to each count being directed thereagainst immediately after the statement, "To the first count," "To the second count," and so on through the other three. After dealing with the five counts, the demurrer concludes, "To the complaint as a whole and separately to each count thereof," following this with two grounds alleging that the damages claimed are remote and that they are speculative. A separate demurrer, separately filed, to count 7 of the complaint, also appears in the record.

Counsel for appellant take the point, and stress it in brief, that the judgment entry shows a ruling on demurrer to the complaint as a whole. Counsel for appellee controvert this contention, and insist that the recital quoted evinces a ruling overruling, not only that part of the demurrer expressly addressed to the whole complaint, and as well those addressed to each count, including count 5, but also overruling the separate demurrer to count 7. In support of appellee's view we are cited to the case of *A. G. S. R. R. v. Shahan*, 116 Ala. 302, 22 South. 509, from the transcript of which a judgment entry very similar to that with which we are now concerned is copied in brief. There the court took no notice of the question at hand; and, though the conclusion therein reached might have been different, had the point been taken, that decision is not authoritative, for the very reason that no ruling on the present point was made. In short, the question was not considered or decided. It is manifest that the gist of the inquiry involves a construction of the judgment entry, viz.: Was the court's action, to be drawn alone from the judgment entry in the absence of ambiguity therein, upon demurrer to the complaint as a whole or upon demurrer to only parts of the complaint? Appellant can derive nothing in its favor from the caption (of the demurrer) quoted; for the pleading itself expressly addresses the objections contained in it to separate counts of the complaint, except in its last paragraph, wherein the whole complaint is assailed.

We construe the recital to show only a ruling on demurrer to the whole complaint, and not upon demurrers covering separable parts of the complaint. Such was the conclusion of this court in *Griel v. Lomax*, 86 Ala. 182, 5

South. 325, upon substantially the same inquiry we now have. In that case the complaint contained two of the common counts and one special count, and the judgment entry recited "that the defendant demurred to the complaint," and that the court sustained the demurrer; but the demurrer copied into the transcript is addressed only to the special count. The plaintiffs then amended their complaint by adding another special count, and the defendant then demurred "to the complaint as amended," but his demurrer was overruled. Upon this status the court said: "The demurrer, as shown by the judgment entry, is taken to the entire complaint, as amended, and not to any particular count supposed to be defective." In our recent case of *Alabama Chemical Co. v. Niles*, 47 South. 239, the *Griel-Lomax* decision was, in substance and effect, followed.

The presumption, on appeal, of the correctness of the action of the primary court, must be affirmatively overcome by recitals in the transcript presented here, before error to reversal is shown; and, in keeping with this necessity, to acquit the trial court of error, it will be presumed, in the absence of an unequivocal ruling by the court on demurrer, that the demurrant abandoned it. We have, hence, as the only demurrer addressed to the whole complaint, and on which only the judgment entry shows the court to have ruled, that asserting the damages claimed to be remote and speculative. These objections cannot be taken by demurrer; motion to strike or special charges to the jury being the approved method to eliminate, if improper, such claimed elements of recovery. Of course, where the pleading is not sufficiently definite and certain to apprise the defendant of the character of the injury proximately flowing from the wrong, demurrer is the proper pleading to test that infirmity. *City Delivery Co. v. Henry*, 139 Ala. 161, 34 South. 389. That demurrer, to the whole complaint, was correctly overruled.

Counsel for appellant have presented an elaborate argument in support of their contention that neither the complaint, nor any count of it, states a cause of action, and hence will not support the judgment; and the ground of the insistence is that no primary duty rests on the defendant, as a common carrier of passengers, to, without being sought for the information, inform a passenger of the necessity to change cars in order to reach his destination, as indicated by his ticket or otherwise properly secured right to transportation to a destination beyond a point at which, to reach that destination, the passenger must change cars. The argument is so earnest, as well as elaborate, we feel impelled to respond to it; for, if the contention is sound, a reversal would result.

While the question in hand has not been, so far as we are now advised, the subject of adjudication apart from any other related question, yet there is one decision of a learn-

ed court in which the duty, the breach of which the complaint complains, was affirmed as an essential factor to the conclusion reached therein. This view is confirmed by the texts to be quoted. In 6 Cyc., at page 584, it is said: "Where it is necessary for the passenger to change cars or trains in the prosecution of the journey, reasonable notice thereof by the servants of the carrier is sufficient, and the passenger not governing himself by such notice cannot recover damages if he loses his connection." In 2 Redfield's Law of Railways (8th Ed.) it is said: "The duty of railways where there is a change of cars has often been commented upon by the courts. It seems to result, from the very nature of the case, that the very least which could be regarded as the reasonable performance of the duty of the company towards its passengers would be that the passenger should have timely notice of the change and reasonably sufficient time to make it."

The first-quoted text is based upon the decisions of the New York courts in *Page v. N. Y. Central R. R.*, 6 Duer, 523, and later, after revivor in the name of Barker, was taken to and affirmed by the Court of Appeals, and reported in 24 N. Y. 599. Page bought a ticket from Albany to Lyons. The defendant operated two trains, leaving Albany within an hour of each other, on which Page's ticket was good. One of these ran through Lyons, and the other ran to Syracuse, at which point, to reach Lyons, a change of cars from that train was necessary. Some of the testimony for the plaintiff tended to show that the ticket agent at Albany told the plaintiff that the Syracuse train, taken by the plaintiff, would take him to Lyons. This was controverted. Some of the testimony for the defendant tended to show that the plaintiff was informed, or was offered such opportunity as would have informed an ordinarily intelligent person, employing reasonable care and caution, that a change of cars at Syracuse was necessary. Obviously a material inquiry in the premises, whether as effecting the exoneration of the carrier from the consequences of the asserted misdirection of the agent at Albany or not, was the existence vel non of the primary duty of the carrier to notify passengers of the necessity for a change of cars in order to travel to Lyons. Writing to that proposition the Supreme Court (6 Duer, 529) declared: "If the defendant gave such published notice of the running of its trains, and such special notice in the cars, of the necessity of changing cars at any particular station, that every traveler of ordinary intelligence, by the use of reasonable care and caution, would obtain all the requisite information as to the route to be traveled, and the cars to be taken at an intermediate point of the voyage, it discharges its whole duty in this respect. If a passenger, merely by a failure to use such care and caution, instead of changing cars at a particular station, and taking cars which go to the place to which he

has paid his fare, continues in the cars in which he started, and is carried in another direction, the result is to be attributed to his own negligence, and not to a breach of duty, or of contract, on the part of the company. The fact of the publicity of such regulations, the time, manner, and circumstances of publishing them, and whether sufficient to bring home actual notice to the passenger, provided he bestows reasonable care and attention, in order to inform himself, is one to be determined by the jury." We take the liberty of transposing, in this connection, this clause of the opinion: "If the plaintiff had traveled the road before, in the train leaving at the same hour, it would be a fact bearing upon the question of knowledge. The weight of the fact would depend upon the frequency and recency of the period of such traveling."

From the quoted texts, as well as from the observations of the court in the *Page Case*, it is seen that a primary duty rests on the carrier of passengers to give publicity to its regulations, whether of schedule, including places whereat its train will stop for the discharge or reception of passengers, or of routing on its roadway, embracing points of change to another line of its roadway or that of another company, to the end that the ordinarily prudent and intelligent traveler may be informed of the facts essentially necessary for him to accomplish his journey. The reason for such duty inheres in the nature of the service afforded by such agencies, in connection with the power possessed by carriers to formulate and enforce such reasonable regulations as the conduct of the business requires. Within proper limits, they may make schedules, create routes, and prescribe transfer points at which passengers, traveling beyond, must change cars. Having this power, it would be wholly irrational to say that no duty, commensurate with the power, rests on the carrier to advise the traveling public, by reasonable means, of regulations so necessary to any journey by rail; for such a pronouncement would, essentially, cast upon the passenger the obligation, not simply to exercise reasonable prudence and diligence to ascertain the regulations, with respect to where, when, and how his journey may be made under regulations existing and published, but to seek out unpublished regulations the operation of which affect his journey. The result would be, naturally, that no carrier of passengers would make any effort to give publicity to its regulations touching matters associated with the employment of its transportative agencies. The decision of *A. G. S. R. R. Co. v. Carmichael*, 90 Ala. 19, 8 South. 87, 9 L. R. A. 388, announces, though only in argument of a related question, the duty on the passenger, or proposed passenger, raised by the performance of the primary duty we have said rested on the carrier, to exercise reasonable prudence and diligence to ascertain such regulations in the premises as the carrier has promulgated. If the pas-

senger fails to exercise such care and diligence, his negligence, and not that of the carrier, is the proximate cause of a resultant injury. The Page Case, *supra*, so holds, and we think the reasons stated before are conclusive of the correctness of the views entertained.

By brief of counsel for appellant we are advised that the case was tried on counts 5, 6, and 7. Count 6 ascribes the negligence complained of to have been that of the conductor in not notifying her of the necessity to change cars at Union Springs, in order to seasonably pursue her journey to Andalusia. Counts 6 and 7 ascribe the negligence to the defendant, or its agents or servants, in not so informing the plaintiff. We are dealing with the complaint only, with a view to determine whether the complaint states a cause of action. In the light of the considerations stated, we must hold that these counts do each state a cause of action, though, if assailed by properly grounded demurrer, we are not prepared to say, and are not now so invited, whether these counts would be immune therefrom.

Recurring to the motion for a new trial: The only errors urged and argued, aside from the rulings on the pleadings which have been considered, are that the affirmative charge, requested for the defendant, should have been given, on the grounds, first, that there was a failure of proof, in that the motive power was alleged to have been steam, and there was no proof in support of it; and, second, that the affirmative proof shows that such announcement of the necessity to "change cars at Union Springs for Andalusia" was only met by testimony of a negative character, as that the witnesses did not hear such announcement, if made—and that the verdict was excessive. It is important to note that there was no semblance of testimony offered tending to show any kind of publishing, by the defendant, of its schedules, routes, or changes of cars for any destination over its lines. This fact, if so, is found in the brief, but not in the record, where, to avail, it must be.

There was testimony tending to support the averments of counts 5, 6, and 7, and on it the jury were authorized to base a verdict for the plaintiff. The insistence that the affirmative evidence must prevail over that purely negative, as stated before, cannot avail, because from the testimony of both Mrs. Ashley and her daughter it appears that both testified positively that no announcement or notice of the necessity for a change of cars at Union Springs was made or given; and the fact that at other times their testimony in this regard was negative, as indicated, did not eliminate the positive statements alluded to. The bill itself refutes the last insistence.

We are of the opinion that the allegation of the character of the motive power—steam—was wholly immaterial and unnecessary to be proven in this action, based, as it is, on alleged negligence entirely foreign to what means of power were employed to drive the train on which plaintiff was a passenger of the defendant, a common carrier.

On the question of asserted excessiveness of the verdict, we are not so convinced of its unreasonableness as to warrant us in reversing the trial court. There was evidence before the jury tending to show illness suffered by plaintiff as a result of the negligence charged, and also annoyance, anxiety, and some financial expense entailed thereby. The plaintiff was a woman, was deflected in her journey, was delayed therein, was compelled to bear added travel, and to sojourn in hotels which, she testified, was unpleasant to her.

The judgment must be affirmed.

DOWDELL, C. J., and ANDERSON and MAYFIELD, JJ., concur.

(160 Ala. 186)

STATE ex rel. ALMON v. FOWLER.

(Supreme Court of Alabama. Feb. 4, 1909.
Rehearing Denied April 6, 1909.)

1. OFFICERS (§ 62*)—RESIGNATION—REVOCABILITY.

An unconditional resignation of a public office to take effect immediately cannot be withdrawn, even with the consent of the power authorized to accept it, and though it has not been accepted; but a contingent or prospective resignation can be withdrawn at any time before acceptance.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 93; Dec. Dig. § 62.*]

2. CLERKS OF COURTS (§ 8*)—RESIGNATION—CONDITIONAL ACCEPTANCE—EFFECT.

A circuit clerk's resignation, to become effective on acceptance by the judge, and accepted to take effect at a future day, was revocable by the clerk before that day.

[Ed. Note.—For other cases, see Clerks of Courts, Dec. Dig. § 8.*]

Appeal from Circuit Court, Morgan County; J. J. Ray, Judge.

Quo warranto by the State of Alabama, on the relation of D. O. Almon, Solicitor, against James S. Fowler, Clerk of the Circuit Court. Judgment quashing the proceedings, and relator appeals. Affirmed.

The case made by the petition is: That Fowler was elected to the office of clerk of the circuit court of Morgan county at the November election, 1904, and qualified as such. That on the 21st day of August, 1908, he resigned; his resignation being as follows: "Decatur, Ala., Aug. 21, 1908. Hon. D. W. Speake, Judge, etc., Decatur, Ala.: I hereby resign the office of clerk of the circuit court of the county of Morgan, and ask that the same be accepted by you, the ac-

ceptance to take effect at such time as you may fix or determine. James S. Fowler." That the said resignation was accepted by said judge in writing and indorsed thereon as follows: "The above and foregoing resignation is hereby accepted by me, the said acceptance to take effect on the 19th day of September, 1908. D. W. Speake, Judge." It is then alleged on the 26th day of October, 1908, Judge Speake appointed George T. Britnell, a citizen of Morgan county and a qualified elector, to fill the vacancy, and that he qualified, but has never been able to get possession of the office or possession of the books, papers, etc. The defense set up is that, although the facts stated in the petition are true, nevertheless on the 12th day of September, 1908, Fowler wrote to Judge Speake, addressing him at Moulton, where he then was, in terms withdrawing his resignation, and that said letter reached Judge Speake before the 19th day of September, 1908.

Lowe & Tidwell, Kirk, Carmichael & Rother, W. H. Long, and D. C. Almon, for appellant. Brown & Kyle, E. W. Godbey, and Callahan & Harris, for appellee.

ANDERSON, J. An unconditional resignation of a public office, to take effect immediately, cannot be withdrawn, even with the consent of the power authorized to accept it, and it does not seem to be material that the resignation had not been accepted. *State v. Fitts*, 49 Ala. 402; 23 Am. & Eng. Ency. Law, 424. A contingent or a prospective resignation, however, can be withdrawn at any time before it is accepted. 29 Cyc. 1404. There are some authorities, however, holding that a resignation of a public office does not take effect until an acceptance, among which will be found the leading case of *State v. Clayton*, 27 Kan. 442, 41 Am. Rep. 418. But our court has, by the *Fitts* Case, supra, become committed to the doctrine that an acceptance is not necessary, when the resignation is unconditional and goes into effect immediately.

The resignation, in the case at bar, was not unconditional, as was the one in the *Fitts* Case, supra, but was to become final and effective only upon the acceptance by the judge. An unconditional acceptance by the judge would have rendered the resignation conclusive and effective; but, while the acceptance was indorsed by the judge August 21, 1908, it was conditional, in that its operation and effect was postponed until September 19, 1908. The acceptance not becoming effective until said 19th of September, the respondent had the right to withdraw said resignation, which he did on the 12th of September, 1908. The resignation was by its terms to take effect only upon the acceptance by the judge, and, the judge having made the acceptance effective upon a future

day, the respondent had the right to withdraw said resignation before the arrival of the date fixed by the judge. The resignation did not take effect immediately, but was subject to the acceptance of the judge, and effective only upon the time designated by him, and was withdrawn before the said acceptance, by its very terms, became effective.

The case of *Murray v. State*, 115 Tenn. 303, 89 S. W. 101, is unlike the case at bar. There the officer requested that the resignation be acted upon at once by the judge of the county court, and it appears that it was on that day unconditionally accepted, and the opinion, following the *Grace* Case, 113 Tenn. 9, 82 S. W. 485, seems to have stressed the fact that the acceptance of the resignation ipso facto vacated the office. Here we had no unconditional acceptance, but one which, by its own terms, was not to become effective until a subsequent day.

The trial court properly gave the general charge requested by the respondent, and the judgment is affirmed.

Affirmed.

TYSON, C. J., and SIMPSON and DENSON, J.J., concur.

(123 La. 351)

No. 17,302.

NICK v. BENSBERG.

(Supreme Court of Louisiana. March 15, 1909.)

1. COURTS (§ 224*)—SUPREME COURT—JURISDICTION—JURISDICTION TO BE SHOWN BY RECORD—AMOUNT INVOLVED.

Jurisdiction must affirmatively appear from the record, and where it does not show that the amount involved, exceeds \$2,000 the Supreme Court has no jurisdiction of the case.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 487, 608-618; Dec. Dig. § 224.*]

2. COURTS (§ 121*)—JURISDICTION—AMOUNT INVOLVED—FICTITIOUS CLAIM OF DAMAGES.

A fictitious claim of damages in a certain amount is not sufficient to give the court jurisdiction as of a case involving that amount.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 418-428; Dec. Dig. § 121.*]

3. COURTS (§ 39*)—JURISDICTION—AMOUNT INVOLVED—SWORN STATEMENT OF LITIGANT AS TO.

The jurisdiction of a court is not sustained by the mere sworn statement of a litigant as to the amount involved, where the circumstances of the case contradict him.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 39.*]

4. COURTS (§ 39*)—JURISDICTION—AMOUNT INVOLVED—DAMAGES SUFFERED AFTER INSTITUTION OF SUIT.

Damages suffered after the commencement of a suit, and hence not included in it, cannot serve as a basis for the court's jurisdiction as respects the amount involved.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 39.*]

Appeal from Twenty-Eighth Judicial District Court, Parish of Jefferson; Prentice Ellis Edrington, Judge.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Action by Henry L. Nick against Robert Bensberg. Judgment for defendant, and plaintiff appeals. Cause transferred to the Court of Appeal under Acts 1904, p. 135, No. 56, provided plaintiff or his attorney make oath that appeal was not taken for delay; otherwise, appeal dismissed.

Frederick Anthony Middleton and Peter Stiff, for appellant. Alfred Elias Billings, for appellee.

PROVOSTY, J. Nothing shows that the amount involved in this suit exceeds \$2,000. Hence this court has not jurisdiction of the case. Jurisdiction must affirmatively appear from the record. *Slawson v. Meggett*, 22 La. Ann. 272; *R. R. Co. v. McCloskey*, 85 La. Ann. 785; *Baptist Church v. Dickinson*, 52 La. Ann. 706, 27 South. 100; *State ex rel. St. Romes v. Cotton Press*, 22 La. Ann. 622; *State ex rel. Hero v. Laresche*, 24 La. Ann. 148; *City v. Apken*, 86 La. Ann. 419; *Buddig v. Baldwin*, 88 La. Ann. 396.

The action is possessory, and there is neither allegation nor proof of the value either of the property or of its possession; only a fictitious claim of \$5,000 damages for disturbance of plaintiff's possession. That a fictitious claim of damages does not sustain jurisdiction is familiar jurisprudence.

Plaintiff testifies in general terms that he has been damaged to the amount of \$5,000; but jurisdiction is not sustained by the mere sworn opinion of the litigant as to the amount involved, where the circumstances of the case show differently. *Buddig v. Baldwin*, 88 La. Ann. 396.

The property in dispute is a strip of land about 20 feet wide, lying between Metairie road and Metairie bayou, in Jefferson parish, on the outskirts of this city. The farms of plaintiff and defendant lie on opposite sides of the bayou, facing each other, and are described in their titles as fronting on the bayou. The strip in dispute is on the same side of the bayou as defendant's farm, and therefore, according to the titles, forms part of defendant's land. Defendant has not taken possession of the entire strip along plaintiff's front, in such a way as to cut him off from access to the public road, but has left a lane.

In detailing the manner of his damage, plaintiff says that but for the disturbance he could probably have realized \$25 to \$35 more rent per month for his farm, and that the pendency of this litigation has caused him to lose two opportunities of selling his farm.

It will be observed that plaintiff does not say positively that he could have obtained this increased rent, but that he "probably"

could have done so, clearly showing that his statement is mere conjecture; and conjecture can hardly serve as a basis for a court's action. But, even if the statement were made positively, it would not support the jurisdiction, since the time during which plaintiff would thus have been deprived of this increased rent would have been from the date of the disturbance to the termination of this suit; that is to say, from July 1906, to the present time, say, at outside figures, three years, at \$35 per month, or \$1,260.

The rent was \$25 per month before the disturbance, and has continued at the same figure since. Twenty-five dollars per month increase would have meant an advance of 100 per cent. and \$35 per month increase would have meant an advance of 140 per cent. In the absence of suggestion of any increase in the value of the property, this large advance would appear to us not only not probable, but, on the contrary, highly improbable. In fact, plaintiff's statement on the subject looks a good deal like pure exaggeration.

Not one cent of damages could be awarded on the evidence in the record. In fact, the impression we have of the matter is that no serious effort has been made to prove any.

The opportunities of sale in question occurred after the institution of this suit; hence the damages resulting from their loss were suffered after the institution of this suit, and, as a consequence, are not included in it, and, as a further consequence, cannot serve as a basis for jurisdiction.

The case, however, appears to involve more than \$100, and the right of appeal is highly favored. We will, therefore, make the usual order for the transfer of the case. Thereby we do not mean to decide that the Court of Appeal has jurisdiction, but simply to afford plaintiff an opportunity to show jurisdiction by affidavit, leaving to the court to pass upon the question of its jurisdiction.

Agreeably to the provisions of act No. 56, p. 135, of 1904, it is therefore ordered, adjudged, and decreed that in the event that the appellant, or their attorney of record, make oath before the expiration of six judicial days from the day upon which this decree is handed down that the appeal herein was not taken for the purpose of delay, this cause be transferred to the Court of Appeal, parish of Orleans, to be there proceeded with according to law; otherwise, and in case such oath be not made as thus required, that the appeal herein be, and is hereby, dismissed. It is further ordered that the costs of this court be paid by the appellant.

(123 La. 355)

No. 17,294.

RADOVICH et al. v. JENKINS et ux.

(Supreme Court of Louisiana. March 15, 1909.)

1. FRAUDULENT CONVEYANCES (§ 281*)—RE-TENTION OF POSSESSION—PRESUMPTIONS.

Where the seller remains in possession by virtue of a reservation of the right of occupancy for life, the sale is presumed *prima facie* to be simulated. Rev. Civ. Code, art. 2480.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 800; Dec. Dig. § 281.*]

2. HUSBAND AND WIFE (§ 267*)—COMMUNITY PROPERTY—RIGHTS OF HUSBAND.

The husband can make no conveyance *inter vivos* of the immovables of the community, by a gratuitous title, unless it be for the establishment of the children of the marriage. Rev. Civ. Code, art. 2404.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 930; Dec. Dig. § 267.*]

3. HUSBAND AND WIFE (§ 267*)—COMMUNITY PROPERTY—RIGHTS OF PURCHASER.

The pretended purchaser in a sham sale has no standing to urge that the judgment of nullity should be restricted to the half interest of the wife in the property, especially when the administrator of the husband's succession had joined in the demand of nullity. A sham sale produces no legal effect.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 934; Dec. Dig. § 267.*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Fred. Durlieve King, Judge.

Action by Marie Classi Radovich against John C. Jenkins and wife. On death of Mrs. Radovich, her heirs were substituted. Judgment for plaintiffs, and defendants appeal. Affirmed.

E. A. O'Sullivan and Edward Paul Foley, for appellants. Richardson & Soule and Francis Rivers Richardson, for appellees.

LAND, J. The plaintiff, as surviving widow of Vincent Radovich, instituted this suit to annul the sale of a certain lot of ground made by the deceased husband to the defendant Mrs. Jenkins in the year 1906. The petition alleges, in substance, that said lot was purchased during the marriage and was community property; that on June 14, 1906, the said Radovich made a pretended sale of the property to the said Mrs. Jenkins for the purported price of \$1,500, represented by a note payable 10 years after date and stipulating 3 per cent. interest after maturity; that said pretended sale was a fraudulent simulation, for the purpose of depriving the plaintiff of her community rights in said property, and was in truth a disguised donation *mortis causa*.

Defendants for answer pleaded the general issue. The widow Radovich died, and her heirs were substituted as plaintiffs. The administrator of the succession of Vincent Radovich intervened, and joined the plaintiffs in the prosecution of the suit. There

was judgment in favor of the plaintiffs, annulling the sale in question, and defendants have appealed.

Mrs. Marie Classi, widow, married Vincent Radovich in December, 1883. After living together a number of years, there was a voluntary separation, which continued until the death of Radovich in December, 1906.

At the date of the marriage Vincent Radovich appears to have owned some real estate, which in 1888 he sold to John Radovich, who in 1890 sold the same to A. M. Masich. On May 6, 1906, Masich sold a part of the property thus acquired, consisting of a lot 43.2 feet by 155.84 feet, to Vincent Radovich, for the price of \$1,500, paid in cash.

On June 14, 1906, Vincent Radovich conveyed the same lot to Mrs. Augusta Jenkins, for the price of \$1,500, represented by her note payable 10 years after date and bearing 3 per cent. per annum interest from maturity until paid, with the privilege of paying in monthly installments of \$10. The following stipulation appears in the act:

"The said vendor reserves the right of occupancy of one-half of said premises presently sold, being the half nearest Roman street, the said right of occupancy to be for the term of his life."

The building on the lot consisted of a double cottage, one tenement occupied by Vincent Radovich, and the other by Jenkins and wife, as tenants, at the rate of \$10 per month.

After the death of Radovich, the note for \$1,500 was not found among his papers, but was produced by Mrs. Jenkins in obedience to an order of the court. The note was payable to her own order, and by her indorsed. Mrs. Jenkins did not testify on the trial of the case. There is evidence tending to show that she had stated that the note was given to her by Vincent Radovich. All the other notes belonging to Radovich, as well as his money, amounting to \$500, were deposited with a friend, who produced and deposited the same in the registry of the court.

"In all cases where the thing sold remains in the possession of the seller, because he has reserved to himself the usufruct, or retains possession by a precarious title, there is reason to presume that the sale is simulated, and with respect to third persons, the parties must produce proof that they are acting in good faith, and establish the reality of the sale." Rev. Civ. Code, art. 2480.

As the vendor remained in possession under a reservation in the contract of sale, his title, call it what you may, excluded the possession of the vendee, and was more than a precarious title in the proper sense of the term. The Civil Code of 1838 says that:

"A title which excludes the ownership, such as a lease, is also called a precarious title." Article 8522, No. 27.

Even conceding that the right of occupancy reserved by the vendor is tantamount to a right of habitation embracing one of the cot-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tages, such right differs from the usufruct only in degree. Article 2480 includes all cases where the seller retains possession under any kind of title, however precarious it may be. The reserved contract right to occupy an entire cottage during life is certainly superior to a precarious right of possession, revocable at the will of the vendee. The word "usufruct," as used in article 2480, embraces the right of habitation or occupancy reserved by the vendor, and under which he retains possession of the thing sold. This retention of possession, by reservation in the deed or by agreement with the vendee, creates a *prima facie* presumption of fraud, since such possession is inconsistent with the nature of the contract of sale, transferring, as it does, the ownership and possession of the property.

The act of sale is suspicious on its face. The property was sold on a credit of 10 years without interest. The price was the same in amount as the cash price paid by the vendor a month before. Less than a year afterwards the property was appraised at \$3,000. The note given for the price was found in the possession of the purchaser shortly after the death of the vendor. The possession of the parties was the same before and after the sale. The purchaser declined to testify in her own behalf. The owner had parted from his wife, and his apparent motive was to deprive her of her community rights in the property. The purchaser has not attempted to prove that Radovich intended to make a donation of all his real estate. Such a donation would have been void, as the law declares that the husband can make no conveyance *inter vivos*, by a gratuitous title, of the immovables of the community, unless it be for the establishment of the children of the marriage. Rev. Civ. Code, art. 2404.

The conveyance in question was a pure simulation, and therefore without any legal effect. The pretended purchaser has no standing to urge that the judgment should be restricted to the undivided half interest of the wife, especially as the administrator of the succession of the husband has joined the heirs of the wife in their demand of nullity. The property as a whole must be administered in the succession of the husband.

Judgment affirmed.

(123 La. 359)

No. 17,220.

HERO v. CONSUMERS' LUMBER MFG. & EXPORT CO.

(Supreme Court of Louisiana. March 15, 1909.)

1. CORPORATIONS (§ 553*)—RECEIVER—RIGHT OF STOCKHOLDER TO.

A receiver will not be appointed on the petition of a stockholder; it not satisfactorily appearing that the officers mismanaged or misused the funds or other property of the corporation.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 553.*]

2. CORPORATIONS (§ 553*)—RECEIVER—RIGHT OF STOCKHOLDER TO.

The remedy, if the complaint is well founded, can be found in the charter, which authorizes liquidation of the company's affairs by commissioners.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 553.*]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Thomas C. W. Ellis, Judge.

Action by Charles M. Hero against the Consumers' Lumber Manufacturing & Export Company. Judgment for defendant, and plaintiff appeals. Affirmed.

William Sommer Hero, for appellant. Dart & Kernan and William Kernan Dart, for appellee.

BREAUX, C. J. This is a suit by plaintiff for the appointment of a receiver to take charge of and administer the affairs of the defendant company.

The charter is dated October 6, 1906. The company began operations in the January following.

Plaintiff, who sued for the appointment of a receiver, is a stockholder in the Consumers' Lumber Manufacturing & Export Company to the extent of \$2,500 since June, 1907. He was, prior to March, 1908, vice president of the defendant company.

Robert H. Hackney was the president of the company.

The company was organized with a capital stock on paper of \$50,000. It began operations with less than \$5,000 paid-up capital, and it never had over \$9,000 paid-up capital, represented by 90 shares at \$100 each.

In addition to the stock held by plaintiff, the secretary-treasurer of the company held 25 shares, the president 20, and one of the directors a similar amount.

The hope of plaintiff, as we infer, was that he would always be able to protect his interest, and that he and Director Silva would exercise a controlling interest in amount, or sufficient, at any rate, to protect their own interest.

But, unfortunately for plaintiff, he and Silva did not agree when it became necessary, as plaintiff thought, to act and to prevent action on the part of the other directors.

A meeting of the board of directors was held in March, 1908.

Plaintiff complains that he did not receive timely notice. He had up to that time been vice president of the company. He was succeeded by Close, who was elected in his stead.

But, three or four days after Close had been elected vice president, he became aware that he could not hold the office of director, and, it followed, could not be vice president. He thereupon sent in his resignation, after

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

having served two or three days, both as member of the board of directors and as vice president. His resignation was accepted.

There had been a meeting held in February preceding the election of the board of directors, at which plaintiff was not re-elected as a member of the board.

His position was filled by Close, as just stated.

There was warm discussion at the February meeting, and it was understood that \$3,500 would be raised in order to provide the company with needed funds.

Plaintiff was assessed at \$400 of the amount. He did not show himself anxious to come to the relief of the company.

This, we infer, accounts for the election of another to the board and to the vice presidency.

There was an amount raised by the other members, some \$2,000.

After the resignation of Close, Silva was elected vice president. His opinion was that the company had done fairly well, considering the business depression through which it had passed. He stated that since the depression in business had subsided that company had improved financially.

The cashier of a local bank, who had made an advance of money to the company, was called as a witness.

Before making the loan, he had called for a statement of the company's business, into which he examined carefully, and upon inquiry as to the officers opened an account with them for \$2,000, of which the company drew only \$1,000.

At its maturity, in spite of the fact that an application had been made for the appointment of a receiver, he renewed the loan.

This officer testified that his bank made no loans unless they had confidence in the parties. He further stated that he usually required those who borrowed to leave 20 per cent. of the amount of the loan as a deposit; that no well-managed bank would attempt to do business without requiring a deposit with the bank.

The president of the defendant company testified in this case.

Notice to attend meeting:

It is true, as set forth by plaintiff in his petition, that short notice, as to time, was given to him to be present at the meeting at which officers were elected in accordance with the terms of the charter to serve during the ensuing year, including the office of vice president, the position the plaintiff had previously filled.

The complaint is not cause sufficient to appoint a receiver. The charter contains no provision regarding notice to be given to the members of the board of a meeting to be held to elect officers.

While under general law and custom notice is necessary, it does not follow that a day's or two days' notice will be considered insufficient, if it appears that the time was

ample if the notified member desired to be present.

A fourth director:

Three directors is the number stated in the charter. It was error to elect a fourth director, in view of that provision, and error to elect him vice president.

This error was not persisted in:

In a day or two after the election, the newly elected vice president discovered the mistake which had been made. At once he resigned and withdrew from the membership of the board, and a member of the board, one of the three remaining, was elected vice president.

This oversight was not of such a nature as to prejudice the company, or any of the rights of the complaining plaintiff. An error of as little consequence as that was can be of no avail to a stockholder seeking to have a receiver appointed.

The asserted insolvency of the company:

No part of the statute mentions insolvency in itself and of itself as grounds sufficient at the instance of a stockholder to appoint a receiver.

The fourth section of the statute (Act No. 159, p. 312, of 1898) cited supra contains the only provision on the subject.

It provides that at the instance of any creditor, having a final and executory judgment, when the corporation is insolvent, is one of the conditions authorizing the court to appoint a receiver.

That is not the condition here, as has clearly been made to appear.

If there are other causes authorizing the appointment under the other provisions of the act, insolvency might be considered as assisting in making out a case under them.

But otherwise we are limited to the condition contained in the cited section supra, so that, even if the corporation is insolvent, the cause is not one sufficient to authorize the court to appoint a receiver.

Minority stockholders:

Plaintiff seeks to have his case considered within the terms of section 2 of the statute (Act No. 159, p. 312, of 1898) in question, in which it is provided that a stockholder may be heard if the majority are violating charter rights of the minority and putting their interest in imminent danger.

We have considered the reasons urged for the appointment on the ground of a violated charter. This ground we pass without further comment, except to say that the law which governs corporations is the same which governs individuals. As to these, the merest oversight, not done with the intention of committing a wrong, is not looked upon as a fault for which action lies.

It is not always the safest method to attempt to summarize in a few sentences the condition of an industrial enterprise. It cannot be said with absolute certainty that it will fail or that it will prove a success.

This corporation began with limited cap-

ital. Afterward all the charter members save one sought to interest their own stockholders. In this they were not entirely successful. They could not well do otherwise under the circumstances. In thus acting, it cannot be said that there was impropriety. They sought to save the concern and to hold it up. As there is no evidence before us of mismanagement, wasting, or misusing, or misapplying the property, we must decline to reverse the judgment.

The rights of minority stockholders must be determined in accordance with act No. 102, p. 128, of 1898.

This act fixes a difference between creditors and stockholders.

As relates to the former, solvency or insolvency is a question to be considered.

As relates to the latter, the management, without regard in itself to solvency and insolvency, must be considered, nor is the fact that the profits are not satisfactory, or that none are realized, contributing questions.

By reason of the law and the evidence being in favor of plaintiff, the judgment of the district court is affirmed.

(123 La. 364)

No. 17,283.

FELL v. McILLHENNY et al.

(Supreme Court of Louisiana. March 1, 1909.)

1. DEPOSITIONS (§ 17*)—PERSONS WHOSE DEPOSITION MAY BE TAKEN—PARTY TO SUIT.

The testimony of a party to a suit, as with any other witness, may be taken under commission. *McLear v. Hunsicker*, 30 La. Ann. 1225.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. § 12; Dec. Dig. § 17.*]

2. DEPOSITIONS (§ 73*)—APPEAL AND ERROR (§ 961*)—TIME FOR RETURN—REASONABLE TIME—DISCRETION OF COURT—REVIEW.

That which constitutes reasonable time to have a commission returned is largely left to the discretion of the judge of the district court, a discretion not interfered with unless there is abuse.

[Ed. Note.—For other cases, see Depositions, Dec. Dig. § 73.* Appeal and Error, Cent. Dig. § 3840; Dec. Dig. § 961.*]

3. DEPOSITIONS (§ 73*)—TIME FOR RETURN—REASONABLE TIME—DISCRETION OF COURT.

Seventeen days the court decided was reasonable time after the case had been fixed for trial to obtain the return of the commission issued on application of defendant.

At one time all the parties to the suit deemed that number of days ample time.

The judge a quo having acted upon the assurance that the commission would be returned in time if a delay of eight days was granted, the delay was granted.

No sufficient reason having been given, as decided by the court a quo, it only remained for it to decline to reopen the issues asked for in a motion for a new trial.

No precedent would authorize a reopening of the issues by action of this court.

[Ed. Note.—For other cases, see Depositions, Dec. Dig. § 73.*]

(Syllabus by the Court.)

Appeal from Nineteenth Judicial District Court, Parish of Iberia; James Simon, Judge.

Action by Annie Seabury Fell against E. A. McIlhenny and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Cammack & Broussard (John Dymond, Jr., of counsel), for appellants. Gordon Adolphus Sandoz, for appellee.

BREAUX, C. J. Plaintiff declared on a promissory note of \$5,316, with 5 per cent. per annum interest from April 21, 1906, and 10 per cent. attorney's fee in case of suit, payable two years after date.

It was originally executed by the maker, and was indorsed by a firm of which he was a member in favor of John R. Fell, plaintiff's father, and by inheritance it became plaintiff's.

Plaintiff instituted suit on this note on the 22d day of May, 1908.

Defendant principal on the note in due time answered, and pleaded substantially that the consideration of the note was life insurance as per policy issued to the maker of the note. He avers, in substance, that the amount of insurance was large; that he finally consented to take out the policy on the promise of plaintiff's father (who was an insurance agent) that, if not prepared to meet the note at maturity, he would grant further time, and would in this manner render it possible for defendant, maker of the note, to easily meet the note; that this promise of the father, since deceased, is binding on the plaintiff.

On the 22d day of June, 1908, defendant applied for and obtained a commission to take the testimony of the maker of the note, — i. e., note sued upon—who was in the city of New York, returnable on or before 10 o'clock on the 1st day of July, 1908, the day set for the trial.

On this day the case was called for trial, and defendant asked for a continuance because the commission had not yet been returned. It was granted by the court to the 8th day of July, 1908.

On the 7th day of July, 1908, the witness answered the interrogatories in New York. The return was received in New Iberia on the 11th of that month, two days after the judgment had been rendered.

But before the commission was returned by the notary in New York, the court, on the day fixed for the trial (that is, on July 8, 1908), called the case for trial. Plaintiff introduced her testimony. The defendants made no offer of testimony. Judgment was rendered for plaintiff as prayed for.

The return was received as just stated. Basing their application upon the fact that the return had been made of the commission as stated, defendants moved for a new trial, which was overruled by the court.

The defendants, through counsel, on the 10th of the month before stated, had a bill of exceptions signed in which the facts are detailed. From it we quote: "That they answered in due time;" that "they were ready for trial, provided plaintiff would admit that the defendant now absent would testify to the facts stated in the motion made for a continuance;" "that this was declined by plaintiff, who insisted upon the trial of the case."

The court overruled the motion for a continuance and ruled defendants to trial, stating that the return day for this testimony had been fixed for July 1, 1908, and that a continuance was granted to July 8, 1908, and that counsel for defendants stated that he would be ready, "whether the commission was returned or not."

The counsel for defendants said by way of admission that:

"The interrogatories were propounded to defendant himself, and to no other witness. The commission, therefore, was gotten out and forwarded by the attorney for defendant 16 days ago, and addressed to Edward F. Clinton, notary in and for the city of New York, or to any other notary, there returnable on July 1, 1908, and extended on that day to July 8, 1908, but not returned."

This commission and interrogatories were not forwarded to a notary, or to any other officer, but sent directly to defendant himself, who was in New York City.

The defendant whose testimony was taken under commission is a resident of the parish of Iberia, and not of New York.

There was no reason shown for the delay in returning the commission. There was ample time for its return, and, having been sent direct to the defendant, there was no legal reason for the delay.

The appeal taken by defendants from the judgment rendered was filed in the clerk's office of this court September 7, 1908.

The case was fixed for hearing before this court on appeal on the 1st of February, 1909, and even prior to that date.

In this court the appellee filed an answer to the appeal on the 12th day of February, 1909, and in the answer alleged here that she was entitled to damages for a frivolous appeal, and asked for damages on that ground of 5 per cent. on the amount of her note and interest thereon.

The first question presented for decision is whether the witness in his own behalf may be examined, as such, under commission. We answer in the affirmative, and cite in sup-

port of the answer *McLear & Kendall v. Hunsicker*, 30 La. Ann. 1225.

Now as to the commission:

Doubtless a reasonable time should be allowed for the return of a commission sent to take evidence at a distance.

In our opinion reasonable time was allowed. The court seems to have taken into consideration the distance and the delays necessary for its return.

A continuous session of the court, referred to in the brief for defendants during 10 months of the year, does not do away with the necessity of exerting due diligence to return the commission in time for the trial. Causes should be tried as nearly as possible in the order of their fixing. Unquestionably they should be postponed for good reason to another day, and even continued to another term if necessary, but not without good reason.

But of this necessity the trial judge is considered the proper judge. His refusal to postpone or continue the case presents scant grounds for complaint on appeal. Moreover, we have already stated that, in our opinion, the time allowed by the court was sufficient.

The rule is: Postponement or continuance is within the discretion of the trial court, reviewable only in case of abuse.

The usual words, in applications for a continuance, "due diligence," were not inserted in defendants' motion for a continuance. It is essential as an allegation; also as a fact.

Seventeen days within which to return the commission has every appearance of having been ample time. Besides, on reading the record, which brings up the facts, we have become convinced that the judge has not abused his discretion.

Five per cent. for a frivolous appeal:

The answer of plaintiff to the appeal, and her allegation for damages on the ground that the appeal was frivolous were not filed in time but were filed a number of days after the transcript had been filed and a number of days after the case had been fixed for argument on appeal. Under the rules of practice, damages cannot be allowed.

Moreover, the error in taking the appeal is not of such a character as would justify assessing damages on the ground of its being frivolous.

For reasons assigned, the judgment appealed from is affirmed.

PROVOSTY, J., takes no part, not having heard the argument.

(57 Fla. 140)

PITCH PINE LUMBER CO. v. GEO. E. WOOD LUMBER CO.

(Supreme Court of Florida, Division A. Feb. 16, 1909. Headnotes Filed April 20, 1909.)

1. SALES (§ 81*)—TIME THE ESSENCE OF THE CONTRACT.

When the failure to perform a contract to deliver a large quantity of lumber is due to the inability of the seller to obtain the lumber, and there is partial delivery under the contract after the time named therein, time is not of the essence of the contract, so that the parties thereto might not by their acts continue its life a reasonable time thereafter.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 217-223; Dec. Dig. § 81.*]

2. SALES (§ 176*)—DELAY BY BUYER—WAIVER.

A slight delay on the part of the purchaser of lumber to be shipped in large quantities, if it constitute a breach of the contract, may be waived for valuable consideration.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 436-444; Dec. Dig. § 176.*]

3. CUSTOMS AND USAGES (§ 3*)—EXCHANGE OF COURTESIES.

Mutual exchange of courtesies, binding on neither party, though customary at a port, does not become of binding force upon a contract there made.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. §§ 2-10; Dec. Dig. § 3.*]

(Syllabus by the Court.)

Error to Circuit Court, Escambia County; J. Emmet Wolfe, Judge.

Action by the Pitch Pine Lumber Company against the Geo. E. Wood Lumber Company. Judgment for defendant, and plaintiff brings error. Reversed.

Blount & Blount & Carter, for plaintiff in error. Maxwell & Reeves, for defendant in error.

COCKRELL, J. This is an action for breach of a simple contract to deliver 950,000 feet of long leaf pine lumber, originally made in April, 1905, between the plaintiff in error and the Sanford Lumber Company, and subsequently assumed by the defendant in error. There was verdict and judgment for the defendant.

The material portions of the contract are the delivery of the lumber of certain specifications as to sizes and quality free along vessel at Pensacola at the agreed price of \$20 per thousand feet, the said lumber "all to be well and truly manufactured, * * * to be prepared with dispatch and ready in proper shipping condition for shipment not later than December, A. D. 1905." Under this contract only about 200,000 feet were delivered prior to December, 1905; but partial deliveries were made in April and September of 1906, which were accepted and paid for, and in December of that year the defendant refused finally to make further de-

livery and declared the contract forfeited and at an end.

The assignments of error are numerous, and present many interesting questions both of pleadings and of substantive law. We shall not, however, attempt to discuss them seriatim. The defense is put upon the theory that the plaintiff first breached the contract, so as to relieve the defendant from obligation thereunder. There is a plea to the effect that the parties, prior to any breach, by mutual consent abandoned and dissolved the contract; but this plea is entirely overthrown by the evidence.

There was an attempt both to plead and to prove a custom of the port of Pensacola as to the respective duties of the parties to similar contracts; but it would appear that these "duties" were not binding, merely mutual courtesies of give and take, which might be followed or not, at the option of either party.

At no time did the party contracting to sell have the quantity and class of lumber called for, and the letters written by that party are abundant evidence of this fact and of its eagerness to be relieved of a bad bargain; the price of lumber having increased about one-half. Under the alleged "custom," perhaps, there was a request from the seller that the buyer accept a partial shipment in December, 1905, which was by mutual consent postponed to a later date by reason of the failure of a vessel chartered by the buyer to arrive in Pensacola; but there was no pretense of a demand that the buyer accept the balance of the lumber, or any portion thereof, and it is clear from the evidence that the seller did not have accessible the logs from which the lumber could be manufactured. The utmost good feeling obtained between the parties at that time, and for months thereafter, both wishing to make the loss as light as possible; and in view of this the buyer would purchase other lumber from defendant's mill to help along.

The admission of liability on the contract subsequent to 1905, and the inability to carry out its provisions by the delivery of the lumber, continued at various times during 1906, until suddenly, in December, came the denial of liability. The mistake as to its legal rights, if such it was, cannot now avail the defendant. It is evident that neither party treated time as of the essence of the contract, the slight delay in its preparation for the reception of the partial shipment by the plaintiff injured no one, there was no misunderstanding as to any fact, and with full knowledge of the exact status both parties, making material concessions, agreed to keep the contract alive after the expiration of the time named for its complete performance.

Upon the record before us we can find no breach of the contract committed by the

plaintiff, such as to destroy its right of action thereon, and the judgment is reversed.

WHITFIELD, C. J., and SHACKLEFORD, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

(57 Fla. 468)

LOTT et al. v. BARNES & JESSUP CO.
(Supreme Court of Florida. March 9, 1909.
Headnotes Filed April 20, 1909.)

1. EQUITY (§ 167*)—PLEA.

A plea in equity may be overruled, because it is too broad.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 403; Dec. Dig. § 167.*]

2. EQUITY (§ 167*)—PLEA—SUFFICIENCY.

Upon bill filed for the appointment of a receiver and to enforce a mortgage lien, containing many grounds of equity, a plea to the entire bill, which denies personal liability for the indebtedness secured, may properly be overruled.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 403; Dec. Dig. § 167.*]

(Syllabus by the Court.)

In Banc. Appeal from Circuit Court, Liberty County; John W. Malone, Judge.

Bill by the Barnes & Jessup Company against H. M. Lott and M. H. Womack. From an order overruling a plea to the bill, defendants appeal. Affirmed.

Raney & Oven and J. L. Neeley, for appellants. Baker & Baker, for appellee.

COCKRELL, J. This is an appeal from an order overruling a plea to a bill filed to enforce a mortgage lien executed under seal by Lott and Womack upon their turpentine plant, lying principally in Liberty county, Fla., in which one R. B. Jackson subsequently acquired an interest subject to the mortgage.

The plea going to the whole bill interposed by Lott and Womack sets up substantially as epitomized in appellants' brief as follows: "That the said mortgage and the notes thereby secured did not represent and constitute the entire agreement made and entered into by and between the said Barnes & Jessup Company, the North Carolina corporation mentioned in the bill of complaint, but that said instruments were only a part of the entire agreement entered into between the parties, and that it was also agreed between the parties that there was to be no personal liability upon the part of said Lott and said Womack, or either of them, or said company, on account of the turpentine, or other business, referred to in said mortgage, or by any agreement, covenant, or obligation to be found therein, or in either of said instruments, or on account of any advances or expenditures made and agreed to be made

by the said Barnes & Jessup Company thereunder, and that it was further understood and agreed between said parties that the said Lott and Womack should take charge of said turpentine business and other business contemplated by said instrument to be carried on under the name of said Lott & Womack, and that they should endeavor to work said business and property out of debt, and as a consideration of so doing they should have the property covered by the mortgage and the net profits, if any, for their services, and that the said Barnes & Jessup Company were to make the necessary advances for carrying on said business, and, in short, that the Florida corporation which succeeded the North Carolina corporation took over the same obligation, and that the said firm of Lott & Jackson, in making the contract of April 9, 1906, set forth in the bill of complaint, were acting upon the line and in accordance with the original agreement between said Barnes & Jessup Company and said Lott and Womack, in pursuance of the original agreement, except that, if the advances made by appellee were paid by the firm of Lott & Jackson, the said property was to be held by said Jackson in the proportion of two-thirds and by the said Lott in the proportion of one-third."

The principal attack upon the plea is that it fails to allege such an agreement as would in dignity overcome the solemn act of the parties, as evidenced by the very full and complete sealed instrument set forth in the bill. There is no attempt to charge fraud or mistake in the execution of the mortgage, nor does it appear wherein it was lacking in definiteness and completeness. This court does not seem to have definitely settled the question so raised, though the cases of Solary v. Stultz, 22 Fla. 263, Booske v. Gulf Ice Co., 24 Fla. 550, 5 South. 247, and Griffling Bros. Co. v. Winfield, 53 Fla. 589, 43 South. 687, tend strongly to show the plea vulnerable on this ground.

There is, however, it seems to us, a fatal objection to the plea, in that it is entirely too broad. If proven by unobjectionable evidence, it would go only to that feature of the prayer of the bill asking conditionally a deficiency decree. It does not negative the liability placed upon the corpus of the property by the advancement of moneys for its acquisition or improvement. There were other obligations than the prepayment of money which the mortgagors assumed and agreed should subject the property to foreclosure, should the obligation not be carried out; for example, the duty to give the business personal attention and to keep the plant in good going condition, as also the conditional agreement of the parties that a receivership be appointed should conditions warrant. The plea makes no attempt to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

show compliance with the conditions imposed by the admitted contract upon the mortgagors.

In their reply brief the appellants urge that they should have been permitted to amend their pleas. We find no request for such amendment, and the suggestion if it ever had merit, comes too late.

The order is affirmed.

WHITFIELD, C. J., and TAYLOR, J., concur.

HOCKER, J. (concurring). I agree to the conclusion of Mr. Justice COCKRELL that there is no reversible error in the order of the judge below overruling the plea. *Brown v. Solary*, 37 Fla. 102, 19 South. 181 (eleventh and twelfth headnotes). But I do not wish to commit myself to the proposition that if the judge below had overruled the plea as a plea to the whole bill, and allowed it to stand as an answer to that part of the bill to which it was applicable, such an order would have been technically erroneous as a matter of pleading. *Mitford & Tyler's Pl. & Pr. in Equity*, 381, and note 4; *United States of America v. McRae*, 3 L. R. Chan. App. Cas. 79; *Searight, Thornton & Co. v. Payne*, 1 Tenn. Ch. 186; *French v. Shotwell*, 5 Johns. Ch. (N. Y.) 555; 16 Enc. Pl. & Pr. 604.

SHACKLEFORD, J. (concurring). I concur in the conclusion reached by Mr. Justice COCKRELL, and in the main with what is said in his opinion. I would like to emphasize one point. Since the plea "fails to allege such an agreement as would in dignity overcome the solemn act of the parties as evidenced by the very full and complete sealed instrument set forth in the bill," to use the apt words in Mr. Justice COCKRELL's opinion, that, in my opinion, makes the plea fatally defective. This court has consistently and uniformly held, since its organization in 1846 up to the present time, that any pleading, whether in an action at law or a suit in equity, is to be strongly construed against the pleader thereof. We have further held, in pursuance of this principle, that the one filing a pleading must suffer the consequences of omitting therefrom essential matters which are presumed to lie peculiarly within his knowledge and which would tend to make the pleading certain. We have also held that, "when a plea has on the face of it two intendments, it ought to be construed most strongly against the party who pleads it." *Cotten v. Williams*, 1 Fla. 37, text 49; also see *Bennett v. Herring*, 1 Fla. 387, text 390. In *Atlantic Coast Line R. R. Co. v. Beazley*, 54 Fla. 311, text 393, 45 South. 761, text 789, we held that this principle must apply with especial force to a plea which is in the nature of a

confession and avoidance. It is also an established principle that the allegata and probata must meet and correspond, and that the complainant should allege in this bill the matters upon which he relies and which are material to his case. *Lyle v. Winn*, 45 Fla. 419, 34 South. 158. In other words, he must allege such matters as he would have to prove, for proof without sufficient allegations is unavailing. If a replication had been filed to the plea in the instant case, it would have been incumbent upon the defendants to prove the matters averred therein. *Ocala Foundry & Machine Works v. Lester & Daniels*, 49 Fla. 347, 38 South. 56. This being true, I do not see why the principle enunciated in *Lyle v. Winn*, supra, is not equally applicable to a plea in equity. To hold otherwise, it seems to me, would be equivalent to saying that the plea constituted a defense to the bill, whether the agreement undertaken to be set up therein was in writing, under seal, as was the instrument in the bill, upon which the suit is based, or parol. It is obvious that this would not do.

WHITFIELD, C. J., concurs, also, with SHACKLEFORD, J.

PARKHILL, J., absent on account of illness.

(57 Fla. 57)

COUCH v. PALMER.

(Supreme Court of Florida. March 16, 1909.)

HUSBAND AND WIFE (§ 195*)—CONVEYANCE OF WIFE'S SEPARATE ESTATE—LIABILITY OF WIFE UNDER COVENANTS.

Section 2472, General Statutes of Florida of 1906, is in effect an express legislative declaration that a married woman may covenant in a deed executed by herself and husband against incumbrances and for warranty of title, but that such covenants shall not bind or obligate her personally, but should operate only as an estoppel against her and all persons claiming by or through her. This statute applies as well to warranties contained in deeds by the wife conveying her separate property.

[Ed. Note.—For other cases, see *Husband and Wife*, Dec. Dig. § 195.*]

(Syllabus by the Court.)

In Banc. Error to Circuit Court, Hillsborough County; Joseph B. Wall, Judge.

Action by Ira Couch against Jennie D. Palmer. Judgment for defendant, and plaintiff brings error. Affirmed.

Frazier & Mabry, for plaintiff in error. F. M. Simonton, for defendant in error.

TAYLOR, J. The plaintiff in error, as plaintiff below, sued the defendant in error, as defendant below, in the circuit court of Hillsborough county in an action of covenant. The defendant demurred to the plaintiff's declaration, on the ground that said declaration shows on its face that the defendant was a married woman at the time of the execution

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of the deed containing the covenant sued on, and under coverture of her then living husband, Frank H. Palmer, and that she could not be held personally liable at law upon such covenant.

This demurrer was sustained, and final judgment on the demurrer was entered in favor of the defendant, to review which the case is brought here by the plaintiff by writ of error.

The declaration shows that on April 1, 1904, the defendant, being then a married woman and owning as her separate property a certain lot of land in the city of Tampa, joined with her then living husband in a deed of conveyance of said land to the plaintiff, which deed contained a covenant of warranty against incumbrances on said property; that since the execution of such deed her husband had died, leaving her at the time of the institution of the suit a feme sole; that there had been a breach of said covenant against incumbrances, in that at the time of the execution of such deed there existed against the property conveyed thereby a lien in favor of the city of Tampa for paving assessments, which the plaintiff had been compelled to pay; and that he had demanded the same of the defendant, but that she refused to pay the same.

The sole question presented is: Can a married woman under the laws of this state personally obligate or bind herself by covenants of warranty in a deed executed jointly by herself and husband conveying her separate real estate?

This question is fully answered by the provisions of section 2472 of our General Statutes of 1906, the same having been section 1966 of the Revised Statutes of 1892, as follows:

"A married woman who joins with her husband in executing a conveyance or mortgage of real property, or of any estate therein, may enter into any covenants as to the title or against encumbrances or of warranty, but such covenants shall have no other effect than to estop her and all persons claiming as her heirs, or by or through her, in the same manner as if she were not married."

The plaintiff contends here that this section affects only conveyances of the husband's property that are joined in by the wife, and that it has nothing to do with conveyances by the wife of property that she owns separately from her husband. We cannot sustain this contention.

The quoted provision of our statute does not sanction the distinction contended for, but is as broad, general, and comprehensive in its terms as language can make it, and it declares in unmistakable terms that the covenants of a married woman against incumbrances contained in a deed of conveyance of real property, or of any estate therein, ex-

ecuted jointly by husband and wife, shall have no other effect than to estop her, and all persons claiming as her heirs, or by or through her. This is an express legislative declaration that a married woman may covenant in a deed executed by herself and husband against incumbrances and for warranty of title, but that such covenants shall not bind or obligate her personally, but should operate only as an estoppel against her and all persons claiming by or through her.

It follows that the circuit court did not err in sustaining the defendant's demurrer to the plaintiff's declaration, or in the rendition of the final judgment thereon.

The judgment of the circuit court in said cause is hereby affirmed, at the cost of the plaintiff in error. All concur, except PARK-HILL, J., absent on account of illness.

(57 Fla. 28)

STONE v. STATE.

(Supreme Court of Florida. March 2, 1909.
Headnotes Filed April 20, 1909.)

1. CRIMINAL LAW (§ 596*)—CONTINUANCE—ABSENT WITNESS.

An abuse of discretion in refusing a continuance is not shown, when the absent witness is wanted merely for an impeachment, for which the predicate had not been laid.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1328-1330; Dec. Dig. § 596.*]

2. HOMICIDE (§ 308*)—INSTRUCTIONS—DEGREE OF CRIME.

On a trial for murder in the first degree, the court may give the statutory definition of murder in the second degree, though the evidence may not make out strictly a case of that degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 643-646; Dec. Dig. § 308.*]

3. HOMICIDE (§ 254*) — EVIDENCE — SUFFICIENCY.

There being credible evidence of murder in the first degree, a verdict of murder in the second degree will not be disturbed.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 534; Dec. Dig. § 254.*]

(Syllabus by the Court.)

In Banc. Error to Circuit Court, Walton County; J. Emmet Wolfe, Judge.

Hester Stone was convicted of murder in the second degree, and brings error. Affirmed.

Daniel Campbell & Son, for plaintiff in error. Park M. Trammell, Atty. Gen., for the State.

COCKRELL, J. Hester Stone was indicted in the circuit court for Walton county for murder in the first degree, by cutting to death with a knife one Nancy Campbell. She was convicted of murder in the second degree, and sentenced to life imprisonment.

Upon her arraignment at the spring term, 1908, she was granted at her instance a continuance to the then ensuing fall term, and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

upon being put to trial at that term she moved a further continuance upon the ground of the absence of a witness, and the refusal of this continuance constitutes the first assignment of error. We find no abuse of discretion in the denial of the motion.

The testimony she expected to procure was the evidence of one A. H. Hillson, the committing officer, to the effect that the principal state witness had made at the preliminary hearing a statement different from that given by her at the trial. No proper predicate was laid for the impeaching evidence, there were numerous other witnesses present at the preliminary hearing, who might have been called, had the proper predicate been laid, and the necessity of an adjournment to another term to secure Hillson's presence is not sufficiently shown. Other objections might be urged and multiplied.

The court gave the statutory definition of murder in the second degree, and this is assigned for error. There was no error here. Our statutory definition of manslaughter is reached by a process of exclusion, being in substance an unlawful killing which is not murder in any of its degrees, and to define it correctly to the jury it is proper to give the statutory definitions of murder, even though the evidence may not make out strictly a case of one of the higher crimes.

In the charge of the court upon the crime of manslaughter, charged in the indictment along with that of murder, there appeared in the original transcript a clerical mispision, in that it permitted the jury to find manslaughter, when the facts hypothesized would justify a verdict of murder in the first degree; but this slip did not in fact exist, as shown by the corrected copy of the charges now on file before us.

There was credible evidence from which the jury might have found a verdict of murder in the first degree, and under the statute we shall not disturb the one rendered.

The judgment is affirmed. All concur, except PARKHILL, J., absent on account of illness.

(57 Fla. 73)

HAYS et al. v. WEEKS.

(Supreme Court of Florida. March 16, 1909.
Headnotes Filed April 20, 1909.)

1. ELECTION OF REMEDIES (§ 11*)—WAIVER OF PROPER REMEDY.

If in fact or in law only one remedy exists, and a mistaken remedy is pursued, the proper remedy is not thereby waived. More than one remedy must actually exist.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. § 14; Dec. Dig. § 11.*]

2. PLEADING (§ 218*)—DEMURRER—DETERMINATION—JUDGMENT.

When a demurrer to a plea is sustained, and a subsequent plea stricken, there should be

judgment final upon the demurrer, and not a default judgment for want of a plea.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 558, 559; Dec. Dig. § 218.*]

(Syllabus by the Court.)

In Banc. Error to Circuit Court, Suwannee County; J. W. Bryson, Clerk.

Action by J. W. Weeks against R. F. Hays and others. Judgment for plaintiff, and defendants bring error. Reversed.

J. B. Johnson, for plaintiffs in error. J. P. Lamb and J. F. Harrell, for defendant in error.

COCKRELL, J. Weeks recovered judgment against Hays upon a promissory note in the sum of \$437.66, and against R. H. Holmes and W. F. Brannon, as sureties on a forthcoming bond, in the sum of \$200, to which the defendants have prosecuted this writ of error.

To the declaration Hays pleaded that the plaintiffs had unsuccessfully sued in replevin upon the same cause of action. See Weeks v. Hays, 55 Fla. 370, 45 South. 987. The sustaining of a demurrer to this plea is the first assignment of error. We held heretofore that the written contract did not reserve title to or possession in the property sold in the plaintiff, and therefore he could not recover in replevin, and the question now presented is: Does the mistaken election between inconsistent supposed remedies, where only one in fact exists, preclude pursuing the correct one?

In the recent case of American Process Co. v. Florida White Press Brick Co., 56 Fla. —, 47 South. 942, we held that a party will not be permitted to enforce wholly inconsistent demands respecting the same right, and in Campbell v. Kauffman Milling Co., 42 Fla. 328, 29 South. 435, that the recovery of a judgment, even though without satisfaction, destroyed the plaintiff's right of election; but in the former case we were careful to say: "If in fact or in law only one remedy exists, and a mistaken remedy is pursued, the proper remedy is not thereby waived." More than one remedy must actually exist.

We think the rule there announced is sound and well supported by the cases there cited. The order upon the demurrer is in line with that announcement and will not be disturbed.

The defendant filed an additional plea, which is admittedly a substantial repetition of the first plea, and was properly stricken.

No further action by the circuit court itself was requested or taken. A default for want of a plea and final judgment thereon was entered by the clerk. The first plea filed, to which demurrer was sustained, remained of record, and it was error to enter default for want of a plea. Garlington v. Priest, 18 Fla. 559; L'Engle v. L'Engle, 19 Fla. 714; Pettys v. Marsh, 24 Fla. 44, 3 South. 577.

There are serious objections offered to the validity and form of the final judgment, and as to the liability of the sureties in this summary proceeding upon the carelessly worded attachment bond. We prefer having these objections, such as may not be curable, passed upon primarily by the circuit judge, and do not now express a final opinion upon them. The judgment is reversed. All concur, except PARKHILL, J., absent on account of illness.

(57 Fla. 60)

DEMPS v. HOGAN.

(Supreme Court of Florida. March 16, 1909.
Headnotes Filed April 16, 1909.)

1. EJECTMENT (§ 17*)—RIGHT TO POSSESSION.
It is well settled that a plaintiff in ejectment, to be entitled to recover, must show in himself a present right of possession.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 63, 64; Dec. Dig. § 17.*]

2. SPECIFIC PERFORMANCE (§ 41*)—CONTRACTS ENFORCEABLE—PART PERFORMANCE OF ORAL CONTRACT—POSSESSION.

Where the owner of land, by himself or through his agent, makes a verbal contract of sale thereof to another for an agreed price, and puts the vendee in possession, upon compliance with the terms of his contract of purchase a court of equity will in favor of such purchaser enforce specific performance of such contract, notwithstanding the statute of frauds, requiring all contracts for the sale of land, or some memorandum thereof, to be in writing and signed by the vendor; and in such a case, until there is a breach by the purchaser of his contract of purchase that amounts to a forfeiture of his right to the possession, the vendor cannot oust him by ejectment.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 120; Dec. Dig. § 41.*]

(Syllabus by the Court.)

In Banc. Error to Circuit Court, Suwannee County; Fred W. Butler, Referee.

Ejectment by J. C. Hogan against E. A. Demps. Judgment for plaintiff, and defendant brings error. Reversed.

Humphreys & Harrell, for plaintiff in error. L. E. Roberson, for defendant in error.

TAYLOR, J. The defendant in error, as plaintiff below, sued the plaintiff in error, as defendant below, in the circuit court of Suwannee county, in an action of ejectment for the recovery of possession of a tract of land there situate. The cause was referred to a referee for trial, who upon the trial rendered judgment in favor of the plaintiff below, and such judgment the defendant below brings here for review by writ of error.

Motion for new trial was made and denied, and such ruling duly excepted to, and the denial of such motion is assigned as error.

Such motion was made upon the grounds, among others:

(1) Because the findings of the referee are contrary to law; (2) and because said findings are contrary to the evidence and are not supported by the evidence.

The referee erred in the denial of this motion, and under the facts and proof erred in not rendering judgment in favor of the defendant below.

From the proofs it appears that Hogan, the plaintiff, being the holder of the legal title to the land in dispute, verbally empowered one Brown, as his agent, to sell the land to the defendant and to put the defendant in possession thereof.

Brown, as such agent, with the full knowledge and consent of the plaintiff, sold the land to the defendant and put him in possession thereof; the defendant paying to the plaintiff a considerable portion of the purchase price. There is not a scintilla of proof that the defendant made any default in the terms of his contract of purchase, or in any manner forfeited his right to the possession of the land under his contract of purchase. Under these circumstances the plaintiff had no right in law to a recovery of the possession of such land.

It is well settled that a plaintiff in ejectment, to be entitled to recover, must show in himself a present right of possession. *Barco v. Fennell*, 24 Fla. 378, 5 South. 9; *Jones v. Lofton*, 16 Fla. 189; *Rose v. Withers*, 39 Fla. 460, 22 South. 724; *Norris v. Billingsley*, 48 Fla. 102, 37 South. 564.

Where the owner of land, by himself or through his agent, makes a verbal contract of sale of such land to another for an agreed price, and puts the vendee in possession, upon compliance with the terms of his contract of purchase a court of equity will, in favor of such purchaser, enforce specific performance of such contract, notwithstanding the statute of frauds, requiring all contracts for the sale of lands, or some memorandum thereof, to be in writing and signed by the vendor (*Browne on Statute of Frauds* [5th Ed.] §§ 465, 467, and numerous authorities there cited); and in such a case, until there is a breach by the purchaser of his contract of purchase, that amounts to a forfeiture of his right to the possession, the vendor cannot oust him by ejectment (*Norris v. Billingsley*, supra).

The judgment of the court below in said cause is hereby reversed, at the cost of the defendant in error. All concur, except PARKHILL, J., absent on account of illness.

(57 Fla. 493)

MYERS et al. v. JULIAN.

(Supreme Court of Florida. March 23, 1909.)

1. EQUITY (§ 362*)—PROCEDURE—FAILURE TO PROSECUTE—DISMISSAL.

Where there is an answer to a bill in equity denying all of the material allegations of the bill, and after the filing of such answer the complainant takes no steps for six months or more towards taking testimony to sustain his bill, it is the right of the defendant, after the time for taking testimony has elapsed, to set the cause down for hearing on bill and answer; and upon

notice being given for the final hearing on such bill and answer it is proper for the court, in such a case, to enter a decree dismissing the bill, where no satisfactory excuse is shown for the neglect to take testimony in the cause.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 760; Dec. Dig. § 362.*]

2. NOTICE (§ 10*)—SERVICE—SUFFICIENCY.

Where a copy of a written notice, required by law to be served in a pending cause upon a party thereto or upon his attorney, is handed to such attorney, he cannot avoid or nullify such actual service by handing such copy, served on him, back to the party serving it, and declining to accept service of such notice.

[Ed. Note.—For other cases, see Notice, Cent. Dig. § 23; Dec. Dig. § 10.*]

(Syllabus by the Court.)

In Banc. Appeal from Circuit Court, Columbia County; Bascom H. Palmer, Judge.

Bill by R. H. Myers and others against A. J. P. Julian, executor of Tabitha Watson. Decree for defendant, and complainants appeal. Affirmed.

A. J. Henry, for appellants. Boozer & Gillen, for appellee.

TAYLOR, J. The appellants, as complainants below, filed their bill in the circuit court of Columbia county in equity against the defendant, as executor of the last will of Tabitha Watson, deceased, for an accounting for certain moneys and other personalty to which they claimed to be entitled as residuary legatees under the will of one William M. Myers, deceased, by whose will said personalty was bequeathed to said Tabitha Watson for life, and after her death to go to the complainants. The bill was filed on October 18, 1907. On December 2, 1907, the defendant answered the bill, denying all of the material allegations thereof, and demanding strict proof of the truth thereof by the complainants. On January 6, 1908, the complainants filed a general replication to the answer. No further steps were taken by the complainants until the 15th day of June, 1908, when the defendant set the cause down for final hearing upon bill, answer, and replication, and on the same day the defendant's solicitor served upon the attorney for the complainants a notice to the effect that said cause had been set down for final hearing on bill and answer, and that he would call up such final hearing before the judge on the 22d day of June, 1908, and on said last-named day, the complainants and their counsel failing to appear, the judge rendered a final decree dismissing the bill. On July 2, 1908, the complainants moved for an order vacating the said decree on the ground, in substance, that no sufficient notice of such final hearing upon bill and answer had ever been given the complainants or their counsel, and for further time to take testimony.

This motion was denied by the judge on July 13, 1908. On the 20th of July, 1908, the

complainants filed a petition for rehearing upon substantially the same grounds as in their said motion to vacate the decree. This petition for rehearing was denied on September, 19, 1908, and for review of these various orders the complainants have brought the case here by appeal.

We do not think that there was any error in any of the said orders appealed from. After the said cause was at issue the complainants let it lay dormant for more than six months without taking any steps looking to the introduction of proofs, when the defendant, as he had a perfect right to do, set the case down for final hearing upon bill and answer, and at the time set by notice for such final hearing the complainants failed to appear when the judge properly made the decree dismissing the bill. It is contended that there was no service of notice of such final hearing. We think that, the affidavits of the complainants' counsel on the subject of this notice shows that there was a sufficient service upon him of such notice. His affidavits show that a copy of such notice was handed to him, and that he saw what it was, but then and there declined to accept service of such notice, and handed the copy served on him back to the defendant's attorney, who served it on him. Of course, he could decline voluntarily to accept service of a notice; but he could not avoid and nullify the actual fact of such service by handing the copy served on him back to the person serving it. The fact of such service remains, notwithstanding his surrender of the copy served on him and his declination voluntarily to accept such service. We do not think that there was any satisfactory explanation of the apparent laches of the complainants in not taking their testimony for more than six months after the cause was at issue. Neither do we think that there was any error in refusing the rehearing applied for.

Finding no error, the decrees of the court below, appealed from in said cause, are hereby affirmed, at the cost of the appellants. All concur, except PARKHILL, J., absent on account of illness.

(123 La. 369)

No. 17,512.

In re DEAL.

DEAL v. HODGE.

(Supreme Court of Louisiana. March 29, 1909.)

JURY (§ 58*) — WAIVER OF RIGHT TO JURY TRIAL.

The provisions of section 1426 of the Revised Statutes have been abrogated and replaced by those of Act No. 135, p. 216, of 1898. (Gauthier v. Lapeyrouse, 122 La. 35, 47 South. 367.)

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 58.*]

(Syllabus by the Court.)

Election contest between Charles Deal and Thomas G. Hodge. On an order refusing contestant the right to have the case tried by a jury, he applies for writs of certiorari, mandamus, and prohibition. Judgment reversed, and writ of mandamus ordered.

Edgar Williamson Sutherlin, Lewel Colbert Butler, and Hugh Conniff Fisher, for relator. Blanchard, Barret & Smith, for respondent. Respondent Judge, pro se.

Statement of the Case.

NICHOLLS, J. In relator's application for the writs mentioned he alleged:

"That at the general election held in this state on the 3d day of November, A. D. 1909, relator and Thomas G. Hodge were opposing candidates for the office of trustee or city councilman in and for the Ninth municipal ward of the city of Shreveport, said parish, and that petitioner was duly elected at said election to said municipal office, but said Hodge was erroneously and illegally returned as elected to said office by the commissioners of election in said municipal ward, and the city council of said city, on the face of said returns made by said commissioners, had recognized and admitted said Hodge's right to hold said office and to exercise and enjoy the rights, privileges, and functions thereof; and

"That relator has contested the rights of said Hodge to said office, and on November 5, 1908, he presented to the said city council, at the meeting thereof held according to law to promulgate and announce the result of said election, his protest against the promulgation of said returns and the announcement of the result of said election as showing said Hodge as elected to said office, but his protest was ignored by said city council, and said Hodge was announced and declared elected to said office by said city council at said meeting, and that relator thereafter, on November 13, 1908, before said Hodge was inducted into said office, and before the newly elected city council for said city was organized or inducted into office, instituted a suit in the First judicial district court of Caddo parish, La., against said Hodge, contesting his right to be inducted into said office, or to exercise and enjoy the right, privileges, and functions thereof, and therein prayed for an injunction restraining said Hodge from entering into said office or exercising the rights, privileges, and functions thereof, said suit being entitled 'Charles Deal v. Thomas G. Hodge,' No. 12,501 in said court, and that on relator's application for said injunction a rule nisi was ordered by said court, and on December 16, 1908, defendant filed an answer to said rule nisi, and on the hearing of said rule said injunction was refused by said court, and that thereafter, on November 25, 1908, the defendant Hodge filed his answer to said suit in said court, and that relator in his petition in said suit prayed for trial by jury in said suit, as he was entitled by law to have, and that on the — of —, 190—, the court ordered a trial by jury in said case, and relator, on January 20, 1909, gave and filed the necessary jury bond and made the necessary jury deposit in said suit, and that at the time of the institution of said suit no jury was in attendance on said court for the trial of said case, and that on December 20, 1908, a jury was drawn by the jury commissioners for said court to serve for three respective weeks, commencing January 18, 1909, and January 25, 1909, and February 1, 1909; and

"That on Saturday, January 16, 1909, relator made application to said court in open court to fix said case for trial for the first of said jury weeks of court, and said case was fixed for trial

for Thursday, the 21st day of January, 1909, and that the trial of another jury case was taken up and occupied the attention of the court during January 21 and 22, or the greater part of January 22, 1909, too late to impanel a jury in said case on that day, and plaintiffs counsel then made application to said court to impanel a jury the next day, January 23, 1909; but the court discharged the jury on January 22, 1909, on account of there being other business before the court on Saturday, January 23, 1909, and on account of the protracted and arduous services rendered by the jury during that week, but the judge, on discharging the jury, stated he would order the drawing of a special jury to try said case if the plaintiff required it; and

"That plaintiff's counsel applied to the judge and district attorney having charge of the criminal cases in the other section of the court to consent to the service of the regular panel or venire so drawn as aforesaid to try said case during the following week of said court, commencing on January 25, 1909, but said judge and district attorney in charge of the criminal cases in the criminal section of the court would not consent thereto, on account of the large docket and large volume of business in the criminal section of said court during the said following week, requiring the services of the regular panel or venire of jurors in the criminal section of the court during the whole of the following week, commencing January 25, 1909; and

"That relator on January 23, 1909, filed a motion in open court to advance said case on the docket as a preference case, and that the same be proceeded with and tried as a preference case, and that it be set down for trial for a fixed day, and that a special jury be drawn to try said case as provided by law; and

"That the plaintiff's counsel then asked in open court that said case be set down for trial on Thursday, January 28, 1909, but defendant's counsel then in open court suggested that the sheriff would not probably have time to summon a special jury for Thursday, January 26, 1909, but that it would be better to set the case down for Tuesday, February 2, 1909, and the case was accordingly set down for trial for Tuesday, February 2, 1909, and the court then ordered the jury commissioners to draw a special jury to try said case on that day as so fixed; and

"That on Tuesday, February 2, 1909, when said case was called for trial in said court with the special jury so drawn and summoned, and then in attendance on the court for the trial of said case, the defendant's counsel then filed a motion to quash the special panel and venire of jurors so drawn and then in attendance on the court for the trial of said case on February 2, 1909, on the alleged grounds and for the alleged reasons that only 30 jurors had been drawn on said special panel and venire, and that said special panel and venire had been drawn by the jury commission of the said parish, and that said special panel and venire of jurors should have been drawn by the clerk and sheriff, and that 50 jurors should have been drawn on said panel, as provided in section 1426 of the Revised Statutes of Louisiana, and that, after argument of said motion, plaintiff's counsel contending that the said special jury had been legally drawn and was composed of the legal number of jurors, and defendant's counsel urging that the jury had not been legally drawn and was not composed of a legal number of jurors, the said court sustained said motion, and quashed said panel and venire of jurors, and discharged said special jury, and to which ruling of the court plaintiff's counsel at the time excepted and reserved a bill of exceptions, which was signed, and that thereafter plaintiff's counsel at once asked the court to summon another special jury to try this case in some legal

manner, urging that it was a preference case and should be tried without delay, and after more argument the court reserved any further ruling on the request for the drawing of another special jury until the next morning, Wednesday, February 3, 1909; and

"That on Wednesday, February 3, 1909, defendant's counsel filed a motion and plea to the effect that section 1426 of the Revised Statutes of 1876 provided that the jury should have been drawn by the clerk and sheriff within three days after the contestant and voters caused their petition to be filed, and that, the jury not having been drawn in that manner and within that time, the delay amounted to an acquiescence on plaintiff's part of defendant's right to the municipal office in contest, and defendant pleaded 'the said delay of more than three days as an estoppel and in bar of plaintiffs further proceeding in said suit,' and that after argument the court finally sustained said motion and plea, and dismissed plaintiff's suit, and plaintiff's counsel reserved a bill of exceptions to said ruling, and said bill of exceptions was accordingly signed; and

"That on February 4, 1909, plaintiff filed a motion for a new trial, and for the vacating and setting aside of the decree dismissing the said suit, and for the reinstatement of said case on the docket of said court for trial according to law, and on February 6, 1909, plaintiff filed a motion in said court for the fixing of said case for trial and for an order to the jury commission to draw such a number of jurors as the court may deem necessary to constitute a special venire of jurors to hear and determine said case, said drawing to be made in accordance with the forms prescribed by Act No. 135 of the General Assembly of this state for 1898, relative to juries, etc., approved on the 13th day of July, 1898, to attend the court for the trial of this case on the day fixed for the trial thereof, and that after argument of said motion the court on February 13, 1909, rendered a written opinion whereby said order and decree dismissing said suit was annulled, vacated, and set aside, and said case was reinstated on the docket of said court, but the court held that plaintiff was not entitled to trial by jury, because a jury had not been drawn by the clerk and sheriff within three days after the plaintiff's petition was filed, as provided by section 1426 of the Revised Statutes, the court holding that the 'first jury was improvidently granted and illegally drawn, and was correctly set aside, and that for the reason the jury asked for in plaintiff's motion should not be granted, both as coming too late and not being in accordance with law,' and although the court annulled, vacated, and set aside the order and decree dismissing the said suit, and reinstated the same on the docket thereof for trial, the court further decreed that plaintiff's application for the drawing of the jury came too late and was not in accordance with law, and therefore it was refused and denied. * * *

"Relator represents that the court had ordered the trial of said case by jury, and relator had made the necessary deposit and given the necessary bond for jury costs, and that there was then no jury in attendance on said court to try said case, and that he is entitled to have said case tried as a preference case by a special jury, to be drawn therefor by the jury commission in accordance with the provisions of act No. 135 of the General Assembly of 1898 relative to juries, etc., approved July 13, 1898, and to have the judgment and decree of said court, refusing relator the right to have said case tried by jury, annulled, abrogated, and set aside, and that the judgment and decree of said court, refusing to give relator a trial of said case by jury, worked an injury to him and deprived him of his legal rights in the premises, save in an application to the Supreme Court under its general constitutional supervisory powers over the district court. Relator annexed hereto cer-

tified copies of all the proceedings had in said case, including the procès verbal of the drawing of the jury for said court for January, 1909, as aforesaid, and the special jury drawn to try this case, which was quashed and set aside, and including the minutes of the court in said case, and a certificate of the clerk that the jury deposit was made by plaintiff."

Opinion.

The relator in this case, on November 13, 1908, filed a petition claiming that he had been elected a member of the city council of the city of Shreveport, for the Ninth municipal ward of that city, at an election held for that purpose on the 3d of that month, but that the commissioners of election had erroneously and illegally returned and proclaimed that Thomas G. Hodge had been elected to that position at that election.

Under allegations appropriate to such an issue, he asserted his right to the position and contested that of Hodge to the same. In that petition he prayed for trial by jury as provided by law. It is alleged in relator's application, and not denied, that the court issued an order for the drawing of a jury. A jury panel of 30 persons was in fact drawn, but by the jury commissioners. No panel of 50 jurors was drawn by the clerk of the district court, the sheriff, and the recorder, under section 1426 of the Revised Statutes. Objection having been made by the defendant to the panel so drawn, it was quashed and set aside.

The only question presently before the court is whether, a jury not having been drawn within the time fixed for the drawing of a jury by the clerk, sheriff, and recorder, under section 1426 of the Revised Statutes, the plaintiff in that case forfeits the right to have those issues tried by a jury when the case should go to trial. The district judge held that the delays mentioned in section 1426 of the Revised Statutes for the drawing of a jury having expired, it was too late for any jury to be drawn thereafter, and the case would have to be tried before the judge alone. The failure of the proper officers to draw a proper jury within the time in which the law made it their duty to have acted, carried with it the right of the defendant to have the panel set aside, and, at most, the right to exact that a new panel be drawn. The error committed by the jury commissioners, if such it was, in drawing the jury at all, and the errors committed by that body, if errors there were, in drawing the jury, were not imputable to the plaintiff in the suit. The defendant in this case had been inducted into office and would discharge the duties of the office without opposition until the issues should be finally decided. No rights would be interfered with by the impaneling of a new jury. A jury impaneled at one time was as competent to pass upon the issues involved as that impaneled later. Time was not of the essence of the drawing of the jury. The provisions of the law on that subject were merely directory,

not sacramental, carrying as a penalty for nonobservance the loss of the right to a trial by jury. No principle of law was involved in the matter. Juries, even in criminal cases, are constantly being set aside for failure of those charged with duties connected therewith to comply with the requirements of the law in drawing them and in summoning jurors, in the matter of time, as well as other matters, without forcing the issues to be tried thereafter by the judge alone. The whole question in this case is one of costs. It is not claimed that relator has failed to make the deposit of \$12 required by law to be deposited by the party asking for a jury trial, nor that he has not given a bond to cover future costs. We are of the opinion that the court erred in holding that the right to a trial by jury was lost.

The right of the relator to a trial by jury has not been lost. The provisions of section 1426 of the Revised Statutes have been abrogated and replaced by the provisions of act No. 135, p. 216, of 1898. *Gauthier v. Lapeyrouse*, 122 La. 35, 47 South. 367.

For the reasons herein assigned, it is hereby ordered, adjudged, and decreed that the judgment of the district court refusing to grant relator's application for a trial by jury of the issues involved in the case of *Charles Deal v. Thomas G. Hodge*, in which relator is the plaintiff, and holding that he has lost the right to a trial by jury in that case, be and the same is hereby annulled, avoided, and reversed. It is further ordered and decreed that a writ of mandamus issue to the district judge, ordering him to grant relator's application for a trial by jury, said jury to be drawn by the jury commissioners under the provisions of Act No. 135, p. 216, of 1898, under order of the district court.

(123 La. 375)

No. 17,268.

MONROE GROCER CO., Limited, v. J. A. PERDUE & CO., Limited (SOUTHERN DEVELOPMENT CO., Garnishee).

(Supreme Court of Louisiana. March 1, 1909.)

1. GARNISHMENT (§ 130*) — PROCEEDINGS TO ENFORCE—OFFSET BY GARNISHEE.

The damages claimed by him as an offset had not been liquidated. He could not plead an unliquidated claim in compensation of an amount which he owed to his creditor, whose claim was garnished.

[Ed. Note.—For other cases, see *Garnishment*, Cent. Dig. § 259; Dec. Dig. § 130.*]

2. GARNISHMENT (§ 146*)—REOPENING CASE—DISCRETION OF COURT.

The contract which the garnishee offered in evidence, after the testimony had been introduced on the motion to traverse the answers and after the argument, did not show that the claim for damages was liquidated. It was not timely offered.

[Ed. Note.—For other cases, see *Garnishment*, Dec. Dig. § 146.*]

3. TRIAL (§ 377*)—REOPENING CASE—DISCRETION OF COURT.

It was within the discretion of the trial court to reopen the case, or not, at the point at which application was made to reopen the case.

[Ed. Note.—For other cases, see *Trial*, Dec. Dig. § 377.*]

4. SET-OFF AND COUNTERCLAIM (§ 35*)—LIQUIDATED DEMANDS.

Compensation takes place between two debts equally liquidated and demandable.

[Ed. Note.—For other cases, see *Set-Off and Counterclaim*, Cent. Dig. §§ 58-64; Dec. Dig. § 35.*]

5. GARNISHMENT (§ 130*) — PROCEEDINGS TO ENFORCE—OFFSET BY GARNISHEE.

There was no positive evidence that the garnishee would ever succeed in proving his claim.

[Ed. Note.—For other cases, see *Garnishment*, Dec. Dig. § 130.*]

(Syllabus by the Court.)

Appeal from Sixth Judicial District Court, Parish of Ouachita; *James Pemberton Madison*, Judge.

Action by the *Monroe Grocer Company, Limited*, against *J. A. Perdue & Co., Limited*, in which action the *Southern Development Company* was summoned as garnishee. Judgment for plaintiff, and the garnishee appeals. Affirmed.

Stubbs, Russell & Theus, for appellant. Newton & Newton, for appellee *Monroe Grocer Co.* William Butler Clark, curator ad hoc, for appellee *J. A. Perdue & Co.*

BREAUX, O. J. Plaintiffs are the creditors in the sum of \$2,100 of the *J. A. Perdue & Co., Limited*, contractors, who left the state a short time before suit was brought. They proceeded against their debtors by attachment.

As they were absent, a curator ad hoc was appointed to represent the latter.

Plaintiffs at the time obtained a writ of garnishment, and made the *Southern Development Company* a party garnishee to the suit, to which interrogatories were propounded.

The *Southern Development Company*, through its president, answered the interrogatories and denied indebtedness to *J. A. Perdue & Co.*; stated that *Perdue & Co.* had constructed part of the line of the railway of the *Arkansas, Louisiana & Gulf Railway Company* between *Bastrop* and *Monroe*; that this was done under a contract with the *Southern Development Company*; that the amount of the work performed by the *Perdue Company* was \$54,795.83, of which the *Southern Development Company* had paid to *Perdue & Co.* a considerable amount, leaving due, however, the sum of \$3,437.57; but that said *Perdue & Co.* are indebted to the *Southern Development Company* in an amount largely in excess of this last-mentioned sum. To quote literally from the answer:

"On account of claims against the said *Southern Development Company* for amount of dam-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ages (sustained by property holders along said line of railway) due by said company, which bear a lien and privilege on the property of the said Southern Development Company and said Arkansas, Louisiana & Gulf Railway Company for delay in completing the work, the faulty and negligent character thereof, and the unnecessary expense caused by the failure of the Perdue Company to fulfill the terms of its contract with the Southern Development Company, so that the Southern Development Company is not indebted to the Perdue Company in any amount."

It was noted that nothing was said in the reference originally about a reconventional demand. The issue here is compensation vel non. Although the debtors were not present, it is not evident that they were not residents of the parish in which the suit was brought. Be that as it may, the issues under the pleadings and facts are limited to whether there was or was not compensation.

To state the idea in different words: The Southern Development Company, a constructing company, which was under obligations in accordance with a contract with the railroad company named, gave part of its work, as we take it, to be done by the Perdue Company. It is very apprehensive that at an early date the railroad representatives will call upon it, the garnishee, to pay for work that Perdue & Co. failed to properly and timely perform. The garnishee in general terms also claims damages in its own right.

The nature of the work and the amount of the damages are not stated.

The curator ad hoc, representing Perdue & Co., in his answer to plaintiff's petition in this suit, stated that he made inquiry and found that Perdue & Co., whom he represented, were at Pine Bluff, Ark. He wrote to them. To his letter the firm answered that the company had no defense to make.

The curator ad hoc produced the letter, and it was offered in evidence by plaintiff.

In this letter Perdue & Co. stated that they were indebted to the Monroe Grocer Company; intended to pay their indebtedness as soon as they could get a final settlement; that they did not wish to contest the suit, but were opposed to paying before obtaining a final settlement; and in that event, to quote from the letter:

"We want our funds prorated among the people we owe there, and then make arrangements to pay my balances."

The word "my" of the letter being evidently an error.

The plaintiff in the garnishment proceedings—that is, the Monroe Grocer Company—traversed the answer of the garnishees, except as the garnishees showed by their answers that the Southern Development Company is indebted to J. A. Perdue & Co. in the sum of \$3,437.57. They prayed that the development company be held indebted to Perdue & Co. in the sum last stated absolutely, without offset, and not subject to any counterclaim of the Southern Development Company.

The case being at issue, testimony was heard.

Plaintiffs proved their claim against Perdue & Co.

Argument was then heard, and the papers were taken by the court for consideration of the issues.

After the case had been closed the garnishee filed a motion asking that the case be reopened, in order to enable it to offer the contract entered into between the Perdue Company and the Southern Development Company, alleging that there was ambiguity in the answer which it desired to explain.

The trial judge declined to grant the application and overruled the motion.

On the Merits.

Discussion and judgment:

The appellants' contention is, in the first place, that the testimony offered after the note of evidence had been closed and argument heard did not have the effect of contradicting the original answers of the garnishee, and that in consequence there was no good reason to refuse the garnishee's motion to reopen the case.

In the second place the appellants' contention is that the motion and the affidavit to reopen the case should have been allowed, as it was timely presented and subserved the ends of justice.

And, lastly, that, even if the asserted amendments were properly rejected by the court, the answers of the garnishee did not authorize the judgment rendered.

Taking up the first proposition for decision, the supplemental motion of the garnishee was not for the purpose of explaining or amplifying the defense made. The contract entered into between the Southern Development Company and Perdue & Co. did not contain an explanation which rendered it proper to admit it in evidence. It was, besides, not timely offered. This contract shows that the garnishee, the Southern Development Company, had agreed with Perdue & Co. for the work to be done, and contained all needful stipulations and specifications in that connection. This contract threw no light upon the subject. It had naught to do with the issues, by reason of the fact that in the answer to the interrogatories propounded the garnishee, the Southern Development Company, admitted that it was indebted in an amount as before stated. That admission could not be contradicted by a contract, or any other evidence, as the garnishee could not prove that it was not indebted in the amount stated.

Now, as relates to the damages claimed as an offset, it is the only issue presented. The contract did not prove that there were any damages due, or that the garnishee had any claim for damages under the contract. It does not appear that the court erred in not permitting the garnishee to reopen the case after it had been closed.

The second proposition is equally as untenable.

It is well settled that it is within the discretion of the trial court to finally decide whether to reopen or to decline to reopen a case after the argument has been closed and the case submitted for decision.

In the case of *Rose v. Whaley*, 14 La. Ann. 375, cited by the garnishee, the court rescinded the order, taking the interrogatory for confessed, and allowed the garnishee to answer. This was timely, and entirely within the discretion of the court.

In another case, also cited by the garnishee, *Hennen v. Forget*, 27 La. Ann. 381, before the day fixed for hearing on the rule taken by the plaintiff on the garnishee to show cause why the answer should not be taken for confessed, the garnishee was permitted to answer and explain his answers.

This was allowed by the court, again in its discretion, before acting upon the issues presented.

We have seen that in the present case the application to amend the interrogatories and explain them was made after that case had been heard on the motion to traverse the answers and after argument and submission.

Has the garnishee in the pending case, at the time the motion was made to reopen, any claim as of right to reopen?

In *Cross on Pleadings* it is stated that the application to reopen lies within the discretion of the court to permit the amendment—citing *Davis v. Oakford*, 11 La. Ann. 379; *Robeson v. Railroad Co.*, 13 La. 469.

This commentator further states that this court has held that the answers of the garnishee cannot be amended, citing *Adams v. Dinkgrave*, 26 La. Ann. 628, and *Taylor v. McGee*, 19 La. Ann. 374; but that later it had been again decided to the contrary, and this court had gone to the older decisions, citing *Tapp v. Green*, 22 La. Ann. 42, and *Maduel v. Mousseau*, 28 La. Ann. 691.

Leaving this conflict in jurisprudence to whatever extent it may exist, we will state that in our opinion, if it appears evident that an amendment should be allowed, it is a matter of discretion with the district court.

This brings us to the third and last proposition of the garnishee in the order before stated, which is that the answers (of this garnishee) in any event did not authorize the judgment rendered.

In deciding this point, we will in the first place state that there is no question but that the garnishee has a right to a set-off of a claim he has against his creditor to the exclusion of the plaintiff in the garnishment proceedings. The garnishee, as a creditor of his debtor, has in his hand a security of which he cannot be divested, if the indebtedness falls within that category of debts which can be pleaded in compensation.

We say, which can be pleaded in compensation, for, if it cannot be so pleaded, the

garnishee then has no right to retain the claim of its creditor in satisfaction of its claim.

We have found no decision directly in point in our jurisprudence (although *Hancock v. Bank*, 32 La. Ann. 593, has some bearing). It stands to reason, however, as an original proposition, that the garnishee cannot be heard to urge any claim at all it may fancy should be allowed as a set-off. There must be a limit in matter of a set-off.

In our opinion that limit is found in article 2209 of the Civil Code, which provides that compensation takes place between two debts having equally for their object a sum of money or a certain quantity of consumable things of one and the same kind, and which are equally liquidated and demandable.

If there should be at any time any departure from the strict letter of this article, it would never be to the extent of permitting a garnishee to offset a claim undefined as to amount and as to facts, as the one pleaded in this case by the garnishee to offset its indebtedness to the claim of its creditor, whose claim is garnished in its hands.

In the absence of directly pertinent authority, we again referred to the excellent work, *Cross on Pleading*, p. 335.

We have noticed before, in turning the pages of the work, that he is given to seeking the origin of words and their derivatives. Here he states that the word "garnishee" is derived from "garnishment," from "garnir"—"to warn," "to give notice to," the debtor not to pay his indebtedness, but to answer the writ served. He adds that these words find no place in French jurisprudence; that other words are used instead in France—that is, "saisie-arrest."

While the word "garnishee," it seems, is borrowed from the French language, the proceedings in garnishment are derived (Mr. Cross) from the English jurisprudence.

For that reason we in the first place consulted the decisions in jurisdictions in which the common-law system prevails.

From them we glean that the garnishee has the same right in defense which he can plead in a direct action, if one were brought against him on a claim for which he has been garnished.

And, again, the garnishee in garnishment proceedings should plainly set forth the nature of his right.

Where a garnishee claims a set-off, or facts from which the court can determine, the amount must be clearly shown.

Neither needful facts, nor the amount, are stated in this case to give rise to a right which can be considered as sufficient for a set-off. The claim is not stated, the amount is not fixed, and it is not even certain that it is an existing amount.

The set-off must be clearly and specifically pleaded. See *Eng. & Am. Ency. of Law*, vol. 9, pp. 835, 836.

We take up for a moment the French jurisprudence upon the subject, as it throws some light upon it.

Compensation peut-elle se faire en cas de saisie-arrêt? Laurent, vol. 18, p. 443, § 429.

"Un créancier du créancier pratique une saisie-arrêt entre les mains du débiteur. Celui-ci peut-il opposer au saisissant ce que lui doit le débiteur saisi? Il faut distinguer. Si le tiers saisi était créancier avant la saisie-arrêt, la dette sera éteinte par la compensation qui s'opère de plein droit; celui entre les mains duquel la saisie a été pratiquée peut donc dire au saisissant qu'il a saisi-arreté une créance qui n'existait plus, c'est-à-dire que la saisie est inexistante comme étant sans objet. On suppose naturellement que la créance opposée en compensation réunissait toutes les conditions pour être compensable avant la saisie-arrêt; si elle n'est devenue liquide ou exigible qu'après la saisie-arrêt, on rentre dans une autre hypothèse, celle qui est prévue par l'article 1298: la compensation ne pourra plus se faire."

Article 1298 of the French Code corresponds to article 2215 of our Code.

From Dalloz we quote:

"Mais si la créance était antérieure à la saisie, et pourvu quelle réunit alors les conditions requises pour la compensation, cette dernière déjà accomplie ne souffrirait aucun obstacle de la saisie opérée postérieurement."

The garnishee should, to the end of protecting his right, timely plead all that is needful to sustain his claim for compensation. The bare suggestion of the possibility of litigation thereafter on account of an apprehended claim because of an act of negligence of his creditor will not suffice as a defense in garnishment proceedings. It must be reasonably certain that there is a valid claim.

For reasons assigned, the judgment is affirmed. The costs of appeal are due by defendant.

(123 La. 384)

No. 17,346.

STATE ex rel. LE BLANC v. TWENTY-FIRST JUDICIAL DIST. DEMOCRATIC COMMITTEE.

(Supreme Court of Louisiana. March 29, 1909.)

APPEAL AND ERROR (§ 781*)—DISMISSAL—CERTIFICATION OF CONTROVERSY.

Relator, claiming to have been nominated as Democratic candidate for judge, brought mandamus against the Democratic committee for a recanvass. Mandamus being made peremptory, the committee took a suspensive appeal. Before hearing of appeal the election was had, and relator's opponent, who was placed on the Democratic ticket, was elected and commissioned and qualified. *Held*, that appeal would be dismissed, as there was no longer any controversy, and the appeal was functus officio.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3122; Dec. Dig. § 781.*]

Appeal from Twenty-First Judicial District Court, Parish of West Baton Rouge; Joseph Lindsay Golsan, Judge ad hoc.

Mandamus, on the relation of Joseph E. Le Blanc, Jr., against the Twenty-First Judicial District Democratic Committee. Mandamus was made peremptory, and defendant appealed. Dismissed.

See, also, 47 South. 405.

James Clarke Henriques, Albin Provosty, Hewitt Bouanchaud, Paul Geddes Borron, Frederick Paul Wilbert, and Edward Blunt Talbot, for appellant. Laycock & Beale, Edward Nicholls Pugh & Son, Walter Lemann, and Beattie & Beattie, for appellee.

PROVOSTY, J. At the primary election held by the Democratic party on September 1, 1908, for the nomination of candidates for the election of November 3, 1908, the relator was a candidate for the position of district judge of the Twenty-First judicial district. The district Democratic committee canvassed the returns and declared his opponent elected. Thereupon relator brought this suit, asking for a mandamus commanding the said committee to reconvene and recanvass the said returns, and commanding the chairman of said committee to submit to it the full and complete returns of said election. This mandamus was made peremptory in the district court after trial, and the defendant took a suspensive appeal. The appeal was duly lodged in this court, but before it could be heard the election of November 3, 1908, took place, and the opponent of relator, who had been placed upon the ticket of the Democratic party, was elected to the said office of judge, and in due course was commissioned, and he has qualified. Under these circumstances there is no longer any controversy. There is nothing for this court to act on. The appeal is therefore functus officio, and must be dismissed; and the costs of appeal must be borne by appellant. In re Lambert, 115 La. 470, 39 South. 447; In re Jones, 117 La. 106, 41 South. 431.

Appeal dismissed.

(123 La. 386)

No. 17,363.

BANK OF LEESVILLE et al. v. WINGATE.
(Supreme Court of Louisiana. March 29, 1909.)

1. MORTGAGES (§ 380*)—FORECLOSURE.

In foreclosure, the proceedings being ex parte, by order of court, to sell property burdened with mortgage or privilege, the creditor must bring his claim within the terms of the law.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1145; Dec. Dig. § 380.*]

2. EX PARTE AFFIDAVITS.

The president of an incorporated company appeared before the notary and two witnesses and declared that he was authorized to represent the company and sign the act of mortgage.

3. DECLARATION OF PRESIDENT.

The declaration of the president, without evidence of his authority to act in matter of giving mortgage, is not the complete authentic proof required.

4. MORTGAGES (§ 461*)—FORECLOSURE—EVIDENCE—SUFFICIENCY.

The contention was: The resolution of the board of directors, authorizing the granting of a mortgage, was lost. The loss in matter for foreclosure cannot be supplied by ex parte affidavit.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1354; Dec. Dig. § 461.*]

5. ORDER OF SALE VOID.

The order of seizure and sale not being sustained by authentic evidence, it is decreed null.

(Syllabus by the Court.)

Appeal from Twelfth Judicial District Court, Parish of Vernon; John Bachman Lee, Judge.

Action by the Bank of Leesville and others against T. C. Wingate, receiver of Powell Bros. & Sanders Company, Limited. Judgment for plaintiffs, and defendant appeals. Reversed.

Alexander & Wilkinson and Sholars & Lyles, for appellant. Wise, Randolph & Rendall and John R. Monk, for appellees.

BREAUX, C. J. Plaintiff instituted foreclosure via executiva.

It annexes a mortgage to its petition by authentic acts and notes, duly paraphed, executed by Powell Bros. & Sanders Company, Limited, W. H. Powell, President.

T. C. Wingate, having been appointed, qualified as receiver.

Wingate, receiver, appealed from the order of seizure and sale, and urges that the order of seizure and sale was not obtained on authentic evidence.

The contention of the appellant, on the other hand, is that the evidence is in authentic form, and that which is not in that form it is not possible to bring up before the court.

Appellee invokes the rule that, where authentic evidence is impossible from the nature of the case, it is not indispensable.

That rule has been held to apply in matter of the proof of the identity of the persons who are regarded as a descriptio personæ.

That was in substance the opinion in *Rice v. Davis*, 14 La. Ann. 435.

In the case at bar the question is not one which goes to the identity of the persons. It goes to the debt itself, as to whether it is proven by authentic evidence or not.

The act of mortgage before referred to recites that the corporation appears in its corporate name, through its president.

The notary declares in the deed that the president appeared before him and acted by virtue of a resolution passed by the board of directors, authorizing and empowering him to execute the act of mortgage in question,

and that a copy of the resolution referred to is attached and made part of the mortgage.

There is no copy of the resolution attached to the mortgage.

An attempt has been made by the appellee to supply the missing copy by ex parte affidavits, made since the date of the mortgage. These affidavits set out that a resolution was passed and adopted. Affiants declared in these affidavits that this resolution was destroyed by fire about April, 1907, and that it was never recorded in the minute book of the company.

The mortgage rests upon this resolution.

The proof would be sufficient in pais, but it is not equivalent to authentic evidence, authorizing a writ of seizure and sale.

We have carefully reviewed the decisions.

Executory process should not issue on other than authentic testimony is a proposition that is amply sustained.

If there is an exception at all to the general rule, it relates to the descriptio personæ, and sometimes to the transfer of negotiable instruments. But, as relates to the debt, the authentic evidence must be complete. *Nichol v. De Ende*, 3 Mart. (N. S.) 315; *Rowlett v. Shepherd*, 7 Mart. (N. S.) 515; *Dosson v. Sanders*, 12 Rob. 238; *Chambliss v. Atchison*, 2 La. Ann. 491; *Gandoz v. Blaque*, 23 La. Ann. 520; *Tildon v. Dees*, 1 Rob. 407.

In the pending case we have seen that the authentic evidence is not complete. The resolution referred to in the act of mortgage is not before us.

The process issues without citation. It is considered a harsh remedy, and for that reason must come strictly within the terms of the law.

It has been decided that the procurator to give a mortgage, in order to entitle the mortgagee to foreclosure proceedings, must be an authentic act. *Nichol v. De Ende*, 3 Mart. (N. S.) 315; *Chambliss v. Atchison*, 2 La. Ann. 491.

In the case at bar the lost affidavit can be considered of about the same value as an act sous seing privé, as to which it has been decided: An act sous seing privé can only be made authentic by a recognitive act setting forth the tenor, executed before a notary and two witnesses.

There is no recognitive act here, or act of any kind to make proof of the authority of the alleged president of the corporation by which it is alleged that the mortgage was given.

It is therefore ordered, adjudged, and decreed, for reasons stated, that the order of seizure and sale dated the 12th day of August, A. D. 1908, in this case, be and the same is hereby avoided, annulled, and reversed. It is further ordered, adjudged, and decreed that the proceedings of foreclosure be dismissed, at cost of plaintiff in both courts.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(123 La. 339)

No. 17,437.

ST. LOUIS JEWELRY CO. v. IMBRAGUGLIO.

In re IMBRAGUGLIO.

(Supreme Court of Louisiana. March 15, 1909.)

1. PROCESS (§ 134*)—RETURN—SERVICE—SUFFICIENCY.

A sheriff's return on the back of a citation, under the printed heading "Personal Service," that "on the 1st day of July, A. D. 1908, I made service of the copies of petition and citation above mentioned, by delivering them to — in person, * * *," failed to show service on defendant, since nothing can be presumed with respect to citation.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 167; Dec. Dig. § 134.*]

2. APPEAL AND ERROR (§ 1106*)—REMAND FOR CORRECTION OF RETURN ON CITATION.

On appeal to the Court of Appeal from a default judgment, where the sheriff's return on the citation does not show service on defendant, the cause may be remanded for correction of the return.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4387; Dec. Dig. § 1106.*]

3. APPEAL AND ERROR (§ 1106*)—REMAND FOR CORRECTION OF RETURN ON CITATION—NECESSITY FOR SETTING ASIDE JUDGMENT.

Where, on appeal from a default judgment, the Court of Appeal remands the cause for correction of a defective return of the sheriff on the citation, which fails to show service on defendant, the judgment should be set aside, since for all that appears it was rendered without citation.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4387; Dec. Dig. § 1106.*]

Action by the St. Louis Jewelry Company against Joseph Imbraguglio. There was a default judgment for plaintiff, and defendant appealed to the Court of Appeal, which remanded the cause for correction of the sheriff's return on the citation, but did not set aside the judgment; and defendant applies for certiorari or writ of review to the Court of Appeal. Judgments of the Court of Appeal and district court set aside, and cause remanded to the district court.

Coco, Convillon & Coco, for applicant. Joseph Clifton Cappel, for respondent.

PROVOSTY, J. Defendant appealed from a judgment by default, relying upon the defectiveness of the sheriff's return on the citation. The return is on the back of the citation, under the printed heading, "Personal Service." It reads:

"On the 1st day of July, A. D. 1908, I made service of the copies of petition and citation above mentioned, by delivering them to — in person.

"[Signed] W. K. Pearce, Dy. Sheriff."

This return fails to show service on defendant, since nothing can be presumed with respect to citation. The Court of Appeal so found, and remanded the case to afford an opportunity for correcting the return. This was proper. The service may have been good,

and a faulty return may be corrected. But the court did not set aside the judgment thus, for all that appears, rendered without citation. In this it erred. *Adams v. Basile*, 35 La. Ann. 101.

It is therefore ordered, adjudged, and decreed that the judgments of the Court of Appeal and the district court in this case be set aside, and that this case be remanded to the district court; plaintiff to pay all costs, except those incurred before entry of default, and the latter costs to abide result of suit.

(123 La. 391)

No. 17,332.

JOFFRION et al. v. GUMBEL.

(Supreme Court of Louisiana. March 29, 1909.)

1. SPECIFIC PERFORMANCE (§ 90*)—CONTRACT TO CONVEY LAND.

The general rule is that he who seeks the performance of a contract for the conveyance of land must show himself ready, able, and willing to perform the contract on his part.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 228; Dec. Dig. § 90.*]

2. SPECIFIC PERFORMANCE (§ 99*)—LACHES OF PLAINTIFF.

Unreasonable delay in doing those acts which are to be done by him will justify and require a denial of that relief. Plaintiff praying for such relief must have instituted his suit within a reasonable time before any material change affecting the interest of the parties has taken place.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 299; Dec. Dig. § 99.*]

3. SPECIFIC PERFORMANCE (§ 100*)—LACHES OF PLAINTIFF.

It would be an unwarrantable exercise of discretionary power to allow one, holding a mere option to purchase, to lie by for a long time and speculate upon the fluctuating values of property and, after a substantial increase in their value, to enforce a conveyance in his favor at the original price.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 306, 307; Dec. Dig. § 100.*]

(Syllabus by the Court.)

Appeal from Twenty-First Judicial District Court, Parish of Pointe Coupee; Louis Bingaman Claiborne, Judge.

Action by Julie Michel Joffrion and others against Ferdinand Gumbel. Judgment for plaintiff, and defendant appeals. Reversed.

Albin Provosty and Lazarus, Michel & Lazarus, for appellant. Jacob Haight Morrison and Hewett Bouanchaud, for appellees.

Statement of the Case.

NICHOLLS, J. The plaintiffs are the widow of Oscar Joffrion, as natural tutrix of two of the minor children, issue of their marriage, and the remaining plaintiffs are the major children of the said Oscar Joffrion and wife.

Oscar Joffrion died on the 28th of November, 1898. His succession was administered by the widow, who, having fully administered the same, has been discharged. She was separate in property from her husband by marriage contract.

The plaintiffs allege that on the 15th of March, 1895, by public act before Laycock, notary public for the parish of Pointe Coupee, duly recorded, Oscar Joffrion, acting by virtue of and under an agreement entered into with Ferdinand Gumbel, purchased in the name of said Gumbel a certain tract of land in the parish of Pointe Coupee known as the "Old Watkins Place" (which they described), paying therefor the sum of \$502.50. That at the time of said purchase it was distinctly agreed and expressly understood by and between the said Ferdinand Gumbel and the said Oscar Joffrion that, while the title to the above-described property should be taken in the name of the said Ferdinand Gumbel, the said Ferdinand Gumbel should transfer, sell, and deliver to the said Oscar Joffrion one-half of said property for one-half of the purchase price paid therefor by the said Ferdinand Gumbel.

That the aforementioned agreement is evidenced by a certain written letter from Oscar Joffrion to Ferdinand Gumbel, and by a type-written letter signed by Ferdinand Gumbel and addressed to Oscar Joffrion, the letter from Oscar Joffrion to Ferdinand Gumbel being dated March 6, 1895, and that from Ferdinand Gumbel to Oscar Joffrion being dated March 9, 1895.

That the aforementioned letter, signed by Ferdinand Gumbel and addressed to Oscar Joffrion, is now in the possession of petitioner, but that the signature of Gumbel to the same is almost entirely torn off, so much so as to render said signature difficult of identification; and that, because of the condition of the signature, it would materially aid petitioners in the presentation and prosecution of this cause that Ferdinand Gumbel be requested by this honorable court to answer in writing, categorically and under oath, the interrogatories on facts and articles herein propounded to him, hereto annexed and hereto made a part.

That, acting upon the faith of the aforesaid agreement, Oscar Joffrion made the following improvements on property, which were paid for by Oscar Joffrion and petitioners, on the following dates, to wit: Twenty acres of fencing, made and paid for in the summer of 1895, and costing \$150; 28 acres of fencing, made and paid for in the spring of the year 1895, and costing \$180; 5 cabins, made and paid for in the year 1895, and costing \$200 each; and 100 acres of land cleared in the years 1895 and 1896 and costing \$15 per acre—making a total expenditure of \$2,830.

That they, as the sole and only heirs of Oscar Joffrion, are entitled to the undivided one-half of the property hereinbefore de-

scribed upon paying to Ferdinand Gumbel one-half of the price paid for same by Gumbel, as hereinbefore set forth, plus 5 per cent. per annum interest on said sum from the 15th day of March, 1895, to the 25th day of September, 1906; and that petitioners are further entitled to a judgment against said Gumbel, condemning him to pay to petitioners the sum of \$1,415 with legal interest on \$165 and \$500 of said sum for the summer of the year 1895, and on \$750 of said sum from the summer of the year 1896, until paid in full; same being one-half the costs of the improvements, plus legal interest as hereinbefore set forth.

That on the 25th day of September, 1906, through their agent and attorney in fact, Jacob H. Morrison, of the parish of Pointe Coupee, acting by virtue of a power of attorney executed before Hewett L. Bouanchaud, notary public, petitioners did tender to Ferdinand Gumbel at his office in the city of New Orleans, La., in the presence of notary public, duly commissioned and qualified for the parish of Orleans, and two competent witnesses, the sum of \$402 in current money of the United States, same being one-half of the price paid for property by Gumbel, plus legal interest on same from March 15, 1895, to the date of said tender; and did then and there demand of the said Ferdinand Gumbel that he execute a title to petitioners of the undivided one-half of said property, and that he pay to petitioners the sum of \$1,200 in settlement of the cost of one-half the improvements hereinbefore set forth, which demands of petitioners were refused and rejected by Gumbel, whereupon process verbal of said demands and said refusal was made by notary who signed same, together with the witnesses and J. H. Morrison, on the 25th day of September, 1906.

That said tract of land is now fully worth the sum of \$12,000, exclusive of the improvements hereinbefore set forth.

The premises considered, they pray that the said Ferdinand Gumbel be duly cited, and that, in due course of law and after due proceedings had, there be judgment ordering and directing Ferdinand Gumbel to sell and deliver to petitioners the undivided one-half of the property hereinbefore fully described, upon petitioners paying therefor the sum of \$402; and that he be condemned to pay petitioners the full sum of \$1,415, same being one-half the costs of the improvement hereinbefore set forth, with legal interest on \$665 of said sum from the 1st day of August, 1896, until paid in full. And, in the alternative, petitioners pray that should this honorable court decline to compel the said Gumbel to specifically perform his share of the aforementioned agreement and give title to petitioners, as hereinbefore prayed for, then and in that case there be judgment condemning the said Gumbel to pay to petitioners the full sum of \$5,598, same being one-half the

value of said property, minus \$402, due from petitioners to Gumbel in settlement of one-half the purchase price of same and interest as aforesaid, with legal interest on said sum from the 25th day of September, 1906, until paid in full; and the further sum of \$2,830 in settlement of the entire costs of the improvements hereinbefore set forth, with legal interest on \$1,230 of said sum from the 1st day of August, 1895, and legal interest on the remainder of same from the 1st day of August, 1896, until paid in full.

And petitioners further pray for all costs and general relief. Petitioners filed later an amended petition, in which they alleged that they had inadvertently alleged in their original petition "five cabins made and paid for in the year 1895 and costing \$200 each"; that this was incorrect in part; that only \$500 of said amount of \$1,000 was paid to Gumbel by Oscar Joffrion in the year 1895, and that the balance of said amount of \$1,000 was paid by petitioners in the year 1902.

Defendant answered, denying generally all of plaintiffs' allegations, except in so far as admitted in his answer to the interrogatories on facts and articles. Further answering, he alleged that it is true that respondent did purchase the place described in the petition herein, and it is true that the late Oscar Joffrion in his letter of March 6, 1895, did suggest to respondent to purchase the said tract of land, and that respondent in his letter of March 9, 1895, to the said Oscar Joffrion, did agree to purchase the said place, and that it is further true that in his letter to respondent of March 6, 1895, Oscar Joffrion did say:

"Now, if you wish to buy I will put it in your name but you will sell me one half for the amount of one half of what it costs."

And it is further true that respondent did in his letter of March 9, 1895, say that:

"If you can purchase the old Watkins place for \$475.00, I will take it, I will sell you one half of the place for one half of the cost."

Respondent shows that under the said letters respondent purchased for himself and became the sole and absolute owner of the said land, and that he did agree to sell to Oscar Joffrion one-half interest in the place, at the price of one-half of what the place cost respondent. Respondent denies that Oscar Joffrion ever acquired any interest whatever in said place under respondent's purchase thereof, and plaintiffs herein, by the form of their demand and the prayer of their petition, admit that the said Oscar Joffrion never did acquire any interest in said land, and only claim that Oscar Joffrion was in a position where he had the right to buy and to so acquire a one-half interest in said land by paying one-half of the cost thereof, which plaintiffs now offer to do. That Oscar Joffrion, after the purchase of the said place, managed it for respondent; that he took charge of the improvements on the land

and of the cultivation thereof; and respondent shows that respondent paid for all improvements of every kind on the land whether, in the way of draining, building upon, fencing, or in otherwise improving the property. That Oscar Joffrion never at any time during his life offered to purchase any part of the land under his option, and never claimed or pretended that he, Oscar Joffrion, had any right to the lands, but always admitted in the fullest manner that the land was the property of respondent. That all the rents and revenues of the property were received and used by respondent as his property, and that Joffrion never claimed or invested in himself the right to retain any part of the rents and revenues. That all the taxes and public charges of all and every kind accruing against the property were paid by respondent, and Joffrion never offered to pay any part of the said taxes or public charges.

That ever since the purchase of the lands he has been the sole and absolute owner thereof, and that Oscar Joffrion has not and never had any interest in the said land, and that he never at any time availed himself of his option to purchase said interest in said land or sought to avail himself thereof. That Joffrion has by his failure to avail himself of his option and by his conduct waived and relinquished all claims that he might have had to a sale of a one-half interest in property from your respondent to him. That all the rights of Joffrion or of his succession, if any they had, upon the contract, are prescribed under the prescriptions of 3, 5, and 10 years. The premises considered, respondent prayed that the petition and demand of the plaintiffs herein be rejected at their costs; and respondent further prays for all further and general and equitable relief in the premises.

On the 11th of September, 1908, the district court rendered judgment in favor of plaintiffs Emile Joffrion, Edward Joffrion, and the minors Fulgence Joffrion and Albanie Joffrion, decreeing them to be the owners in indivision in the proportion of one-tenth each respectively, of the following described property described in plaintiffs' petition (describing it), upon each of the above-named plaintiffs paying to Ferdinand Gumbel the sum of \$42.20, or one-tenth of the sum of \$402. The judgment further ordered the defendant, Ferdinand Gumbel, to pass title accordingly of the said property to the said Emile Joffrion, Edna Joffrion, and the minors Fulgence Joffrion and Albanie Joffrion, and in default of the said Ferdinand Gumbel's complying with the terms of this judgment, within 30 days from this date, considering that the said property above described is fully worth the sum of \$8,000, exclusive of the improvements thereon, it is ordered that he pay to each of the following named plaintiffs, Emile Joffrion, Edna Joffrion, and the minors Fulgence Joffrion and Albanie Joffrion, the sum of \$800, with legal interest

thereon from the date of judicial demand. It further ordered that the plea of prescription interposed by the defendant herein be and is hereby sustained as to Mistress Philomene Joffrion, wife of Camille D. Lallande, and her demand rejected.

It ordered that the demand of plaintiffs for the value of the improvements of the said property, not having been established with certainty, be, and the same is hereby, rejected as in case of nonsuit, reserving to the said plaintiffs, Emile Joffrion, Edna Joffrion, and the minors Fulgence Joffrion and Albanie Joffrion the right of suing for said improvements; that to the said defendant, Ferdinand Gumbel, it is hereby reserved the right to sue the said last-named plaintiffs for the improvements on said property which may have been made by said defendant. It further ordered, adjudged, and decreed that the defendant, Ferdinand Gumbel, pay all the costs of this suit.

Defendant has appealed.

Mrs. Philomene Joffrion, wife of C. D. Lallande (one of the plaintiffs), was granted a devolutive appeal, but failed to perfect it by executing an appeal bond.

The interrogatories on facts and articles propounded to the defendant and the answers thereto are given below:

"Int. 1. State your name and residence.

"Ans. My name is Ferdinand Gumbel; I am a commission merchant and cotton factor, and reside in the city of New Orleans.

"Int. 2. If you say that your name is Ferdinand Gumbel, that you live in the city of New Orleans, La., and that you are engaged in business as a cotton factor and commission merchant, either individually or as a member of some firm or corporation, state how long you have been thus engaged in business, and state particularly whether or not you were engaged in said business, in the city of New Orleans, La., under the firm name of Ferdinand Gumbel & Co., throughout the month of March, 1895?

"Ans. I have been engaged in business for about 24 years, and was engaged in that business as a member of the firm of Ferdinand Gumbel & Co. through the month of March, 1895.

"Int. 3. Were you acquainted with the late Oscar Joffrion, of the parish of Pointe Coupee, whose heirs are the petitioners in the petition to which these interrogatories are annexed, and, if yes, state how long you knew him, and whether or not you, either individually or as a member of your firm, or both, ever had any business transaction with him?

"Ans. Yes, I was well acquainted with the late Oscar Joffrion of Pointe Coupee parish, and had known him many years before his death. My firm of Ferdinand Gumbel & Co. had had business relations with Oscar Joffrion and business transactions with him for a number of years.

"Int. 4. Is it not a custom of yours to retain and preserve letterpress or carbon copies, or any other form of copy of all letters of an important or business character, written by you, and especially such letters as may evidence an obligation assumed by you towards some one else, and was not such your custom throughout the month of March, 1895?

"Ans. Yes.

"Int. 5. Is it not a custom of yours to preserve all letters of an important or business character received by you, and especially such

letters as may evidence an obligation assumed by the writers of same towards you, and was not such your custom throughout the month of March, 1895?

"Ans. Yes.

"Int. 6. Did you not receive a letter from the said Oscar Joffrion dated March 6, 1895, and reading literally or in substance as follows—

"'Lakeland P. O. March 6th, 1895.

"'F. Gumbel, New Orleans, La.

"'Dear Sir: I spoke to you when in the city in regard to the old Watkins place. I know a way that I can get it for about \$475.00. There is 60 arpents clear and ready to work and 225 acres that has been work and can be cleaned for little or nothing. They have two good cabins on the place; they cost at lease \$400.00. Now if you wish I will buy it in your name, but you will sell me $\frac{1}{2}$ for the amount of $\frac{1}{2}$ what the place cost. The place joins your Sellers place and also my Deloche place. Therefore I can get for next year 300 acres on them. Let me know at once what to do.

"'Truly,

O. Joffrion.

"'N. B. The tract contains 325 acres.'

"And if you say yea, have you not that particular letter in your possession or under your control at the present time, and, if yea, annex same to your answer to this interrogatory?

"Ans. Yes, I did receive a letter, a substantial but not a literal copy of which is contained in Interrogatory No. 6. I have kept that letter in my possession, and have it now, and I hereto attach the said letter in the original. Said letter is written and signed by Oscar Joffrion.

"Int. 7. Did you not dictate, sign, and address, or have addressed, a typewritten letter to the said Oscar Joffrion, dated New Orleans, La., March 9, 1895, and reading as follows:

"'New Orleans, La. March, 9th, 1895.

"'Mr. Oscar Joffrion, New Roads, La.

"'Dear Sir: In reply to your favor of the 6th, I would say if you can purchase the old Watkins place at \$475.00 I will take it but before you consummate the sale, have Mr. O. Provosty to look over the records and see that the title is good as this is very important and unless the title is good I do not wish to purchase the place therefore follow my instructions and as you say there are two new cabins on the place I think same cheap enough for \$475.00. I will resell you one half of the place at one half of the original cost whenever the title is effected. Awaiting your reply.

"'We remain, truly yours,

"'Ferdinand Gumbel.'

"And, if you say yea, have you not a letterpress, carbon, or any other copy of that particular letter, and, if yea, annex it to your answer to this interrogatory?

"Ans. On March 9, 1895, I wrote to Oscar Joffrion the letter as copied in said interrogatory No. 7, in reply to Oscar Joffrion's letter of March 6, 1895, to me. As requested, I attach to this answer, as part hereof, a copy of my said letter of March 9, 1895.

"Int. 8. Did not the said Oscar Joffrion purchase the property, the subject of the letters mentioned in interrogatories numbered 6 and 7, in your name, in pursuance of the understanding between him and you as set forth in said letters, paying therefor the sum of \$502.50; and did you not accept said purchase as satisfactory?

"Ans. Yes, Mr. Joffrion did purchase the property, the subject of the letters mentioned in interrogatories Nos. 6 and 7, and I believe he paid about \$502 therefor. I did accept the said purchase as satisfactory. I attach as part of my answer to this interrogatory a letter from Mr. Oscar Joffrion of date March 6, 1895, informing me of his purchase of the property.

"Int. 9. Did not Oscar Joffrion make improve-

ments on this property at his own expense in the shape of clearing land, building cabins and fences, and digging ditches, and, if yea, state the nature and cost of these improvements or anything else you may know concerning said improvements?

"Ans. After purchasing the said property Mr. Joffrion managed it and attended to it for me, and superintended the improvements on the property, but he made no improvements, that I know anything of, at his own expense. I paid for the cost of clearing the land, building the cabins, fences, and digging the ditches. Mr. Joffrion would incur expenses in clearing the land, or building on it, and would then draw upon me for the amount of money that he needed to pay for the expenses. His drafts contained, in his own handwriting, a statement of the cause for which they were drawn, showing that they were drawn for disbursements and expenses on the Watkins place. In this way I paid:

"On August 8, 1895, Mr. Joffrion's draft on my firm for \$20 for clearing land on Watkins place.

"On August 22, 1895, Mr. Joffrion's draft on my firm for \$40 for clearing land on Watkins place.

"On September 8, 1895, Mr. Joffrion's draft on my firm for \$50 on account of building house on Watkins place.

"On September 18, 1895, Mr. Joffrion's draft on my firm for \$101.60 for lumber for two cabins on Watkins place.

"On September 23, 1895, Mr. Joffrion's draft on my firm for \$33.05 for clearing land on Watkins place.

"On October 5, 1895, Mr. Joffrion's draft on my firm for \$50 for balance due on two cabins on Watkins place.

"On May 7, 1896, Mr. Joffrion's draft on my firm for \$79.03 for wire for the old Watkins place.

"On July 21, 1896, Mr. Joffrion's draft on my firm for \$65 for Watkins place, will send account."

"All of these drafts I attach to this answer as part hereof. As far as I know, I paid for every dollar of improvements of every kind, made on the Watkins place, for Mr. Joffrion had no money at that time with which to pay for these improvements, and owed my firm considerable money. The general understanding between him and myself was that I should pay for these improvements, whether for building cabins or clearing land, or draining or fencing the place, and I always believed and still believe that he charged me for all the improvements of every kind that were made on the place. He was not in a position to expend any money of his own, and he never claimed to me, during all his lifetime, that he had spent any money on these improvements, or that he had any claim against me for money disbursed by him for making improvements on the Watkins place.

"After the year 1896, * * * I paid drafts of Oscar Joffrion for improvements and expenditures on the Watkins place, as follows:

"Drawn: On December 12, 1897, I paid his draft on my firm for \$150 to account of Ferdinand Gumbel for hauling lumber and carpenter work on Seibert & Watkins."

"On December 12, 1897, I paid his draft on my firm for \$105 to account F. Gumbel for Watkins place.

"On January 20, 1898, I paid his draft on my firm for \$48 for building the houses on Watkins place."

"On February 16, 1898, I paid his draft on my firm for \$11 for Watkins, hauling lumber."

"Mr. Joffrion represented me in managing the Watkins place.

"I attach to my answer letter from Mr. Joffrion as follows: One of August 9, 1895, in which he says, 'I received your letter in regard to drawing too much,' showing that he

was then overdrawn and considerably in our firm's indebtedness.

"I also attach copies of my letter to him of date July 30, 1895, August 1, 1895, and August 7, 1895, all of which show that he was largely in my debt at the time. As the only money he had, as far as I know, was obtained from me, he was without money to pay for any interest in the Watkins place. He was continually in my debt—that is to say, in debt to the firm of Fred. Gumbel and Company—from 1895 until the time of his death, and was without means, unless he had borrowed from me, to pay for the improvements on the plantation or to pay for his interest in the place.

"I also inclose letter from him of May 10, 1895, in which he states that his draft for \$78 is 'for 24 rolls of wire for fencing on the Watkins place.'

"Mr. Joffrion always recognized me as the owner of the place, and that I controlled and paid for the expenses and improvements thereon.

"On September 10, 1895, I wrote him a letter, a copy of which is attached hereto, and on September 13, 1895, Mr. Joffrion wrote me a letter, in reply to mine of September 10th, the original of which letter of September 13, 1895, I attach to my answer as part hereof.

"These letters show that Mr. Joffrion recognized me as the owner of the place, and looked to me for payment of the expenses and costs incurred thereon.

"I may add that Mr. Joffrion never at any time during his lifetime asked me to convey to him an undivided half of the Watkins place, and never at any time claimed any rights under his letter to me of March 6, 1895, and my answer to the said letter of March 9, 1895. I always paid the taxes on the Watkins place, and all the expenses of every kind; and all the rentals and income of the place were collected by Mr. Joffrion and turned over to me, as owner of the place."

Attached to defendant's answer to the interrogatories propounded to him was the following letter from Oscar Joffrion:

"New Roads, La. March, 17, 1895.

"Ferdinand Gumbel, New Orleans, La.

"Dear Sir: Inclosed please find patents for Max Land I riten the land would cost \$475, but I thought tract contained 320. As you see it contained 335 acres, it made a different in the price of 27 dollars. I drew on for \$465.30, but I deducted the taxes which is \$42.20. I see that cotton as gone up. If you think it best to sell my cotton sell it.

"Send me for the Sicard land 3 bundle of barb wire.

"Truly,

Oscar Joffrion."

Opinion.

Joffrion died on the 17th of November, 1897. Up to that time he had manifested no intention to avail himself of the right to purchase one-half of the property on payment of one-half of the original costs, nor had he claimed any right in, to, or upon the property. He was managing Gumbel's properties at that time, and had been for many years before. At that date his children were all minors. They and those representing them, as Joffrion had done, were silent as to any right or claim in respect to this property until the 25th day of September, 1906, when they tendered Gumbel the sum of \$402 as "being one-half the price of the property plus legal interest on same from March 15, 1895,

to the date of said tender, and demanded of him to execute a title to one half interest" in the property which he had so purchased.

They also demanded that he should pay them the sum of \$1200, as "being one-half costs of improvements erected on said property by Oscar Joffrion."

Gumbel refused to accept the tender, or to make payment of the sum demanded. This suit followed.

The defendant in his letter of March 9, 1895, consented to resell to Joffrion one-half of the place at one-half of the original cost "whenever the title is effected."

Gumbel was not the owner of that property at that time. When the property was bought by him, Joffrion did not become ipso facto the owner of one-half of the property. It could become his only if he should elect to avail himself of that promise of Gumbel by purchasing the property at the price mentioned in the letter. In order to acquire the ownership it was necessary that an act of sale should be passed and the price paid as stipulated it should be paid. No exact time having been fixed by the parties for the execution of that act, the law would assume that it should be done "forthwith," by which term is meant that it should be done within a reasonable time thereafter, as the parties were presumed to have contemplated this should be done. Until this act should be executed, Gumbel remained the owner of the property, with all the benefits resulting from ownership and with all disadvantages resulting from that fact. In 1895, properties in Pointe Coupee were of very little value, even payment of the taxes thereon being an onerous obligation. This whole property was valued at and actually sold at \$502. In September, 1906, the valuation placed upon it by the district judge was \$8,000. To that great change in values the plaintiffs contributed nothing. They had paid not one dollar towards the acquisition of the property, nor were they the owners of the same, and by reason of that fact itself entitled to the benefit of the increase. The benefit of that increase legitimately inured to the owners.

When Gumbel consented to sell one-half of the property to Joffrion at the small price which he gave his consent to do, it was with the implied condition arising out of the situation that he would sell to him at that price provided that he should elect to purchase and should comply with the obligations attached to his right to buy, within a reasonable time, before values should change.

Holding a position which threw upon him necessarily the obligation of demanding a specific performance by Gumbel should he decline to make a transfer of the property, he certainly knew that he must be prepared to meet the obligations imposed upon a party seeking to avail himself of that particular remedy, and must have known or be held to have known the consequences of not being

able to comply with such obligations. It is a well-recognized rule that:

"A bill for specific performance is addressed in the extraordinary jurisdiction of a court of equity to be exercised according to its discretion. *Van Dorn v. Robinson*, 18 N. J. Eq. 256. The general rule is that he who seeks performance of a contract for the conveyance of land must show himself ready, desirous, prompt, and eager to perform the contract on his part. Therefore unreasonable delay in doing these acts which are to be done by him will justify and require a denial of relief. No rule respecting the length of delay which will be fatal to relief can be laid down, for each case must depend on its peculiar circumstances. *Meidling v. Trefz*, 48 N. J. Eq. 638, 22 Atl. 824; *New Barbadoes v. Vreeland*, 4 N. J. Eq. 157; *Cooper v. Carlisle*, 17 N. J. Eq. 525; *Houghwout v. Boisabuin*, 18 N. J. Eq. 815; *Merritt v. Brown*, 19 N. J. Eq. 286; *Id.*, 21 N. J. Eq. 401; *Crane v. Decamp*, 21 N. J. Eq. 414.

"It is equally well settled that one who seeks specific performance of such a contract must institute his suit within a reasonable time, and before any material change affecting the interest of the parties has taken place. *Penrose v. Leeds*, 46 N. J. Eq. 204, 19 Atl. 134.

"These doctrines are applicable to the case before us. It exhibits an excessive and unreasonable delay not only in giving notice of satisfaction with the title and intent to require a conveyance, but also in the application for relief. In the time which has been permitted to elapse a material increase in the value of the subject-matter of the contract has taken place. It would be an unwarrantable exercise of discretionary power to allow one holding a mere option to purchase to lie by for so long a time and speculate upon the fluctuating values of urban lots, and, after a substantial increase in their value, to enforce a conveyance in his favor at the original price now inadequate.

"Delay in such cases may doubtless be explained, and, in some circumstances, excused, but neither explanation nor excuse can be discovered in this case."

In *Brashier v. Gratz*, 6 Wheat. 528, 5 L. Ed. 322, which was a bill for specific performance, where no time limit was made in the contract, the court (Marshall, C. J.) said:

"The appellant insists that, in equity, time is not of the essence of the contract; that it is in part performed, and that his failure to pay the purchase money until December, 1813, when the tender was made, is justified by the circumstances of the case.

"The rule that time is not of the essence of the contract has certainly been recognized in courts of equity, and there can be no doubt that a failure on the part of a purchaser or vendor to perform his contract on a stipulated day does not of itself deprive him of his right to demand a specific performance at a subsequent date, when he shall be able to comply with his part of the engagement. * * * But the rule is not universal. Circumstances may be so changed that he who is injured by failure of the other contracting party cannot be placed in the situation in which he would have stood had the contract been performed. Under such circumstances, it would be iniquitous to decree a specific performance, and a court of equity will leave the parties to their remedy at law."

And again:

"This, then, is a demand for specific performance after a considerable lapse of time, made by a person who has failed totally to perform his part of the contract; and it is made after a great change, both in the title and in the value, of that which was the subject of the contract,

and by a person who could not have been compelled to execute his part of it, had circumstances taken an unfavorable direction."

In *Richardson v. Hardwick*, 106 U. S. 252, 1 Sup. Ct. 213, 27 L. Ed. 145, where a bill in equity was filed by R. to compel the specific performance of a contract relating to land, wherein R. covenanted with H. by making certain payments within a period named that he might become equally interested in them, the court said:

"The written contract gives the privilege, or, as counsel call it, 'an option,' to become equally interested in the land by paying one-half the purchase money, etc., within two years after its date. The contract of itself did not vest in him any interest or estate in the lands. It merely pointed out the mode in which he might acquire an interest, namely, by paying a certain sum of money within a certain time. He did not pay the money within the time limited, and has never paid it or any part of it, and 18 months before the commencement of this suit Hardwick gave him notice that his option to purchase had been lost, and told him that he had no interest in the land.

"It is clear from the terms of the contract that Richardson was not bound by it. He did not agree to purchase any share in the land, or to pay Hardwick any money. The contract gave Hardwick no cause of action against Richardson. The latter was not bound to become interested in the land or to any money thereon, unless he chose to do so.

"In suits upon unilateral contracts, it is only where the defendant has had the benefit of the consideration for which he bargained that he can be held bound. (Authorities.)

"In this case, Richardson having failed to pay the money or any part of it within the time limited, the privilege accorded him by contract was at an end, and all the rights under it ceased."

On this same subject, see *Bartley v. City of New Orleans*, 30 La. Ann. 264; *Capo v. Bugdahl*, 117 La. 992, 42 South. 478; *Green v. Covillaud*, 10 Cal. 817, 70 Am. Dec. 725; *Smith v. Lawrence*, 15 Mich. 499; *Stone v. Harmon*, 31 Minn. 512, 19 N. W. 88; *Fitzpatrick v. Woodruff*, 96 N. Y. 561; *Magoffin v. Holt*, 1 Duv. (Ky.) 95; *Davidson v. Davis*, 125 U. S. 90, 8 Sup. Ct. 825, 31 L. Ed. 635; *Hanly v. Watterson*, 39 W. Va. 214, 19 S. E. 536; *Larmon v. Jordan*, 56 Ill. 204.

Defendant urges that, Joffrion having died without availing himself of the right to buy the property at the price fixed, his representatives could not avail themselves of that right thereafter; citing Civ. Code, art. 1810.

We have not discussed the question from that standpoint, for, assuming that the heirs had the right to avail themselves of that "conditional right," they did so under the attendant condition that they should carry out the obligation imposed on their author of executing the agreement within a reasonable time, and not wait until values had changed to the injury of the party proposing to sell.

The judgment complained of is erroneous, and must be reversed.

For the reasons herein assigned, it is ordered, adjudged, and decreed that the judg-

ment appealed from be, and the same is, annulled, avoided, and reversed, and the demand of the plaintiff is rejected and dismissed at their costs.

(34 Miss. 817)

BINDER v. WEINBERG. (No. 13,856.)

(Supreme Court of Mississippi. April 12, 1909.)

1. EASEMENTS (§ 12*)—CREATION.

Adjacent owners, under an oral agreement, erected on their lots a two-story building, under a plan calling for a party wall on the boundary and over the wall a common hallway for the second story. It was necessary that the hallway should be kept open for light and ventilation for the rooms on the second floor. Held not to show the creation of an easement by grant.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 35-40; Dec. Dig. § 12.*]

2. EASEMENTS (§ 12*)—CREATION.

A deed of land, "together with all improvements thereon, party wall agreements, and party ownership agreements thereunto appertaining, and easements," etc., does not show a grant of an easement, when none existed before.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 35-40; Dec. Dig. § 12.*]

3. EASEMENTS (§ 19*)—EASEMENTS OF STRICT NECESSITY.

Adjacent owners orally agreed to erect on their lots a two-story building, under a plan calling for a party wall on the boundary and over the wall a common hallway for the second story, and a common stairway. The maintenance of the hallway was necessary for ventilation and light. One of the owners obstructed the hallway on his side of the building, and thereby interfered with light, ventilation, and passage. Held that, since the interference might be remedied at a reasonable expense on the part of such owner, there was no implied easement of strict necessity.

[Ed. Note.—For other cases, see Easements, Dec. Dig. § 19.*]

4. PARTY WALLS (§ 8*)—RIGHTS OF ADJOINING OWNERS—STATUTES.

Adjacent owners orally agreed to erect on their lots a two-story building, under a plan calling for a party wall on the boundary and over the wall a common hallway for the second story, together with a common stairway. The building was erected. The keeping of the hallway open was necessary for light, ventilation, and passage. Held, that the rights of the parties to have the hallway free from obstructions were not controlled by Code 1906, §§ 3561-3565, relating to party walls.

[Ed. Note.—For other cases, see Party Walls, Dec. Dig. § 8.*]

5. LICENSES (§ 59*)—USE OF PREMISES AFFECTING ADJOINING LAND—ESTOPPEL.

Adjacent owners orally agreed to erect on their lots a two-story building, under a plan calling for a party wall on the boundary and over it a common hallway for the second story, together with a common stairway. The building was erected, and the common hallway was used for the second story, and was necessary for ventilation, light, and passage. Held, that there was an executed license, and that a grantee of one of the owners, with notice, was estopped to obstruct the hallway by erecting a room so as to take one-half of the width of the hallway, and thereby interfering with ventilation, light, and passage.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 121; Dec. Dig. § 59.*]

6. VENDOR AND PURCHASER (§ 230*)—BONA FIDE PURCHASER—NOTICE.

A deed to land, together with all improvements thereon, "party wall agreements and party ownership agreements thereunto appertaining, and easements and tenements," etc., is sufficient to put the grantee on notice that there were party wall agreements and other agreements, the full nature and extent of which he could ascertain by inquiring of the adjacent owner.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 503, 504; Dec. Dig. § 230.*]

Appeal from Chancery Court, Washington County; M. E. Denton, Chancellor.

"To be officially reported."

Suit by Frank Binder against Joe Weinberg. From a decree for defendant, complainant appeals. Reversed and entered.

Hugh C. Watson, for appellant. Percy Bell, for appellee.

WHITFIELD, C. J. The facts in this case are substantially as follows: That complainant and appellee's remote vendor, F. J. Butler, in the year 1900 orally agreed to erect on two contiguous lots a two-story brick building as one structure under one common plan; that this common plan provided, among other things, that over the common boundary line between the lots there should be constructed a party wall, extending the entire length of the structure; that over this party wall there should be a common hallway, extending the entire length of the structure, to be open over the party wall and for an equal distance on both sides thereof; that in the front of the building a stairway was to be constructed, leading up over the party wall, and for an equal distance on either side thereof, from the sidewalk up into the common hallway just described; that at the rear end of the structure there was to be constructed a stairway leading down into the rear of said premises, into an alley on which both of the lots abutted; that on the east side of the party wall, and on the ground floor of the structure, appellant was to have his store, to be occupied by him; that on the west side of the party wall a store was to be constructed to be occupied by the tenants of said Butler, appellee's remote vendor; that the structure was to front to the northward on Washington avenue and its rear to face to the southward towards the alley above mentioned; that on the east side of the common hallway on the second floor of the structure appellant was to have offices and rooms throughout its entire length, while on the west side of the common hallway the said Butler was to have offices and rooms throughout its entire length; that in the rear end of said common hallway sewerage and water facilities were to be placed and maintained at the joint cost of appellant and the said Butler; that individual ownership of

the two parties aforesaid was to exist in the structure so planned up to the party wall, party stairway, and common hallway on their respective lots, but that each of said parties' interest in and to the party wall, party stairways, and common hallway should be burdened with an easement therein, in favor of the other party, created by the party-wall agreement, which was to the effect that a party wall was to be constructed as aforesaid up to the second floor of the building, and that on top of and as a part of this party wall there should be a common or party hall, extending for an equal distance on both sides of the party wall, the easement to be in and over each and every part of the party wall, party stairway, and common hallway; that said hallway was to be kept open for the mutual benefit of both parties, this being a matter of necessity, as there were dead walls on the outer boundary lines of both lots, because of adjacent two-story solid-wall buildings; that the only upstairs ventilation and light that the common hallway had was through a rear door and a window at the front thereof; that thus the structure was erected, maintained, and used until the year 1905 by appellant and said Butler, without let or hindrance; that on the 13th day of March, 1905, Butler conveyed his holding to the Citizens' Bank by deed duly recorded, which deed contains the following provision in regard to the party-wall agreement, to wit: "Together with all and singular the improvements thereon situated on all of the aforesaid land, and all easements, party-wall agreements, and party-ownership agreements thereunto appertaining, and easements and tenements," etc.; that simultaneously therewith, on the date last above named, the Citizens' Bank conveyed its holding to Joe Weinberg, appellee, and others, by deed duly recorded, which deed contains the following provision in regard to the party-wall agreement, to wit: "Together with all and singular the improvements thereon situated, the party-wall agreements, and party-ownership agreements thereunto appertaining, and easements and tenements," etc.; that at the time of the purchase of the property by appellee the property stood as originally planned and erected, with the plan of structure and the common user of the party wall, stairway, and common hallway, and the necessity therefor perfectly apparent to him; that appellee inspected said property and had actual notice of the plan of structure from his having occupied it from the date of the erection thereof unto the date of his purchase, and had constructive notice thereof by the provisions of the two deeds above mentioned; that for more than three years after appellee's purchase of said property appellee acquiesced in the uninterrupted use of said common hallway as contemplated by the original plan of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

structure, and so acquiesced until the beginning of the erection of the obstruction which this suit was brought to remove; that the obstruction complained of consisted of a room built in the common hall to the front of and adjacent to the railing which inclosed the upper end of the stairway leading up from the front, and which room extended in width from appellee's wall to the center of the party hall over the party wall, and in length from the stairway to the front wall of the building, thus taking and closing one-half of the width of the hallway for the length of the room; that at the time of the beginning of the erection of the obstruction appellee was notified not to erect the same, and that if he persisted in so erecting the obstruction he would be enjoined, but notwithstanding this notice appellee went forward with the erection of the obstruction in the common hallway until enjoined by the writ of injunction issued in this suit.

Counsel for appellee does not agree that the statement of facts is correct, as above set out, in that part of it which states "that individual ownership of the two parties aforesaid was to exist in the structure so planned up to the party wall, party stairway, and common hallway on their respective lots, and that each of said parties' interest in and to the party wall, party stairways, and common hallway should be burdened with an easement therein, in favor of the other party, created by the party-wall agreement, which was to the effect that a party wall was to be constructed as aforesaid up to the second floor of the building, and that on top of and as a part of this party wall there should be a common or party hall, extending for an equal distance on both sides of the party wall, the easement to be in and over each and every part of the party wall, party stairway, and common hallway; that the said hallway was to be kept open for the mutual benefit of both parties, this being a matter of necessity, as there were dead walls on the outer boundary lines of both lots, because of adjacent two-story solid-wall buildings; that the only upstairs ventilation and light that the common hallway had was through a rear door and a window at the front thereof." But we think that the testimony in the record does substantially show this part of our statement of the facts to be established by the verbal agreement between the original owners. It is true, we think, that the record fails to show the creation of an easement, in the strict sense of that term, by any grant. We do not think the provisions quoted from the two deeds show the grant of an easement, and those provisions could not create an easement when none had existed before. *Bonelli v. Blakemore*, 68 Miss. 136, 5 South. 228, 14 Am. St. Rep. 550.

Since an easement proper lies in grant, and there is no grant of an easement shown, we do not think the appellant can stand on his

contention in that behalf; nor do we think there is any implied grant of an easement on the ground of strict necessity, under the testimony in the case. It is true that the window in the front half of the hallway was obstructed to the extent of one-half of it, and that light and ventilation are both interfered with to some extent thereby; and it is shown that, since the only light the offices opening into the common hallway receive comes from the windows at the two ends of the hallway, there is a serious interference with light and considerable interference with the passageway—the exit and entrance of those ascending the stairway to the common hall. But the testimony is not sufficiently clear and strong, we think, that these difficulties may not be remedied at a reasonable expense on the part of appellee, so that we are disinclined to hold that there was here an implied easement of strict necessity. We think, further, that there is not sufficient evidence that the original agreement between the parties was in writing. At any rate, we would not disturb the finding of the chancellor on that fact. Nor do we think that appellant's case falls within chapter 105, §§ 3561-3565, Code of 1906. On all these points we concur with the learned court below.

But we do think, from the testimony in this record, under the law applicable thereto, that the appellee is estopped, by equitable considerations, from obstructing this common hallway with this new room. It is plain that the original verbal agreement between the parties who built the party wall, and the common hallway above and on the party wall, expressly stipulated that each of the parties was to have the use of the entire hallway, that the light and ventilation of that hallway were not to be interfered with by either, and that the plan of the two buildings, as related to the party wall, and also the common hallway, the way in which both were constructed, and the use to which the common hallway was to be put by both, involved a unity of design; that design being that each party should have full use of the whole common hallway, and derive the full benefit of unobstructed light and air and passageway therein. This is clear from the evidence. The evidence of the appellee himself plainly shows that he had occupied an office in this building for five years as a tenant, from its original construction, and that prior to his purchase he was thoroughly conversant with the plans of this building, and that he knew, when he purchased the building, that the wall was a party wall, that the stairway leading up to the hallway was a party stairway, that the stairway in the rear was also a party stairway, and that the hallway, at the time he purchased it, was and had been used all the while and owned as a party hallway, ever since the building was erected; that objection was

made to his building this room by Mr. Huntzberger, the clerk of Mr. Binder, the appellant, Mr. Binder not being in town when this new room was started, but that appellee went forward with the building of the new room, in the face of positive objections on the part of said clerk; that appellee knew that the new room did block the passageway to a certain extent, and that by reason of the dead walls on both sides of the building the only light and air the hallway got was from the end windows in the hallway; and that the appellee acted on his impression of the law to the effect that he had exclusive individual ownership to his side of the hallway.

It is further evident, from the verbal agreement, that the appellant had put his money into the construction of this common hallway, as well as of the party wall, upon the faith of that verbal agreement that he should have the use of the whole of the common hall, just as his cobuilder should have the use of the whole common hallway, and that it was the purpose of this verbal agreement that this common hallway should be left entirely unobstructed, to be used, according to the agreement, only as a common hallway. The only reason appellee gives for building a new room was that he wished thereby to increase his rent. It was the plain purpose and plan, as shown by the construction and building of the party wall and common hallway, that the common hallway should be so used by both in its full extent, and should not be obstructed in any part of it. On this state of the case we are clearly of the opinion that the appellee is estopped to build this new room. Certainly the right and justice of the case uphold this view. It is also due to be said that whilst the provisions in the two deeds, the one from Butler to the Citizens' Bank, and the one from the Citizens' Bank to the appellee, to the effect that the grantee should have the property conveyed, together "with all and singular the improvements thereon situated on all of the aforesaid land, and all easements, party-wall agreements, tenements, and hereditaments thereunto belonging," were sufficient, whilst not conveying any easement, to put the appellee upon notice that there were party-wall agreements, etc., about this party wall and common hall, the full nature and extent of which he had nothing to do to ascertain except simply to inquire of the appellant.

We think the cases of *Appeal of Cleland et al.*, 133 Pa. 189, 19 Atl. 352, 7 L. R. A. 752, and *Clark v. Henckel* (Md.) 28 Atl. 1089, fully support this view, which view, we may also add, as an important consideration, is in strict accordance with the contemporaneous construction put upon the verbal agreement by the original parties to the agreement. In the case of *Clark v. Henckel*, supra, the owner of the lot conveyed part of it,

and in accordance with an oral agreement with his grantee that an alley should be left between their properties, for mutual benefit, one was laid out, half on the property of each, and used continuously by the owners of the property for 35 years. It was held that, the agreement having been fully performed on both sides, neither should inclose the part of the alley which had been taken from his property. It is true that in that case there had been an adverse user for a length of time much beyond the period of prescription; but the court, quite apart from that, holds and says: "Now, although the parol agreement would not give a right to the alley, yet in this case it has been fully executed by both parties, each one contributing a portion of his land to make the alley, and it has been used for 35 years by the contracting parties, and those who have succeeded to their estates. It is difficult to see how the right of the complainant can be impugned. It has all the elements and requisites of validity. Here is an agreement fully performed on both sides. If any muniment of title were requisite for the protection of the right thus acquired, no one can doubt that a court of equity would decree it."

In the case of *Appeal of Cleland et al.*, supra, the owners of adjoining lots built a single building covering both lots. The only access to the upper stories was by stairs which were altogether on one lot; and it was held that the erection of such building constituted an executed license in the nature of an easement on the part of the owner of said lot, allowing the owner of the other lot to use such stairs, and, further, that purchasers of the lot on which the stairs stood, being affected with notice of the license by the mere existence of the building, cannot prevent the owner of the other lot from using such stairs. The court observed further: "The master has found that there was an express agreement between Mr. Phelps and Mr. Pierce with regard to the use of the stairways now in question. There is sufficient evidence to sustain this in the testimony of the architect, Mr. Perry. If this be so, Mr. Phelps could not subsequently repudiate or revoke it, after Mr. Pierce, in reliance upon it, had consented to the erection of the building in its present form. So far as it is necessary to the plaintiff's case, we affirm this finding of the master. But, as said at the outstart, we do not consider the existence of an express contract essential. The circumstances to which we have referred of themselves clearly raise an equitable estoppel in favor of the one party and against the other. There is no doubt but that the present arrangement of the building was recognized at the time to be for the mutual advantage of all parties concerned; and, so far as it is of such mutual advantage, this advantage cannot be denied by either party to the other. Mr. Pierce, for instance, could

not cut off access through the corridors on the second and third floors from the Phelps to the Dickson part, nor vice versa. For the same reason the owners of the Phelps part cannot interfere with the free and common use by the owners and tenants of the Pierce part of the corridors and stairways which happen to be upon their side of the property. The building being cast by common consent in its present permanent form, neither party can revoke the arrangement, upon the faith of which the money of the other has been expended. Each and every part is affected with what, in its nature, is a permanent servitude, so long as the building itself stands. It cannot be changed from its present form, nor the right of common access now provided for be interfered with, at the will of either party, but only by the common consent of all. 'A right of this character, while not strictly on easement, is in the nature of one. It is really a permission or license, express or implied, to use the property of another in a particular manner or for a particular purpose. Where this permission has led the party to whom it has been given to treat his own property in a way in which he would not otherwise have treated it, as by the erection or construction of permanent improvements thereon, it cannot be recalled to his detriment. Having expended his money upon the faith of it, and not being able to be restored to his original position, equity will not allow the permission to be revoked in breach of such faith. This has given rise to the doctrine of executed or irrevocable licenses. This doctrine obtained an early foothold in Pennsylvania, and has been consistently adhered to ever since.' * * * The defendants are furthermore affected with both actual and constructive notice of the right to which the plaintiff lays claim. Not only were they directly notified of its existence, but they could not use their eyes without having it plainly called to their attention. It was an evident servitude existing over the one building in favor of the other, and arising out of the permanent form in which the building had been constructed. They were thus put upon such inquiry as would have elucidated the facts upon which the plaintiff now justly relies, and are bound thereby."

We think this statement of the law is not only eminently just, but perfectly sound, and covers the case in hand fully. Wherefore the decree is reversed, and a final decree will be entered here, reinstating the injunction and making it perpetual.

(93 Miss. 423)

FIDELITY MUT. LIFE INS. CO. v. MIAZZA. (No. 13,868.)

(Supreme Court of Mississippi. April 12, 1909.)

1. APPEAL AND ERROR (§ 1195*)—LAW OF CASE—EFFECT OF FORMER OPINION.

A statement, in an opinion on a former appeal in an action on a life policy, that the ques-

tion whether insured misrepresented in his application for insurance any matter material to the risk should have gone to the jury, is not law of the case, requiring the jury to pass on the materiality of the testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4661; Dec. Dig. § 1195.*]

2. APPEAL AND ERROR (§ 1195*)—LAW OF CASE—EFFECT OF FORMER OPINION.

A statement, in an opinion on a former appeal in an action on a life policy, that it could hardly be doubted that, if insured had fully disclosed the character of an illness, insurer would not have insured him, is not the law of the case, precluding a finding of no material misrepresentation by insured in his application.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4661; Dec. Dig. § 1195.*]

3. INSURANCE (§ 668*)—ACTION ON LIFE POLICY—JURY QUESTION—MATERIALITY OF MISREPRESENTATION.

Whether a misrepresentation by insured respecting an illness in applying for life insurance might have influenced the company in insuring him held, under the evidence in an action on the policy, a jury question.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1738; Dec. Dig. § 668.*]

4. INSURANCE (§ 258*)—LIFE INSURANCE—APPLICATIONS—CONSTRUCTIVE NOTICE TO INSURER.

A life insurer, notified by an applicant that he had had an attack of insomnia and nervousness, necessitating the attendance of a physician and confinement in a sanatorium, was charged with knowledge of the symptoms and consequences usually and reasonably resulting from such attacks.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 553; Dec. Dig. § 258.*]

5. INSURANCE (§ 669*)—ACTIONS ON LIFE POLICIES—INSTRUCTIONS.

Where, in an action on a life policy, it was a jury question whether a misrepresentation by insured respecting an illness in applying for insurance might have influenced the company in insuring him, it was not reversible error to instruct that plaintiff could recover if insured made no untrue statements constituting misrepresentations material to the risk.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1775; Dec. Dig. § 669.*]

6. INSURANCE (§ 668*)—ACTIONS ON LIFE POLICIES—JURY QUESTIONS.

In an action on a life policy, defended for misrepresentation in the application respecting a former illness, it is a jury question whether insured sufficiently went into the details of his illness, where he disclosed in general terms the nature of the malady.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1738; Dec. Dig. § 668.*]

Appeal from Circuit Court, Hinds County; W. H. Potter, Judge.

Action by Emma S. Miazza against the Fidelity Mutual Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 46 South. 817.

Suit to recover the proceeds of an insurance policy on the life of her deceased husband, Peter Miazza. The case was submitted to a jury under instructions of the court, and a verdict returned for plaintiff, and defendant appeals.

Alexander & Alexander, for appellant. McWillie & Thompson, for appellee.

FLETCHER, J. This case is before the court for the second time. On the first trial in the circuit court a peremptory instruction was given in favor of the appellee, mainly upon the ground that the insurance contract was to be construed according to the laws of Pennsylvania, in which state a misrepresentation will not avoid the policy, unless made with knowledge of the falsity of the representation. This court reversed the case, holding that the contract must be construed according to the laws of Mississippi, and that evidence tending to show that the representations were untrue was competent. It was further held that representations material to the contract have the force of warranties in Mississippi, but that representations in regard to immaterial matters will not defeat a recovery. See *Fidelity Mutual Life Ins. Co. v. Miazza*, 46 South. 817. Upon the remanding of the case to the circuit court, it was tried anew, some additional evidence being introduced, and the issues were submitted to the jury, resulting in a verdict for the plaintiff, from which the insurance company prosecutes this appeal.

It is insisted on behalf of the appellant that the court erred in submitting to the jury the question of whether the alleged misrepresentations by the insured were or were not material. On the other hand, appellee insists that the law of the case was settled in the former opinion, and that certain language therein contained requires that the jury shall pass on the materiality of the testimony. That language is as follows: "The question should have gone to the jury to determine whether or not there had been any misrepresentation by Miazza, in his application for insurance, of a matter material to the risk." We do not think that this language can be so construed as to hold that it was in this case necessarily the province of the jury to pass upon the materiality of the testimony. The language merely holds that it was for the jury to say whether the misrepresentation shown to be material was in fact made by the assured. We think the language of the opinion leaves it as an open question whether or not the jury should have been given the right to decide as to the materiality of any particular misrepresentation. The appellant, on the other hand, insists that the former opinion strongly intimates, if it does not positively decide, that the case was one for a peremptory instruction, unless the testimony of the Memphis physicians should be overthrown. They base this contention upon the following language used in the former opinion: "In this case it can hardly be doubted that, if there had been full disclosure on the part of Miazza as to the character of his illness in 1903, it might reasonably have influenced the company not to make the contract of insurance." And so, responding to what counsel conceived to be the view of the court as thus expressed, the insurance

company offered evidence to the effect that, if the chief medical examiner of the company had known all the facts testified to by the Memphis physicians, the policy would never have been issued. We think that this excerpt from the opinion does not indicate that the jury was without power to hold that there had been no material misrepresentation of fact. It will not do to say that an insurance company can change an immaterial misrepresentation into a material one merely by having its medical men assert that, had they known all the facts, the contract would not have been completed; and the opinion intimates as much, since it is said that "it might reasonably have influenced the company." It is evident that the question of whether it might have influenced the company was essentially a question of fact for the determination of the jury. We think, therefore, that the former opinion in this case does not decide either way the questions which are now pressed upon our attention. We are, therefore, left free to decide these questions upon the present appeal.

Mr. Miazza, in making application to the company, and in his medical examination, and in his statement to the company's local examiner, stated substantially that he had been sick in Memphis in the year 1903; that he was at that time doing both day and night work, had insomnia and nervousness for two weeks, and was attended by Dr. J. B. Stanley, and that he was troubled with insomnia for three weeks. He further stated to Dr. Hunter, the company's examining surgeon, that he had been treated in a sanatorium in Memphis. So far these statements were absolutely true. It appears, however, from the testimony of the physicians in Memphis, that this disorder was accompanied by acute dementia; that he was nervous and in a very anæmic condition, amounting to profound auto-intoxication. This malady, however, yielded to treatment, so that in four days Miazza was wholly restored to reason, and after discharge from the sanatorium was ultimately restored to what appeared to be perfect health. We are not able to say, as a matter of law, that the disclosure made by Miazza was not full and complete in any reasonable or substantial sense. The company was notified that he had an attack of insomnia and nervousness, necessitating the attendance of a physician and his confinement in a sanatorium; and the company must be charged with knowledge of the symptoms and consequences which usually and reasonably result from such an attack. There is no showing here that the appellant's dementia and auto-intoxication existed independent of the insomnia and nervousness, of which notice was given, and we are not able to say that these phenomena are anything more than symptoms of the illness disclosed. It is a matter of common knowledge that temporary dementia

may attend many ordinary ailments. Indeed, it is not unusual for patients suffering from typhoid fever or pneumonia to manifest all the symptoms of a deranged person during the continuance of the illness in its most critical stages, and yet it would be unreasonable to hold that an applicant for life insurance must disclose all the peculiar derangements which attend an attack of one of these serious ailments. And so we conclude that the question was properly left to the jury to say whether the disclosure made by Miazza was or was not in reality a full and complete disclosure as to his illness in Memphis.

In this sense it was not reversible error for the court to give an instruction that the jury should find for the plaintiff if they believed that the applicant had made no untrue statements, such as to constitute misrepresentations which were material to the risk. We are not to be understood as holding that in all cases the question of the materiality of the misrepresentations should be submitted to the jury. We desire to carefully limit this opinion to the facts of this particular case. We only hold that where there has been a disclosure of this kind, setting out in general terms the nature of the malady, it becomes peculiarly a question of fact for the jury as to whether the applicant has sufficiently gone into details of his illness. Of course, many cases might be imagined, where there had been no disclosure as to a serious illness, in which a peremptory instruction for the insurance company would be proper; but it is erecting too difficult a standard to say that the applicant in every case must give a detailed history of the illness with which he was afflicted. In this case the insurance company secured instructions by which the jury was informed that it was the duty of the applicant to make a full and complete disclosure, and, if such disclosure was not made as to facts which would materially affect the risk, then the verdict must be for the defendant. We think that this was as much as the company was entitled to under the peculiar facts of this case.

Affirmed.

(95 Miss. 429)

BYNUM v. DALTON. (No. 13,960.)

(Supreme Court of Mississippi. April 19, 1909.)

MONEY RECEIVED (§ 6*)—RECOVERY—DOUBLE PAYMENT.

The fact that defendant, who brought back a fugitive from justice, obtained an allowance for expenses, under Code 1906, § 2212, for returning the fugitive, did not affect a contract between him and plaintiff whereby the latter advanced a specified sum for expenses for the return of the fugitive, and plaintiff could not recover such sum from defendant.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. § 27; Dec. Dig. § 6.*]

Appeal from Circuit Court, Alcorn County; E. O. Sykes, Judge.

"To be officially reported."

Action by L. S. Dalton against N. M. Bynum. From a judgment for plaintiff, defendant appeals. Reversed and rendered.

One Helms had been charged by affidavit with crime committed in Mississippi and had absconded to the state of Kansas. Dalton, who was interested in seeing Helms prosecuted, secured the services of Bynum to go to Kansas and bring the fugitive back, and gave him \$200 out of which to pay his expenses. A requisition was obtained, and Bynum was named as the agent of the state of Mississippi to return said fugitive. He departed for Kansas, and brought Helms back, and returned to Dalton \$120, stating that \$80 was consumed in expenses. Afterwards Bynum put in an application before the board of supervisors of the county, under section 2212 of the Code of 1906, for expenses in bringing back the prisoner, and set up the fact that he had not received, nor claimed, any reward from the state, county, or any person, and he was thereupon allowed the sum of \$139.80 by the county. Thereafter Dalton demanded of Bynum repayment of the sum of \$80, which Dalton had given him to go after the fugitive. Bynum refused to pay back the money, and Dalton brought suit. From a judgment for plaintiff, the defendant appeals.

The appellee does not contend that the \$80 sued for was not spent for legitimate expenses, but bases his right to recover on the ground that appellant was afterwards allowed his expenses by the county. Appellant contends that appellee employed him and agreed to give him his expense money to go after Helms and return him to the state, and that the transaction was made with him as a private individual, and not as an official of any sort, or as a representative of the state. Section 2212 of the Code of 1906 is as follows: "Any party, acting under a requisition of the Governor, who brings back to this state and delivers to the sheriff of the county where the offense is alleged to have been committed, a person charged with felony, shall receive, to be paid out of the county treasury on the order of the circuit court and of the board of supervisors, twenty cents a mile for the distance necessarily traveled in coming from the place of arrest to the place of delivery; but the same shall not be paid to any party who has received, or who claims a reward from the state, county, or person."

Lamb & Johnston, for appellant. Bennett & Sweat, for appellee.

WHITFIELD, C. J. The relations between Bynum and Dalton are governed by the contract between them that Dalton was

to pay Bynum's expenses. The expenses are conceded to have been \$80, and that is all that Bynum retained of the \$200 originally handed him by Dalton. It was no concern to Dalton what occurred between Bynum and the board of supervisors. That was a matter between Bynum and the state.

The court below erred, the judgment is reversed, and judgment will be entered here for the appellant.

(95 Miss. 347)

PHOENIX INS. CO. v. SMITH. (No. 13,344.)
(Supreme Court of Mississippi. April 19, 1909.)

1. EQUITY (§ 201*) — PLEADING — FORM AND REQUISITES OF CROSS-BILL.

Code 1906, § 587, permitting a defendant in a chancery suit "to make his answer a cross-bill," does not require that the part of the pleading constituting the cross-bill be separate and distinct from the part constituting the answer, and the repetition of averments in the answer is not necessary.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 201.*]

2. INSURANCE (§ 249*) — CANCELLATION OF POLICY—ACTIONS—CROSS-BILL.

In an action by an insurance company to cancel a policy as obtained by fraud, and because the agent was not permitted to insure property at that place, defendant answered, denying any knowledge of the limitations placed upon the agent as to territory, and averred that the policy was taken out in good faith, and that there was an error in the policy in describing the property. The suit was begun after the property was destroyed, and defendant by leave of court amended his answer, making it a cross-bill, and prayed "that the policy be reformed and paid." *Held*, that the cross-bill contained sufficient averments to be good as against a demurrer.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 249.*]

3. INSURANCE (§ 623*)—ACTIONS—LIMITATIONS BY PROVISION OF POLICY—WAIVER.

The stipulation in a policy of insurance, requiring suit to be brought within one year after the loss, is for the benefit of the insurer, and may be waived by it, and will not be available where, after a loss occurs, the insurance company files a bill to cancel the policy, although a cross-bill in such action, asking for an enforcement of the policy, was filed more than a year after the loss.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1551; Dec. Dig. § 623.*]

Appeal from Chancery Court, Tunica County; Percy Bell, Chancellor.

Action by the Phoenix Insurance Company against J. G. Smith. Plaintiff demurred to an amended answer. The demurrer was overruled, and plaintiff appeals. Affirmed and remanded.

The appellee, Smith, was the owner of a storehouse and stock of goods near the town of Pentecost. The land on which the store was situated was leased land. Smith applied to the agent of the appellant insurance company, one Dorsey, and secured insurance on the storehouse and stock of goods for the sum of \$5,000. The policy covered a period

of one year from November 9, 1902, but was not delivered to Smith until about March of 1903. The premium for one year was paid by Smith. The policy described the property as situated in the town of Pentecost. In June, 1903, the property insured was destroyed by fire, and in October, 1903, the appellant insurance company filed a bill in chancery against Smith and Dorsey for the purpose of having the said policy canceled on the ground that it was obtained by fraud; that Dorsey, the agent, was not permitted by the company to insure property, except in and around the town of Tunica; that it was not the kind of risk that the company had authorized its agent to take; that the title to the land on which the property burned was situated was not in fee simple in the applicant; that Smith did not take an inventory of his goods, as required by the terms thereof, nor did he keep a record of sales; that, had the true facts been known to the company, this policy would not have been issued; and the prayer of the bill is for a cancellation.

In November, 1903, the defendants answered, denying the allegations of the bill. In his answer Smith denies any knowledge of the limitations placed upon Dorsey, the agent, as to territory, and avers that the policy was taken out in good faith, and that it was error on the part of the agent not describing the property as being situated near Pentecost, since the agent knew the location of the property. The case was continued from term to term, and in 1907, by leave of the court, Smith amended his answer, making it a cross-bill, and asking for affirmative relief by inserting the following prayer, to wit: "That the policy be reformed and paid."

To this answer a demurrer was interposed, which raised the following questions: (1) That the relief asked for by the cross-bill was not sought within 12 months after the fire, as provided by the terms of the policy, barring suit after 12 months; (2) that the cross-bill did not sufficiently set up the facts. This demurrer was overruled, and this appeal is prosecuted.

J. W. Cutrer, for appellant. Fontaine & Fontaine and May, Flowers & Whitfield, for appellee.

ALEXANDER, Special Judge. Under section 587, Code 1906, which permits a defendant in a chancery suit "to make his answer a cross-bill" against the complainant or his codefendant, it is not required that the part of the pleading constituting the cross-bill be separate and distinct from the part constituting the answer, and a repetition of averments contained in the answer is not necessary. The answer was evidently drafted without any thought at the time of making it a cross-bill, and, if viewed as a cross-bill, is vague and inartificial, especially in its

averments as to the amount of the loss; but it contains sufficient averments to make it good as against a demurrer.

The stipulation in the policy of insurance requiring suit to be brought within one year after the loss is for the benefit of the insurer. It rests solely on contract, and the insurance company may waive the provision or by its conduct estop itself to plead the lapse of the period. It certainly needs no citation of authority to sustain a proposition so obvious as that an insurance company, which, after a loss, instead of awaiting an action on the policy or the expiration of the year, files a bill against the insured to cancel the policy as having been fraudulently procured, or because of noncompliance with various provisions cannot, as against a cross-bill, although filed more than a year after the loss and seeking recovery therefor, be permitted to avail of such stipulation. Although no injunction against bringing suit on the policy is issued, defendant is warranted in assuming that the insurance company, by impleading him in a court of competent jurisdiction in regard to the very matters necessarily involved in an action on the policy, has waived the benefits which, if it had stood solely on the defensive, might have accrued from the limitation.

Affirmed and remanded, with leave to cross-complainant to amend, if so advised.

(95 Miss. 337)

**RETAIL LUMBER DEALERS' ASS'N v.
STATE ex rel. ATTORNEY GENERAL.
(No. 13,301.)**

(Supreme Court of Mississippi. April 12, 1909.)

1. MONOPOLIES (§ 17*)—COMBINATIONS IN RESTRAINT OF TRADE.

Under Code 1906, c. 145, § 5002, providing that a combination intended to hinder competition in the sale or purchase of a commodity shall be a criminal conspiracy, it is immaterial whether the means adopted be peaceable and otherwise lawful, if the intent be to accomplish the unlawful object.

[Ed. Note.—For other cases, see *Monopolies*, Cent. Dig. § 13; Dec. Dig. § 17.*]

2. MONOPOLIES (§ 17*)—COMBINATIONS IN RESTRAINT OF TRADE.

Code 1906, c. 145, § 5002, providing that a combination intended to hinder competition in the sale or purchase of a commodity shall be a criminal conspiracy, is violated by a combination of retail lumber dealers under an agreement not to purchase from any wholesale dealer competing with retailers.

[Ed. Note.—For other cases, see *Monopolies*, Cent. Dig. § 13; Dec. Dig. § 17.*]

Appeal from Chancery Court, Hinds County; G. G. Lyell, Chancellor.

Bill by the State, on the relation of the Attorney General, against the Retail Lumber Dealers' Association. From a decree granting a perpetual injunction, ordering the dissolution of defendant, and enjoining its further operation, defendant appeals. Affirmed.

E. L. Brown and Mayes & Longstreet, for appellant. R. V. Fletcher and J. B. Stirling, Atty. Gen., for the State.

HARPER, Special Judge. On or about the 14th day of March, 1906, certain persons, partnerships, and corporations, then engaged in the retail lumber business in Louisiana and Mississippi, organized an association known as the "Retail Lumber Dealers' Association of Mississippi and Louisiana." A constitution for the government of this association was duly adopted by them.

Under the head of "Declaration of Purpose," which is a preamble to the constitution, we find, among others, the following provision:

"We realize the convenience, and the necessity, of the retail lumber dealer to every community, and we are interested in the promotion of the general welfare and the perpetuation of the retail lumber business. We recognize the absolute right of every person, partnership, and corporation to establish and maintain as many retail yards as they may wish, whensoever and wheresoever. We recognize the right of the manufacturer and wholesale dealer in lumber products to sell lumber in whatever market, to whatever purchaser, and at whatever price, they may see fit. We also recognize the disastrous consequences which result to the retail dealer from direct competition with wholesalers and manufacturers, and appreciate the importance to the retail dealer of accurate information as to the nature and extent of such competition where any exists. And, recognizing that, we, as retail dealers in lumber, sash, doors, and blinds, cannot meet competition from those from whom we buy, we are pledged as members of this association to buy only from manufacturers and wholesalers who do not sell direct to consumers, where there are retail lumber dealers who carry stock commensurate with the demands of their communities, and we are pledged not to buy from lumber commission merchants, agents, and brokers, who sell to consumers, but do not carry stocks, nor from a manufacturer who sells to such lumber commission merchants, agents, or brokers."

Article 2 of said constitution provides as follows:

"The object of this association is and shall be to secure, and disseminate among its members, any and all legal and proper information which may be of interest or value to any member or members thereof, in his or their business as retail lumber dealers, and to carry into actual effect our 'Declaration of Purpose.'"

Article 3 of said constitution provides as follows:

"Section 1. No rules, regulations, or by-laws shall be adopted in any manner stifling

competition, limiting production, restraining trade, regulating prices, or pooling profits.

"Sec. 2. No coercive measures of any kind shall be practiced or adopted towards any retailer, either to induce him to join the association, or to buy or refrain from buying of any particular manufacturer or wholesaler. Nor shall any discriminatory practices on the part of this association be used or allowed against any retailer for the reason that he may not be a member of the association, or to induce or persuade him to become such member.

"Sec. 3. No promises or agreements shall be requisite to membership in this association, save those provided in these 'Articles of Association and Declaration of Purpose,' nor shall any members be restricted to any particular territory, but may compete any and everywhere."

Article 7 of the constitution provides as follows:

"Section 1. Report of Secretary.—Any member of this association having cause of complaint against a manufacturer or wholesale dealer, or his agents, because of shipment to a consumer, shall notify the secretary of this association in writing, giving as full information in reference thereto as practicable, such as date or dates of shipment and arrival, car number and initials, original point of shipment, names of consignor and consignee, the purpose for which the material was or is to be used, and such other particulars as may be obtainable. Such notice must be sent, with or without information in detail, within 30 days after the receipt of shipment at point of destination, and no notice shall be filed of any such sale or shipment occurring within 60 days after the first issue of membership list succeeding the acceptance of his application. Upon receipt of such notice, the secretary shall first ascertain whether or not the complaining member carries a stock commensurate with the demands of his community, and, if he finds that such stock is not carried, he shall ignore the complaint, unless upon application of such complaining member the executive committee shall reverse his finding; but, if he find that such stock is carried, he shall then notify the manufacturer or wholesaler that the rules of this association do not allow its members to buy from those manufacturers and wholesalers who sell to consumers, and unless such manufacturer or wholesaler shall satisfy the secretary that the complaint is not well founded the secretary shall report the facts to the executive committee, and upon the approval of his finding by a majority of the executive committee the secretary shall then notify the members of this association of such sale, and they shall discontinue to buy from such manufacturer or wholesaler until notified by the secretary that such wholesaler or manufacturer does not sell to consumers where there is a retail dealer who carries a stock

commensurate with the demands of his community; but this section shall not apply in cases where the business methods or financial condition of such retailer will not justify a manufacturer or wholesaler in dealing with him. Under no circumstances shall the secretary enter into any agreement with a manufacturer or wholesaler that any one of the association members will deal with him, nor shall he in any case exact a promise from the wholesaler or manufacturer that he will not sell to consumers, nor shall any result other than that of the members refusing to buy from any such manufacturer or wholesaler follow from the steps taken as hereby provided.

"Sec. 2. The foregoing provisions shall apply in reported cases of lumber commission merchants, agents, and brokers who sell to consumers, but do not carry stock, and as against the manufacturers who sell to such commission merchants, agents, or brokers.

"Sec. 3. Each member, when he joins this association, and once each year thereafter, and oftener if the secretary shall request it, shall furnish the secretary a list of those manufacturers and wholesalers, and their agents, from whom he makes purchases of lumber and other building materials."

Thereupon, on November 19, 1906, the Attorney General, in the name of the state, filed a bill, in which he set out the foregoing facts, and alleged that said association was acting in violation of chapter 145, §§ 5002-5021, Code 1906, to wit, the chapter on "Trusts and Combines," showing that said association was a trust or combine in restraint of trade, and intending to hinder competition in the sale or purchase of a commodity, contrary to the provisions of said chapter. Defendants answered, admitting all the substantial facts set out in the bill, but denying that its association was an unlawful combination or conspiracy, either in restraint of trade or in violation of any other provision of said chapter. After hearing the cause on bill and answer, the chancellor in the court below held that the association was in violation of law, and granted a perpetual injunction, ordering that it be dissolved, and enjoining the further operation of said organization; and from this decree the defendants appealed.

We have each of us carefully read the able arguments and laboriously reviewed the mass of authorities cited by counsel in this case. It is indisputable that a line of the older authorities, commencing with the Bohn Case, 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319, and ending with the Montgomery Ward Case (C. C.) 150 Fed. 413, hold that at common law, and under the particular statutes therein construed, it is lawful for retailers to combine and agree not to purchase from wholesalers who sell direct to consumers, so long as they confine themselves to a simple withdrawal of their own patronage, without resorting to any agree-

ment with the wholesaler direct, or threats, or fines, or other direct coercive measures. These courts base their decisions upon the theory that such a combination is a legitimate protective and defensive measure, and that, since it is perfectly lawful for each individual retailer to withdraw his patronage from a wholesaler at any time and for any cause, it is equally lawful for them to combine to do what each might lawfully do individually. But the courts of Indiana, Georgia, Nebraska, and Tennessee, and other states, have expressly repudiated the grounds upon which the former decisions were rested, and declare the doctrine therein announced, that what one may lawfully do any number may combine to do, to be untrue and unsound, and these decisions cite many instances where the vice and harm lies in the combination alone.

It was said in *Bailey v. Master Plumbers' Association*, 103 Tenn. 99, 52 S. W. 853, 46 L. R. A. 561, that "it is entirely true, as in effect observed in *Macaulay Bros. v. Tierney*, 19 R. I. 255, 33 Atl. 1, 37 L. R. A. 455, 61 Am. St. Rep. 770, and in *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 55 N. W. 1119, 40 Am. St. Rep. 319, sub nom. *Bohn Mfg. Co. v. Northwestern Lumbermen's Ass'n*, 21 L. R. A. 337, that in the first instance each member of the association had a perfect legal right to buy material and supplies exclusively from any dealer or dealers he might choose, and each dealer had an equal right to select members for his customers, and to confine his sales to them only. These were inherent rights, which no competitor was authorized to dispute, and no court empowered to control or curtail. But, in our opinion, it does not follow, from this undoubted freedom of individual member and of individual dealer, that all of the members may, as ruled in those cases, lawfully enter into a general and unlimited agreement, in the form of by-laws, that they and all of them will make their purchases from only such dealers as will sell to members exclusively. The premise does not justify the conclusion. The individual right is radically different from the combined action. The combination has hurtful powers and influences not possessed by the individual. It threatens and impairs rivalry in trade, covets control in prices, and seeks and obtains its own advancement at the expense and in the oppression of the public. The difference in legal contemplation between individual right and combined action in trade is seen in numerous cases. Any one of several commercial firms engaged in the sale of India cotton bagging had the right to suspend its sale for any time it saw fit. Yet an agreement between all of them to make no sales for three months without the consent of the majority 'was palpably and unequivocally a combination in restraint of trade.' *India Bagging Association v. Kock*, 14 La. Ann. 164. Any one of several companies had the right to sell the whole or only a part of its output to only such per-

sons, in only such territory, and at only such prices, as it pleased; yet it was inimical to the interest of the public and unlawful for them to combine and agree that those matters should be determined and controlled by an agency jointly created for that purpose." This latter view commends itself in our judgment, and appears to be founded upon sound reason and just observation.

Again, it is said that it must appear certain that the means adopted by the retailers will be effective, and that as a necessary result of their action competition will be stifled and the freedom of trade restrained. This argument has met with favor with some courts, in construing the common law and particular statutes. But we take it that the Legislature of this state must have had in view all of these various and vexing questions, and sought to set them at rest in the plain and explicit language used therein. Under our statute, which provides that a combination "intended to hinder competition in * * * the sale or purchase of a commodity shall be a criminal conspiracy," it is unimportant to consider whether the means adopted are calculated to be effective or not. The vital question is the design, the purpose, the intent of the combination; and it is likewise unimportant to consider whether the means adopted be peaceable and otherwise lawful, if the purpose and intent of the combination be to accomplish the unlawful object.

Applying these principles to the instant case, it is plain that the express and avowed object and purpose of this combination was to prevent the wholesaler from competing with the retailer in selling to the consumer. Nor is this avowed purpose confined to a prevention of what is sometimes called "unfair" competition, but to any and all competition of every sort. So far as these retailers could prevent, it was their purpose and intent, if language means anything, to deter the wholesaler from competing with the retailer in selling to the consumer at any time, in any place, and at any price, by a threat of the withdrawal of their trade. This, we believe, is directly in violation of the plain letter of the statute. We can conceive how "unfair" competition by the wholesaler with the retailer might, under certain circumstances, destroy the retailer, to the ultimate detriment of the public, thus directly stifling competition. However, we have no such case before us, but only the case of a combination intended to destroy all competition by the wholesaler with the retailer, whether fair or unfair. But, even if the former case were here presented, it is not for the retailer, nor perhaps for this court even, to undertake to say what is an unfair competition, since the statutes of 1906 (Code 1906, § 5002) make no exception, and no such distinction appeared until the Legislature of 1908 (Laws 1908, p. 124, c. 119) so amended the act of 1906 as to itself define what was unfair competition, and de-

clared a penalty therefor, thus making clear the purpose of the Legislature to require all persons to look to the law for protection against unfair competition, rather than to their own efforts and combinations, and to look to the law to define and declare what shall be unfair competition, rather than permit the courts or the parties in interest so to do.

It is further urged that this combination is not inimical to public welfare, and, therefore, not unlawful. In the case of *Barataria Cannery Company v. Joulain*, 80 Miss. 555, 31 South. 961, it was distinctly held that the words "inimical to the public welfare" are not an added element of definition attached to each of the definitions already given in the separate sections of this statute, but that the offense is complete when shown to come within the terms of any section of the statute, as thereby the Legislature, in whom the discretion is vested, by its very declaration determines said act to be inimical to the public welfare.

Finally, it is urged that the very existence of the retailer depends upon such combinations. This appeal is one to be made to the Legislature. But we cannot think that even as an economic proposition it is sound. The retailer has not lived and grown and thrived for these many hundred years without such factitious aids, to at last succumb to such fortuitous circumstances. His right to exist rests upon foundations. As long as he continues to faithfully serve the convenience and necessities of the people, as he has in the past, he need have no fear of permanent harm from any manner of competition with the wholesaler within the law as it is now written, but he may be expected to continue to live and flourish by virtue of his own sturdy, individual self-reliance, cultivated in the benign atmosphere of unrestrained freedom of trade, and the beneficial influences of a fair and healthy competition.

It appearing to us that the plain purpose of the instant association is to stifle competition between wholesaler and retailer in dealing with the consumer, and that such a combination, with such an express and avowed purpose, is directly in violation of both the letter and the spirit of the statute above referred to, which statute makes no distinction between classes and kinds of competition which it seeks to preserve, and the decision of the chancellor being in conformity with this view, the decree of the lower court is therefore affirmed.

(96 Miss. 423)

COOPER v. RIVERS. (No. 13,836.)

(Supreme Court of Mississippi. April 19, 1909.)

1. SHERIFFS AND CONSTABLES (§ 103*) — LIABILITIES—OFFICER AS BAIL.

Under Code 1906, § 1464, requiring the sheriff taking a bail bond to return the same

to the clerk of the court, and providing that any sheriff neglecting to take a sufficient bail shall stand as special bail, a sheriff receiving money from a third person, to be forfeited unless accused, discharged from custody in consequence of the deposit, appeared to answer a criminal charge, is a special bail, and on his paying the deposit into court the third person cannot obtain judgment against the sheriff therefor.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. § 220; Dec. Dig. § 103.*]

2. BAIL (§ 73*) — INVALIDITY — PARTIES IN PARI DELICTO.

Under Code 1906, § 1464, providing that any sheriff taking insufficient bail shall stand as special bail, etc., it is improper for a sheriff to discharge one accused of crime on a third person depositing money as security for his appearance, and the third person is in *pari delicto* with the sheriff and cannot recover the deposit.

[Ed. Note.—For other cases, see *Bail*, Cent. Dig. §§ 254-256; Dec. Dig. § 73.*]

Appeal from Circuit Court, Marshall County; L. G. Fant, Special Judge.

"To be officially reported."

Action by J. L. Cooper against L. N. Rivers. From a judgment for defendant, plaintiff appeals. Affirmed.

The record shows that in September, 1906, one T. L. Cooper was indicted by the circuit court for perjury, and on October 10th was arrested by the sheriff. He was unable to give bond, and his father, J. L. Cooper, agreed with the sheriff that he would turn over to the sheriff the sum of \$250, to be a forfeit unless T. L. Cooper should appear at the February term, 1907, of the circuit court to answer the charge preferred against him. The sheriff gave J. L. Cooper a receipt as follows: "Oct. 17, 1906. Received of J. L. Cooper two hundred and fifty dollars, to be held as a forfeit for T. L. Cooper's appearance at February term, 1907, of circuit court of Marshall county, Mississippi. [Signed] L. N. Rivers, Sheriff." At the February term, 1907, T. L. Cooper appeared and demurred to the indictment, and his demurrer was sustained and the indictment dismissed by order of the court, and the sheriff was directed to hold the defendant to await further action of the grand jury then in session. The grand jury promptly returned another indictment for perjury. The sheriff did not take T. L. Cooper into custody, nor has he been arrested since the second indictment, but has fled, and no disposition of the charge against him has ever been made.

In January, 1908, J. L. Cooper filed suit against the sheriff to recover the sum of \$250 paid as aforesaid for T. L. Cooper; his contention being that there is no law authorizing the sheriff to take money as a deposit in lieu of bail, and that the money so deposited with the sheriff was for T. L. Cooper's appearance at the February term, 1907, to answer the charge preferred against him on the first indictment, and that there was no agreement that it should be held to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

secure his appearance on another indictment at another term of the court. An interpleader was filed by the sheriff, in which he set up substantially the foregoing facts, and alleged, further, that the money was in a local bank to his credit as sheriff, and was held by him as special bail for the appearance of T. L. Cooper, who was still at large, and that he held the money ready to pay into court to be applied as the court might order. The court thereupon ordered the sheriff to pay the money into court and to take the receipt of the clerk. Judgment nisi was afterwards entered against T. L. Cooper, without the knowledge of J. L. Cooper, the plaintiff. This cause was tried on the pleadings and an agreed state of facts, and the court found for the defendant, and ordered that plaintiff take nothing by his suit, and taxed him with costs, from which judgment this appeal is prosecuted.

Smith & Totten, for appellant. Geo. Butler, Asst. Atty. Gen., for appellee.

WHITFIELD, C. J. In section 1464, Code of 1906, it is provided as follows: "It is the duty of the sheriff taking a bail bond to return the same to the clerk of the circuit court of the county in which the offense is alleged to have been committed on or before the first day of the next term thereof; and if any sheriff neglect to take a bail bond, or if the same, from any cause, be insufficient at the time he took and approved the same, on exceptions taken and filed before the close of the next term, after the same should have been returned, and upon reasonable notice thereof to said sheriff, he shall be deemed and stand as special bail, and judgment shall be rendered against him as such." On the facts of this case we think the sheriff became special bail. The sheriff admits he is special bail himself, and pays the money into court, and left the contest between the plaintiff and the state, represented by the district attorney. On this ground alone we rest the judgment of affirmance.

There is, however, another ground, to wit, that the plaintiff is in *pari delicto* with him in having joined in the violation of the law in taking the deposit of \$250, instead of taking a proper bond or recognizance. In 50 Ill. 199, *Davis v. People*, we have a case on all fours with the case at bar. It was illegal in the state of Illinois to take the cash deposit instead of a bond or recognizance, and the court held that the act of the sheriff was illegal. But it went on to hold that the plaintiff was in *pari delicto* with the sheriff, and so could not recover the money. That court said:

"Then it follows that the act is unauthorized and illegal, and, if so, the sheriff has wrongfully become possessed of this money, and plaintiff in error is entitled to recover it back, unless he is in *pari delicto*. That

it is a flagrant violation of the duty of a sheriff or jailer to discharge a prisoner committed to his custody under proper authority, unless it be by legal requirement, there can be no question; and, should a sheriff receive a bribe for the purpose, he would no doubt render himself liable to indictment and punishment under the Criminal Code, or where the sheriff willfully, or from ignorance of his duty, unlawfully discharges a prisoner indicted for crime. Section 101 of the Criminal Code declares that if any sheriff, coroner, jailer, keeper of a prison, constable, or other officer or person whomsoever, having any prisoner in his legal custody before conviction, shall voluntarily permit or suffer such prisoner to escape or go at large, every such officer or person so offending, shall, on conviction, be fined in any sum not exceeding \$1,000, and imprisoned in the county jail not exceeding six months. It is apparent that the receipt of this money for the purposes shown by the evidence was illegal, and that it did not warrant the discharge of the prisoner; and, if that was not authorized, it was in violation of section 101 of the Criminal Code; and, if so, then plaintiff in error was *particeps criminis*. There is no rule of law more firmly established than that a party who gives or pays money to induce another to commit a crime or misdemeanor, being a party to it, cannot recover it back. Although this money was not paid as a bribe, it was left as an indemnity to the sheriff to procure the release of the prisoner, and plaintiff in error thereby contributed to the breach of the law, and, from the evidence in the case, to a violation of the Criminal Code. It then follows that, as plaintiff in error contributed to the wrongful discharge of the prisoner and has thus assisted in obstructing justice, he has no right to recover this money back from defendant in error."

The case of *Smith v. State*, 86 Miss. 315, 38 South. 319, rests upon a different state of facts, and upon a different principle of law. There is no merit or justice in the contention of the appellant.

Therefore the judgment is affirmed.

(95 Miss. 644)

MOORES v. THOMAS et al. (No. 13,523.) (Supreme Court of Mississippi. April 19, 1909.)

1. TAXATION (§ 421*) — ASSESSMENT — SUFFICIENCY OF DESCRIPTION.

The description of property assessed for taxation as the W. $\frac{1}{4}$ X N. W. $\frac{1}{4}$ —S. E. $\frac{1}{4}$ X N. W. $\frac{1}{4}$ is a sufficient description of the W. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ and S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$; the almost universal practice being to omit the "of," and it being allowable to disregard the "X."

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 734; Dec. Dig. § 421.*]

2. TAXATION (§ 341*) — ASSESSMENT — DIRECTORY PROVISIONS.

The assessment in *solido* of two tracts of land belonging to different individuals does not invalidate the assessment; Code 1906, § 4283,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Index

directing how the roll is to be made up, and providing that all the subdivisions of a section shall be set down, if they belong to different persons, being merely directory.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 575; Dec. Dig. § 341.*]

3. TAXATION (§ 689*)—TAX SALES—VALIDITY OF PROCEEDINGS.

Code 1906, § 4284, stating the essentials of an assessment as to description of the land, and section 4332, providing that no tax sale shall be invalidated, except by proof that the land was not liable for sale for the taxes, or that the taxes had been paid before sale, or that the sale had been made at the wrong time or place, and that if any part of the taxes for which the land was sold was illegal, or not chargeable on it, that shall not invalidate the sale, unless it appear that before sale the amount legally chargeable on the land was paid or tendered to the tax collector, declare the only matters which will invalidate a tax sale.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 689.*]

4. TAXATION (§ 709*)—SALE—REDEMPTION.

Where two tracts of land belonging to different owners are assessed together, one of the owners would not have to pay on both tracts, or redeem both, if sold for taxes; but he could pay on or redeem any subdivision, under Ann. Code 1892, § 3824, providing that if the purchaser at a tax sale bid and pay a larger sum than the amount of taxes, damages, and costs, and the excess at redemption be in the collector's hands, it shall be refunded to the purchaser, and if only a part of the land be redeemed the excess shall be apportioned ratably to the amount of taxes due at the time of sale on the respective parts, and section 3853, providing that the owner of land sold for taxes may redeem any part of it, where it is separable by legal subdivisions of not less than 40 acres.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 709.*]

5. TAXATION (§ 335*)—LIABILITY OF PERSONS—ESTOPPEL TO DISPUTE.

Ann. Code 1892, § 3772, provides that lands not given in by any person shall be valued by the assessor. Section 3787 provides that assessment rolls shall remain on file subject to objection for a certain time, and that persons failing to file objections shall be concluded by the assessment after its approval by the board of supervisors or by operation of law. *Held*, that where an owner leaves the assessment of his land to the assessor, and fails to file objections thereto, he is liable for the taxes so assessed, and upon sale of the land therefor and failure to redeem it his ownership thereof is lost.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 562; Dec. Dig. § 335.*]

Appeal from Chancery Court, Harrison County; T. A. Wood, Chancellor.

Bill to quiet title by J. H. Moores against Stanley O. Thomas and others. Decree of dismissal, and complainant appeals. Reversed, and decree entered for complainant.

In October, 1906, the appellant filed a bill in chancery to quiet his tax title to the land in controversy, which was bought by him in 1893 at a tax sale for the taxes of the year 1892. The defendants answer, and the questions presented for the court to pass on are: First, that the assessment and sale are void because of insufficient description;

second, because the land was not all owned by one party, but was assessed on the tax roll in one assessment, as to an unknown owner. The chancellor found for defendants, and dismissed the bill, and complainant appeals.

T. S. Howell, for appellant. Money & Graham, for appellees.

MAYES, J. There are two contentions in this case on the part of appellees. The land in controversy, 120 acres, was the subject of different ownership at the date of assessment and sale for taxes; 80 acres being owned by one person, and the remaining 40 by another. The whole tract was assessed together as "Unknown," and described as the "W. $\frac{1}{2}$ X N. W. $\frac{1}{4}$ —S. E. $\frac{1}{4}$ X N. W. $\frac{1}{4}$." It is argued that this assessment is void, because the description is insufficient; and, if this contention be not sound, then it is argued that the assessment and sale was void, because the assessment was in solido, and it is asserted that under section 4283, Code 1906 (section 3774, Ann. Code 1892), an assessment to "Unknown" must comprise only 40 acres.

The almost universal practice is to omit the "of," and the "X" may be disregarded. The description of the land by abbreviation commonly used on the roll, as shown by the pages in the transcript, leaves no doubt that the 120 acres known as W. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ and S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ were assessed. The argument that, because the 80 acres and the 40 acres belonged to different owners, the assessment was void, is not sound. The direction as to how the roll is to be made up by section 4283, Code 1906 (section 3774, Ann. Code 1892) is merely directory, and nonobservance did not vitiate the assessment. Sections 4284, 4332, Code 1906 (sections 3775, 3817, Ann. Code 1892), declare what, and only what, shall invalidate a sale for taxes.

The argument that any harm could come to the owner of either parcel by the joint assessment is unsound, for it is not true that the owner would have to pay on all or redeem all. The owner may pay on any subdivision or redeem any subdivision. Sections 3824 and 3853, Ann. Code 1892.

It is the duty of the owner of land to give it in to the assessor, and, if he does not, the assessor is to assess it. Section 3772. The assessor is to call on each person for a list of his personal property. Section 3754. Not so as to land; nor is any oath required as to land. The assessor must assess it as best he can. A time is fixed for all objections. Section 3787, et seq. If the negligent owner has left the assessment to the assessor, and has any objection to the assessment, he should make them at the time prescribed, failing in which, he must pay on his own. If not, it must be sold, and, if not redeemed,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

it is lost to him. The requirement as to separate lands of different owners is based on the requirement that owners shall give in the lands to the assessor, and presupposes that to be done. How else is the assessor to know as to ownership?

Our law is extremely liberal to the owner. He must know his own, and pay the taxes on it, or lose. Every opportunity is given for correction of errors and prevention of injustice. It is only by neglect and failure of plain duty that loss can come. The rights of infants and persons of unsound mind are safeguarded, and adults can suffer only by neglect of the most reasonable requirements.

The state has been trying for many years to compel land owners to pay taxes on their land, and those who disregard their obligations to the state and fail to pursue the laws are entitled to have only themselves to blame. An assessment is necessary; but placing the land on the roll for assessment, with a valuation, by a description commonly used and understood, is an assessment, and the owner, who knows his own, is bound to look after it, and complain at the time and in the manner prescribed for all, and, if he does not, he must suffer the consequences. It is no hardship or injustice to visit the legal consequences of his disregard of duty and neglect of his interest on one who fails to give in his land for taxation, and to look after it, and pay the taxes on it, or redeem it, until years have elapsed and sales have been made and value increased.

The courts are bound to support the legislative policy to secure payment of taxes on land, and uphold all acts not in contravention of the Constitution. The decisions in other states, whose statutes are different from ours, and much in the works on Tax Titles, are wholly inapplicable here, where our system is *sui generis* in many respects.

The decree of the chancellor is reversed, and a decree entered here confirming the title of complainant.

HUMPHREYS v. McFARLAND. (No. 13,724.)

(Supreme Court of Mississippi. April 19, 1909.)

Appeal from Circuit Court, Yalobusha County; Sam C. Cook, Judge.

"To be officially reported."

Action between Ed Humphreys and W. B. McFarland. From the judgment, Humphreys appeals. Affirmed.

See, also, 48 South. 182.

I. T. Blount, for appellant. Kimmons & Kimmons, for appellee.

WHITFIELD, C. J. This case is perfectly controlled by the opinion recently delivered in the case of Spengler v. Stiles-Tull Lumber Co., 48 South. 966. Affirmed.

BAKER v. COLUMBUS RY., LIGHT & POWER CO. (No. 13,917.)

(Supreme Court of Mississippi. April 19, 1909.)

Appeal from Circuit Court, Lowndes County; J. L. Buckley, Judge.

Action between Martha Baker and the Columbus Railway, Light & Power Company. From the judgment, Baker appeals. Affirmed.

Wm. P. Stribling, for appellant. Wm. Baldwin, for appellee.

PER CURIAM. Affirmed.

PILGREEN v. SPENCER et al. (No. 13,715.)

(Supreme Court of Mississippi. April 19, 1909.)

Appeal from Chancery Court, Chickasaw County; J. Q. Robbins, Chancellor.

Action between E. G. Pilgreen and Dicus L. Spencer and others. From the judgment, Pilgreen appeals. Affirmed.

J. H. Ford and L. P. Haley, for appellant. Leftwich & Tubb, for appellees.

PER CURIAM. Affirmed.

STANLEY et al. v. HALL. (No. 13,893.)

(Supreme Court of Mississippi. April 19, 1909.)

Appeal from Chancery Court, Alcorn County; J. Q. Robbins, Chancellor.

Action between Annie D. Hall and Minnie W. and J. C. Stanley. From the judgment, the Stanleys appeal. Affirmed.

Young & Young, for appellants. Candler & Candler, for appellee.

WHITFIELD, C. J. Affirmed. See Gordon v. Anderson, 90 Miss. 677, 44 South. 67.

(159 Ala. 128)

TEMPLIN v. STATE.

(Supreme Court of Alabama. Feb. 9, 1909.)

Rehearing Denied April 6, 1909.)

1. TRESPASS (§ 81*)—CRIMINAL RESPONSIBILITY—WARNING—PERSON GIVING WARNING.

One could not be convicted of trespass after warning, where the warning was given by one in his capacity as an officer of the law, and not as the owner's agent, though he was also an agent of the owner, with authority to warn off trespassers.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. § 171; Dec. Dig. § 81.*]

2. INDICTMENT AND INFORMATION (§ 166*)—PROOF—CONJUNCTIVE AVERMENTS.

Where a complaint charged two offenses conjunctively, proof of both was required to sustain a conviction.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. § 527; Dec. Dig. § 166.*]

3. INDICTMENT AND INFORMATION (§ 129*)—JOINDER OF OFFENSES—CONJUNCTIVE AVERMENTS.

A complaint charging that accused trespassed after warning, and refused to leave the premises after being warned to do so, charged two offenses conjunctively.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. § 414; Dec. Dig. § 129.*]

4. CRIMINAL LAW (§ 1187*)—DISPOSITION—REVERSAL AND RENDITION.

Where the evidence conclusively showed that there could be no conviction of the offense charged, a judgment of conviction will be reversed, and judgment rendered discharging accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3221; Dec. Dig. § 1187.*]

Mayfield, J., dissenting in part.

Appeal from Bibb County Court; W. L. Pratt, Judge.

J. C. Templin was convicted of trespassing after warning, and he appeals. Reversed, and accused discharged.

The affidavit was in the following language: "Personally appeared before me, G. G. Pate, a justice of the peace in and for said county, C. C. Peyton, who, being duly sworn, says on oath that J. C. Templin, within 12 months before making this affidavit, in said county, did trespass after warning, and did refuse to leave the premises of Red Feather Coal Company, after being warned to do so, against the peace and dignity of the state of Alabama," etc. The evidence tended to show that the defendant was on a road which led from the main public road near Lucile to the post office, commissary, and houses occupied by the employes of the Red Feather Coal Company, when he was warned to get off the property. The warning came from Peyton, whose testimony tended to show that it was given in his capacity as an officer of the law, and not as an agent or employe of the Red Feather Coal Company.

Frank S. White & Sons, for appellant. Alexander M. Garber, Atty. Gen., and Thomas W. Martin, Asst. Atty. Gen., for the State.

MAYFIELD, J. On further examination of this record we find no evidence to support the judgment of conviction. The undisputed evidence shows that the warning given was by Peyton as an officer of the law, and not, as the agent of the owner of the premises. While it is shown that Peyton was the agent of the company, the owner of the premises, and had authority to warn off trespassers, yet he testified that he warned defendant as an officer of the law, and not as the agent of the owner.

The affidavit or complaint charged that defendant trespassed after warning, and refused to leave the premises after being warned. It charged two offenses conjunctively, and this required proof of both. There was no attempt to prove the first—in fact, all the evidence indisputably disproved it; nor did the evidence prove any offense, if properly charged. The evidence conclusively showing that there could be no conviction of the offense charged, the judgment is reversed, and judgment will be here rendered discharging the defendant.

Reversed and rendered.

DOWDELL, C. J., and SIMPSON and DENSON, JJ., concur.

MAYFIELD, J. The writer is of the opinion, though the other justices do not agree with him in this, that the affidavit was insufficient to support a conviction, in that there was no oath or affirmation to support it, that affiant had probable cause for believing, and did believe, that an offense was committed, and that defendant was guilty thereof, as required by the statute (Code 1907, § 6703), and that both the arrest and the prosecution were in palpable violation of sections 5, 7, and 8 of the state Constitution of 1901, which read as follows:

"Sec. 5. That the people shall be secure in their persons, houses, papers and possessions from unreasonable seizure or searches, and that no warrants shall issue to search any place or to seize any person or thing without probable cause, supported by oath or affirmation."

"Sec. 7. That no person shall be accused or arrested, or detained, except in cases ascertained by law, and according to the form which the same has prescribed; and no person shall be punished but by virtue of a law established and promulgated prior to the offense and legally applied.

"Sec. 8. That no person shall, for any indictable offense, be proceeded against criminally, by information, except in cases arising in the militia and volunteer forces when in actual service, or when assembled under arms as a military organization, or, by leave of the court, for malfeasance, misdemeanor, extortion and oppression in office, otherwise than is provided in the Constitution; provided, that in cases of misdemeanor, the Legislature may by law dispense with a grand jury and authorize such prosecutions and proceedings before justices of the peace or such other inferior courts as may be by law established."

The mere statement, in the affidavit, that the offense was committed and the defendant was guilty, is not a compliance with the statute authorizing prosecutions to be commenced by such affidavit, nor a compliance with the Constitution. The Constitution requiring that "no warrant shall issue . . . without probable cause, supported by oath," etc., and that arrests and prosecutions must be according to forms prescribed by law, and the statute having prescribed what is sufficient to support the warrant and prosecution, in lieu of an indictment (which would otherwise be necessary), and having not only done this, but given the form thereof, this court cannot say that a different form from that prescribed by law is as good as, or better than, the only one prescribed by the Legislature. If the Legislature had done as to the affidavits, as it has as to indictments, then the affidavit in question would be suf-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ficient; but it has not done so. It has not said that this form prescribed, or some other like it, will be sufficient; but it has said that the one given or prescribed is sufficient. Courts can only construe, expound, and apply the statutes. They cannot reform them, nor make others, and say these are the law, because better than the ones the Legislature made. The form that the "law" (the Constitution and the statute) has prescribed for this arrest and this prosecution, and which the Constitution directs and demands, provides that the affiant shall make oath that he (affiant) has probable cause for believing, and does believe, what he swears. It also requires the judge, court, or justice issuing the process, thus starting the criminal machinery of the state against the citizen, to have such probable cause for believing that the offense charged in the affidavit was committed.

This record shows that there was not the semblance of an attempt to comply with this form prescribed by law, but that an entirely different one was adopted—one which the court must, in my humble opinion, say is not the one prescribed, but a better one. The court has no more power or right to make a better one, than it has to make a worse one, than that "prescribed by law." This case illustrates, as clearly and strongly as it is possible so to do, the evils of allowing prosecutions to be begun and tried in such manner. Here is a man traveling upon the highway, pursuing his legitimate and lawful business, when he is suddenly hailed and halted, and told by another he is a trespasser—a law breaker—and peremptorily ordered to then and there turn his wagon around and leave the road. He refuses so to do, until he can proceed a few yards and deliver some food and vegetables to customers who had ordered same—promising to thereupon leave, at the bidding of this lawmaker and executioner; but this small request is denied the citizen, and he is then and there arrested, deprived of his liberty, and carried before a magistrate, and this lawmaker and executioner swears he has committed two offenses. Upon this a warrant is issued, returnable to the court, and the citizen is put upon trial; and on the evidence of the lawmaker and executioner, and all the other witnesses, he is convicted and sentenced. He appeals to this court; and the cause must be reversed and rendered, because the evidence, which is undisputed, shows the commission of no offense.

I deem it proper to say here that what is stated above is not intended as a criticism of the affiant and officer who made this arrest and affidavit, because it conclusively appears that he testified truly, fully, and freely as to all things, and did only what he thought was his duty, but that the wrong is in the practice, which requires a man not learned in the law to make, construe, and execute the

law, without any kind of a quasi judicial determination as to whether any offense at all has been committed.

(150 Ala. 159)

HORAN v. GRAY & DUDLEY HARDWARE CO.

(Supreme Court of Alabama. Feb. 4, 1909. Rehearing Denied April 6, 1909.)

1. MASTER AND SERVANT (§ 258*)—INJURY TO EMPLOYÉ—PLEADING—SUFFICIENCY.

A complaint for injury to an employé, who fell into an unguarded hole in a basement, was insufficient, where it failed to aver any duty of the employer to warn plaintiff of the danger, resulting in the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 817; Dec. Dig. § 258.*]

2. MASTER AND SERVANT (§ 261*)—INJURY TO EMPLOYÉ—COMPLAINT—CONSTRUCTION—PRESUMPTIONS.

Under the rule requiring a pleading to be construed more strongly against the pleader, on demurrer to a complaint for injury to an employé, which fails to allege any duty of the employer to warn against the danger, or any want of knowledge by the employé of the danger, it will be presumed such knowledge existed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 853; Dec. Dig. § 261.*]

3. MASTER AND SERVANT (§ 154*)—DANGER TO EMPLOYÉ—DUTY TO WARN.

If an employé knew of the danger resulting in his injury, or by using ordinary care could have known of it, his employer was not bound to warn him against it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 308; Dec. Dig. § 154.*]

4. APPEAL AND ERROR (§ 680*)—REVIEW—INSUFFICIENT RECORD.

Overruling of demurrers to pleas cannot be reviewed, where they are not in the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2880-2882; Dec. Dig. § 680.*]

5. JUDGMENT (§ 194*)—RIGHT TO—ESTABLISHMENT OF ONE OF SEVERAL PLEAS.

Establishment of one of several pleas as fully entitles defendant to judgment as proof of all would.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 355, 356; Dec. Dig. § 194.*]

6. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—OVERRULING DEMURRER TO PLEAS.

Any error in overruling a demurrer to a plea was harmless, where defendant was entitled to a verdict on another plea.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4102; Dec. Dig. § 1040.*]

Appeal from City Court of Birmingham; C. C. Nesmith, Judge.

Action by William Horan against the Gray & Dudley Hardware Company for damages for injuries suffered in the course of his employment. Judgment for defendant, and plaintiff appeals. Affirmed.

Count 1 was in the following language: "Plaintiff claims of defendant \$10,000 as damages, for that on, to wit, the 4th day of January, 1905, plaintiff was the servant or employé of the defendant, and engaged in

the discharge of his duties as such servant or employé, which duty was to go into the basement of a certain school building in Woodlawn, Ala., to take measurements for cold-air pipes to a furnace which was being placed in said school building by defendant through its servants or employé. Plaintiff avers that in fitting said furnace in said school building, or preparing for its use or operation, defendant's said servants or employé, acting within the scope of their authority, dug or excavated a ditch or hole in the cellar or basement of said school building near or adjoining said furnace, which ditch or hole was uncovered and without guard or signal showing its existence, and without anything to warn of its danger, and which said ditch or hole was dangerous to any one working in said basement or cellar near said furnace and without knowledge of the existence of said ditch or hole. Plaintiff avers, further, that defendant's foreman, Ollie Chaddock, who had superintendence intrusted to him and was then in the exercise of his said superintendence, negligently failed to warn plaintiff of the existence of said ditch or hole, and, as a proximate consequence of his negligent failure to warn plaintiff of the existence of said ditch or hole, plaintiff fell or stepped into said hole, and injured, strained, or broke his right leg or ankle, from which injury plaintiff suffered great physical and mental pain, and was caused to expend money and lose time in curing himself from his said injuries and hence this suit."

The fourth count is as follows: "Plaintiff claims of the defendant corporation ten thousand dollars (\$10,000.00) as damages, for that on, to wit, the 4th day of January, 1906, plaintiff was employed and in the service of defendant, and in the discharge of his duty as defendant's agent or servant; that defendant was, through its agents or servants, engaged in putting in or installing a furnace or heating apparatus in a school building in Woodlawn, Jefferson county, Ala., and one Ollie Chaddock was the foreman of defendant, and he was delegated with authority from defendant to direct servants or employé of defendant engaged in that particular work. And plaintiff avers that the said Ollie Chaddock instructed the plaintiff to take certain measurements from a furnace in the basement of said school building, when there was but little light to enable plaintiff to see; and the said Ollie Chaddock negligently failed to tell, warn, or inform plaintiff that there was a hole or ditch near said furnace which was dangerous. And plaintiff avers that, as a proximate consequence of such negligent failure of the said Ollie Chaddock to warn plaintiff of the danger to him by reason of said hole or ditch, plaintiff walked or fell into said ditch or hole, and strained, fractured, or injured his leg, ankle, or foot, and suffered great mental and physical pain therefrom, and was rendered less

able to work and earn money, to his great damage; and hence this suit."

Demurrers were interposed to count 1 as follows: "It is not alleged in said count that plaintiff could not, by the exercise of due care, have seen said ditch or hole. No state of facts is averred, making it incumbent upon plaintiff to warn defendant of the existence of said ditch or hole. It is not averred that he could not have seen said ditch or hole by the exercise of due care. It is not averred that plaintiff did not know of the existence of said ditch or hole at the time he fell into it. It is not alleged that said ditch or hole was so dangerous that it was the duty of the defendant to warn plaintiff of the existence of said ditch or hole."

The same demurrers were interposed to count 4, with this additional one: It does not appear that said Ollie Chaddock knew that there was but little light in said basement.

Plea 7 was as follows: "Defendant says that plaintiff proximately contributed to the injuries complained of in this: Plaintiff knew that it was usual and customary, in installing furnaces and heating plants in buildings, in many instances to dig a ditch or make an excavation for cold-air pipes, or other pipes connecting with said furnace; and hence plaintiff knew, or ought to have known, by reason of that fact, that there was or might be a ditch or excavation in said basement, and without making inquiry as to the existence of such ditch or excavation, and without light, negligently went into said basement."

Robert N. Bell, for appellant. Cabaniss & Bowie, for appellee.

DOWDELL, J. The first and fourth counts of the complaint, to which demurrers were sustained, were each defective and subject to the demurrer. In neither of said counts is it alleged that any duty existed on the part of the master to warn the servant of the danger from which the injury resulted, nor is any state of facts averred from which such duty would arise. For aught that appears from the averments of these two counts, the servant himself knew of the existence of the danger, and, according to the familiar rule of construing the pleading more strongly against the pleader, it will be presumed, on demurrer raising the question, from a failure to aver want of knowledge, that such knowledge existed. If the plaintiff had knowledge of the danger, or by the exercise of ordinary care could have known of it, then the defendant was under no legal duty to warn him. The demurrer sufficiently raised the question, and the ruling of the court thereon was free from error.

The judgment entry recites that demurrers to pleas 7 and 8 were overruled, but the demurrers to these pleas are nowhere set out

in the record. We cannot tell what the demurrers were, and for aught we know they were general, and for this reason were overruled. In this state of the record, the action of the court on the demurrers cannot be reviewed on appeal. This has been repeatedly held by this court.

Where there are several pleas upon which issue is joined, the establishment of any one of them entitles the defendant to a verdict, as much so as the proving of all of them. The seventh plea of the defendant in the case before us, upon which issue was joined, was proven without conflict in the evidence. This authorized the giving of the general affirmative charge, as requested in writing by the defendant. Under this state of the case, whether error was committed or not in the ruling of the court on the demurrer to the fourth plea is of no consequence, since, if error was committed, it was error without injury.

It is unnecessary to consider other questions discussed by counsel, as what we have ruled is conclusive of the case. The judgment is affirmed.

Affirmed.

SIMPSON, DENSON, and MAYFIELD,
JJ., concur.

(160 Ala. 300)

HICKEY v. McDONALD BROS.

(Supreme Court of Alabama. Feb. 4, 1909.
Rehearing Denied April 3, 1909.)

1. CHATTEL MORTGAGES (§ 153*)—RECORD—"PURCHASER WITHOUT NOTICE."

A "purchaser without notice," within Code 1907, § 3386, providing that transfers of personalty to secure debts, etc., are inoperative against "purchasers without notice" until recorded, etc., means a bona fide purchaser without notice.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. § 153.*]

For other definitions, see Words and Phrases, vol. 7, p. 5860.]

2. CHATTEL MORTGAGES (§ 153*)—BONA FIDE PURCHASERS.

One is not a bona fide purchaser, within Code 1907, § 3386, providing that transfers of property to secure debts, etc., are inoperative against purchasers without notice until recorded, etc., if he knows facts which should cause a prudent man to investigate, and which, if followed up, would lead to a defect in the seller's title.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 256-259; Dec. Dig. § 153.*]

3. CHATTEL MORTGAGES (§ 157*)—PURCHASER OF MORTGAGED PROPERTY—BONA FIDES—EVIDENCE—SUFFICIENCY.

Evidence held to warrant a finding that, when defendant in detinue bought the mortgaged property involved, he knew facts sufficient to put him upon inquiry as to the seller's title, which, if followed up, would lead to a discovery of its invalidity.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. § 157.*]

4. TRIAL (§ 191*)—INSTRUCTIONS—ASSUMPTION OF FACTS.

In detinue by chattel mortgagees against the mortgagor's purchaser, instructions that if defendant did not have notice of the mortgage, nor information which, if followed up, would lead to notice of such mortgage, verdict must be for him, and that before plaintiffs could recover they must show that defendant received such notice, or was placed in possession of facts which, if followed up, would lead to notice of the mortgage before he purchased, were properly refused, as assuming that defendant was a bona fide purchaser, and authorizing a recovery by him unless he had notice of the mortgage, or of facts which, if followed up, would lead to notice thereof.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431; Dec. Dig. § 191.*]

5. CHATTEL MORTGAGES (§ 157*)—PURCHASE OF MORTGAGED PROPERTY—BONA FIDES—JURY QUESTION.

Whether defendant, buyer of mortgaged personalty, was a bona fide purchaser, held, under the evidence, in detinue by the mortgagees, a jury question.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. § 157.*]

6. CHATTEL MORTGAGES (§ 157*)—PURCHASER OF MORTGAGED PROPERTY—BONA FIDES—INSTRUCTIONS.

In detinue by chattel mortgagees against the mortgagor's purchaser, instructions that if defendant had no notice of the mortgage, nor any information which would lead a reasonably prudent man to notice that his seller had obtained the property by fraud, and that plaintiffs held a mortgage before he bought, verdict must be for defendant, were properly refused as authorizing a finding for defendant, unless he had notice of the mortgage and of the fraud in his seller's title, or of facts which would have led to knowledge of both, whereas notice of either fact would preclude his defense as against plaintiffs.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. § 157.*]

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

Detinue by McDonald Bros. against T. J. Hickey. From a judgment for plaintiffs, defendant appeals. Affirmed.

The facts in this case are sufficiently stated in a former report of this case in 151 Ala. 497, 44 South. 201, 13 L. R. A. (N. S.) 413, reference to which is here made. The following charges were requested by the defendant and refused: (1) The general affirmative charge. (3) "The court charges the jury that if they believe from the evidence in this case that Hickey did not have any notice of the mortgage to McDonald Bros., and they further believe from the evidence that Hickey did not have any information which, if followed up, would lead to notice of said mortgage to McDonald Bros., then you must find for the defendant, and assess the alternate value of the property, and also assess the damages for the detention of the same." (4) "The court charges the jury that if they believe from the evidence that Hickey, the defendant in this case, had no notice of the mortgage to McDonald Bros., nor any infor-

mation which, if followed up, would lead a reasonably prudent man to notice that Tilly had obtained the mule by fraud, and that McDonald Bros. held a mortgage on said mule, before the purchase of the mule from Tilly, then you must find for the defendant." (5) "The court charges the jury that, before the plaintiffs can recover in this case, they must prove that the defendant received such notice, or was placed in possession of such facts, as, if followed up, would lead to notice of the existence of the McDonald mortgage, before the defendant purchased the mule from Tilly." (7) "The court charges the jury that if they believe from the evidence in this case that T. J. Hickey, the defendant in this case, had no notice of the mortgage to McDonald Bros., nor any information which, if followed up, would lead a reasonably prudent man to notice that Tilly had obtained the mule by fraud, and that McDonald Bros. held a mortgage on said mule, before the purchase of said mule from Tilly, then you must find for the defendant, and assess the alternate value of the property at \$225, and the value of the hire or detention at \$90."

Inge & McCorvey, for appellant. Sullivan & Stallworth, for appellees.

ANDERSON, J. When this case was here before (reported in 151 Ala. 497, 44 South. 201, 13 L. R. A. [N. S.] 413) this court held that the plaintiffs parted with the title to the mule under the sale. Consequently, on the trial from which this appeal is taken, the plaintiffs were put to their title under the mortgage given them by the purchaser at said sale. As the mortgage had not been recorded, the issue was whether or not the defendant was such a purchaser as is protected under the terms of section 3386 of the Code of 1907. "Purchasers without notice," as mentioned in section 3386 of the Code of 1907, has been construed to mean bona fide purchasers without notice. *Morris v. Bank of Attalla*, 142 Ala. 638, 88 South. 804; *Southern Association v. Riddle*, 129 Ala. 562, 29 South. 667. In the *Morris* Case, *supra*, it was held that, because the consideration of the subsequent purchaser was tainted with usury, he was in no position to invoke the statute of registration against the prior purchaser, whose mortgage had not been recorded, and of which the usurious mortgagee had no notice. If, therefore, the fact that usury, constituting a part of the evidence, prevented the purchase from being bona fide, any facts put in the possession of the second purchaser, which should cause a prudent man to investigate, and which, if followed up, would lead to a defect in the vendor's title, and he failed to investigate before purchasing, he will not be a bona fide purchaser; or if the consideration paid for the thing purchased is so grossly inadequate as to strike the understanding of an honest and intelligent man that the sale was not in good faith, the pur-

chase would not be bona fide. *Gordon & Rankin v. Tweedy*, 71 Ala. 213.

Our court, in discussing the right of subsequent purchasers to invoke the statute of registration against prior purchasers said, in the case of *Center v. P. & M. Bank*, 22 Ala. 743: "It has been repeatedly held, and may now be considered as settled law, that if the subsequent purchaser be put in possession of such facts concerning the title which the vendor offers to sell as should cause a prudent man to inquire further before he would proceed with the purchase, he will be charged with notice required by the statute; and if he still goes on to complete his purchase he does so at his own peril, and will not be allowed to invoke the protection of the statute of registration. * * * When a second purchaser is affected with such notice, he can acquire no equity, because it is his own folly to expend money under such circumstances; and it is not just that by such purchase he should be permitted to deprive the first purchaser of the title he has acquired by sale made to him bona fide, and on which a full and valuable consideration has been paid to the vendor. Such second sale would be fraudulent in the vendor; and if the subsequent purchaser is, or from the circumstances surrounding him ought to be, in possession of facts sufficient to put him on his guard, he becomes particeps fraudis, and is entitled to no protection." See, also, *Smith & Co. v. Zureher*, 9 Ala. 208. The case of *Jones v. State*, 113 Ala. 95, 21 South. 229, is not applicable to section 3386 of the Code of 1907, although cited under said section. The section there held as not pertaining to bona fide purchasers was section 999 of the Code of 1896 (section 3376 of the Code of 1907).

It must be observed that whether the facts put into the possession of the second purchaser would or would not, if followed up, lead to a discovery of the first purchaser's title, yet if they are such as to put a prudent man on inquiry as to the vendor's title, and the second purchaser consummates the sale without ascertaining that the vendor had the right to sell, he cannot invoke the statute of registration against a prior bona fide purchaser, because he is not himself a bona fide purchaser, and does not come under the protection of the statute. There was evidence from which the jury could infer that the defendant was in the possession of facts that would question the vendor's title to the mule and his right to sell the same, and which would put a prudent man upon inquiry before consummating the purchase, and which, if followed up, would disclose that the vendor did not have the right to sell the mule, whether they led to knowledge of the plaintiffs' mortgage or not. There was evidence in this case from which the jury could have inferred that the defendant was in possession of facts sufficient to put him upon inquiry as to the title of Tilly, and which, if followed

up, would have led to a discovery of its imperfection. Tilly was working for the defendant as a day laborer for small wages, was hard up, and continually overdrawing his wages. Tilly claimed to have gotten the mule from Payne under a \$250 mortgage held by him. Payne was represented as living near Spring Hill, which is in the same county. In addition to this, there was the statement of the defendant, made to one of the plaintiffs, that Tilly was lying around his place trying to sell the mule, and he finally paid him \$50 for a mule agreed to be worth at the time \$185. The trial court did not, therefore, err in refusing the general charge requested by the defendant.

Charges 3 and 5, requested by the defendant, were properly refused. They assume that the defendant was a bona fide purchaser, and instruct a finding for the defendant unless he had notice of the plaintiffs' mortgage, or of facts which, if followed up, would lead to notice of said mortgage. As we have heretofore set out, unless the defendant was a bona fide purchaser, he could not invoke the statute of registration, and it was a question for the jury as to whether or not he was such a purchaser.

Charges 4 and 7, requested by the defendant, were properly refused. They request a finding for the defendant unless he knew of the plaintiffs' mortgage, or of facts that would lead to notice of same, notwithstanding Tilly had a defective title. It is true these charges postulate both notice of the plaintiffs' mortgage and the fraud in the title of "Tilly"; but they instruct a finding for the defendant unless he had notice of both, or of facts which would have led to knowledge of both, when, under the law, notice of either fact postulated would cut off his defense as against these plaintiffs.

The judgment of the circuit court is affirmed.

Affirmed.

TYSON, C. J., and SIMPSON, DENSON, and MAYFIELD, JJ., concur.

(159 Ala. 614)

ROE v. DOE ex dem. ROWE.

(Supreme Court of Alabama. Feb. 11, 1909.
On Rehearing, April 6, 1909.)

1. ADVERSE POSSESSION (§ 40*)—DURATION OF POSSESSION.

One who has been in adverse possession of land by himself and the predecessors under whom he claims for 52 years has title to the land by adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 148; Dec. Dig. § 40.*]

2. ADVERSE POSSESSION (§ 32*)—VISIBLE AND NOTORIOUS POSSESSION—FILING NOTICE.

Code 1896, § 1541, providing that any person who, without color of title or bona fide claim of inheritance or of purchase, enters upon real

estate and asserts adverse possession thereof, must give notice thereof by filing in the office of the judge of probate of the county in which the land lies his written declaration setting forth such claim, does not apply to one who purchases the land and is put in possession under a bona fide contract of purchase, or to one whose predecessor had secured title through adverse possession before the statute became effective.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 32.*]

On Rehearing.

3. LIMITATION OF ACTIONS (§ 76*)—COMPUTATION OF PERIOD—POSTPONEMENT BY PRECEDING LIFE ESTATE.

Where adverse possession of land starts before plaintiff's predecessor secures title to the property, that such predecessor wills the property as a life estate to claimant's mother, with the remainder in fee to claimant, does not postpone the running of the statute in favor of the one holding by adverse possession during the existence of the life tenancy, as limitations will not be interrupted by the subsequent disability of a claimant, unless by a statutory provision.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 417; Dec. Dig. § 76.*]

Appeal from Circuit Court, Macon County; S. L. Brewer, Judge.

Ejectment by John Doe, on the demise of Cordelia Roe, against Richard Roe, with notice to Mary R. Goetchius and Ella Russell. There was judgment for plaintiff, and defendant appeals. Reversed and remanded.

The controversy was over a part of the N. ½ of section 28, township 16, range 5. The defendant disclaimed as to a part of said section which lay on one side a fence row running across the quarter section, and as to the other she pleaded not guilty. Plaintiff derived the title from the government through mesne conveyances to one A. B. Fannin, by will of Fannin to Mary R. Reid, and from Mary R. Reid to plaintiff. The will, it seems, created a life estate in the wife of the testator, who died four years before the bringing of the suit. Plaintiff was one of the children, and Mary R. Reid was the other living child, and the deed from Reid to Roe was for a half interest. The evidence for the defendant showed that she and her predecessors in title had cultivated and otherwise used the land up to the fence row, and that it had been so used and cultivated by her and her predecessors in title before the death of Mr. Fannin, father of the plaintiff. The other facts sufficiently appear in the opinion of the court.

H. P. Merritt, for appellant. O. S. Lewis, for appellee.

ANDERSON, J. The defendant did not question the plaintiff's paper title to the north half of the section, or that the strip of land in controversy was in said north half, but relied solely upon actual adverse possession of said strip in herself and those under whom she holds for over 50 years. The plain-

tiff testified that her father was in the possession of the place; but she knew nothing about the location of the fence, and did not show a possession of the strip south of the fence. On the other hand, her witness Wesley Johnson testified that her possession was only to the fence, and that the defendant's hands cultivated the strip in question. The defendant proved by many witnesses that Col. Chappell maintained the fence 52 years ago, and was in possession of said land and claiming up to the fence; that Russell went into possession under Chappell, and claimed and cultivated up to the fence; and that the defendant has done the same ever since the land was purchased from Russell. The defendant, therefore, acquired title by adverse possession. It matters not that she filed no declaration of her claim to the land, under section 1541 of the Code of 1896, as that statute only became effective in 1893, and her predecessors' possession had already ripened into title, and she went into possession under them by a contract of purchase. Moreover, if she purchased the land and was put in possession under a bona fide contract of purchase, she did not have to file a declaration in the probate office in order to hold adversely. *Holt v. Adams*, 121 Ala. 664, 25 South. 716; *Sledge v. Singly*, 139 Ala. 346, 37 South. 98.

The trial court erred in not giving the general charge requested by the defendant. The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

On Rehearing.

ANDERSON, J. It is insisted by appellee's counsel that the plaintiff's title to the land, under the will of her father, Fannin, was subject to the life estate of her mother, and that the statute did not run against her until the death of her mother, the life tenant (a point not made in the original brief). This rule would obtain if the possession of the defendant and her grantors started after the creation of the plaintiff's remainder or held under the life tenant; but in the case at bar the possession started before Fannin, the father, and husband of the life tenant, acquired the land, and the statute of limitations was and had been running for years before her death, and before the creation of the plaintiff's estate in remainder. It is settled law that after the statute begins to run no subsequent disability supersedes its operation, unless by statutory provision. *Baker v. Barclift*, 76 Ala. 417; *Black v. Pratt Coal Co.*, 85 Ala. 508, 5 South. 89; section 4860 of the Code of 1907. The statute, having started and run for years before the plaintiff's estate came into existence, was not intercepted be-

cause, by the terms of her father's will, her mother took a life estate in the land, and she was not entitled to same until her mother's death.

In the case of *Gindrat v. Western R. R.*, 96 Ala. 162, 11 South. 372, 19 L. R. A. 839, the defendant never went into possession of the land until after the execution and recording of the deed creating the remainder.

(159 Ala. 508)

EQUITABLE LIFE ASSUR. SOCIETY OF UNITED STATES v. GOLSON.

(Supreme Court of Alabama. Feb. 4, 1909.
Rehearing Denied April 6, 1909.)

1. INSURANCE (§ 349*) — LIFE INSURANCE — FAILURE TO PAY PREMIUMS—FORFEITURE.
Failure to pay the premium on a life policy does not of itself forfeit the contract, unless the policy so provides.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 900; Dec. Dig. § 349.*]

2. INSURANCE (§ 349*) — LIFE INSURANCE — NONPAYMENT OF PREMIUMS—EFFECT.

A condition, within the limitation of the statute, that a life policy shall be forfeited for nonpayment of any premium, is a condition subsequent, and nonperformance avoids the policy, unless waived by insurer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 900; Dec. Dig. § 349.*]

3. INSURANCE (§ 349*) — LIFE INSURANCE — NONPAYMENT OF PREMIUMS—EFFECT.

A condition in a life policy, providing for its forfeiture for nonpayment of premiums, is for the benefit of insurer, and will be strictly construed; and a forfeiture will be enforced only when such is the plain meaning of the contract.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 891, 900; Dec. Dig. § 349.*]

4. INSURANCE (§ 349*) — LIFE INSURANCE — NONPAYMENT OF PREMIUMS—EFFECT.

A provision in a life policy that on default in payment of any annual premium after the third the policy may be surrendered for a non-participating paid-up policy, providing the policy be returned to insurer within six months after the date of default, otherwise the policy shall cease, does not provide for a forfeiture of the policy inside of six months after default, and after default insured has six months within which to elect to surrender the policy and get paid-up insurance, or to pay the premium, should he decide not to surrender the policy; and, on his failure to so elect, the policy does not become forfeited for six months after the default.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 891, 900; Dec. Dig. § 349.*]

Appeal from Circuit Court, Geneva County; H. A. Pearce, Judge.

Action by Mary W. Golson against the Equitable Life Assurance Society of the United States to recover on a life policy. From a judgment for plaintiff, defendant appeals. Affirmed.

The suit was for the sum of \$2,500, the face of the policy. The pleas admitted an indebtedness of \$909.60 as paid-up insurance under the terms of the policy, but sought to defeat a recovery upon pleas setting up the condi-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tions of forfeiture, which are fully set out in the opinion of the court. The proof showed that the insured died on the 8th day of June, 1907, and that the defendant had notice of the same, and that the annual premium was payable on or before the 7th day of March in each year, default in which occurs six months after said date.

C. D. Carmichael, for appellant. W. O. Mulky, for appellee.

ANDERSON, J. It has been almost universally held that the failure to pay the premium on an insurance policy does not, of itself, forfeit the contract, unless the policy so provides. 25 Cyc. 824, and authorities cited in note 64. It is true the policy may contain a valid condition, within the limitation of the statute, that it may be terminated or forfeited upon a failure to pay any premium or installment at the time specified in the contract, which would be a condition subsequent, and the nonperformance of which would avoid the policy, unless waived by the insurer. Such a condition, however, being for the benefit of the company, is to be strictly construed, and a forfeiture will be enforced only when it appears that such is the plain intent and meaning of the contract; and if there are repugnant conditions the court will enforce such as are in favor of the insured and will prevent a forfeiture. 8 Cyc. 821; *Ferguson v. Union Mutual Co.*, 187 Mass. 8, 72 N. E. 358; *McMaster v. Life Ins. Co.* (C. C.) 90 Fed. 40.

The pleas in the case at bar do not attempt to defeat a recovery upon the policy entirely, as they concede the plaintiff's right to recover the surrender value of the policy, but claim that the original policy was forfeited for nonpayment of the premium, which matured less than six months before the death of the insured. The forfeiture relied upon in the pleas is as follows: "If premiums upon the policy for not less than three complete years of assurance shall have been duly received by the society, and default shall be made in the payment of a subsequent premium, the policy may be surrendered for a non-participating paid-up policy, for the entire amount which the full reserve on the policy, according to the present legal standard of the state of New York, will then purchase as a single premium, calculated by the regular table for single-premium policies, now published by the society, providing that the policy be returned to the society duly receipted within six months after the date upon which the last premium in default has fallen due; otherwise, the policy shall cease and determine, and all premiums paid thereon shall forfeit to the society."

We do not think that this clause provides for a forfeiture of the policy inside of six months after default in the payment of the premiums, unless the insured during that

time surrenders the policy and gets a paid-up one under the terms of the contract, and thus releases himself from liability for unpaid premiums. In other words, the clause means that after default in any premium, after the third one, the insured has six months within which to elect to surrender the policy and get paid-up insurance, to the extent of what he has paid in, or to pay the premium, should he decide not to surrender the policy, and when he has failed to so elect, notwithstanding the premium is unpaid, the policy does not become forfeited for six months after said premium becomes due. The policies considered in the Alabama authorities cited by counsel for appellant contained a clause making the life of the policy dependent upon the payment of the premiums.

The special pleas failing to show that the original policy had been forfeited before the death of the insured, the trial court properly sustained the demurrer thereto. The judgment of the circuit court is affirmed.

Affirmed.

TYSON, C. J., and DENSON, McCLELLAN, and MAYFIELD, JJ., concur.

(160 Ala. 163)

STATE ex rel. ALMON, Solicitor, et al. v. BURKE, Judge.

(Supreme Court of Alabama. Feb. 4, 1909. On Rehearing, April 6, 1909.)

1. APPEAL AND ERROR (§ 854*)—HARMLESS ERROR—ERRONEOUS GROUNDS FOR CORRECT DECISION.

A correct judgment will not be reversed because the court based its decision on a wrong ground.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3408; Dec. Dig. § 854.*]

On Rehearing.

2. MANDAMUS (§ 147*)—PARTIES ENTITLED TO INSTITUTE.

Under Code 1907, § 636, authorizing the Attorney General to prosecute in the name of the state all suits necessary to protect the rights of the state, and under the statute defining the powers and duties of the circuit solicitor and his county solicitor, and under Code 1907, § 7793, making it a criminal offense for any solicitor to commence a prosecution for any offense, except where it is against his person or property, etc., mandamus by the state to compel a county judge to reinstate on the docket criminal cases can only be instituted on the relation of the Attorney General.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 288; Dec. Dig. § 147.*]

Appeal from Circuit Court, Cullman County; D. W. Speake, Judge.

Mandamus by the State of Alabama, on the relation of D. C. Almon, Solicitor for the Eighth Judicial Circuit, and another, against Robert I. Burke, as Judge of the County Court of Cullman County. From a judgment of dismissal, relators appeal. Affirmed.

Alexander M. Garber, Atty. Gen., Thomas W. Martin, Asst. Atty. Gen., and J. B. Brown, for appellants. George H. Parker and John O. Eyster, for appellee.

MAYFIELD, J. This was an application by the state, on the relation of D. C. Almon, its solicitor for the Eighth judicial circuit, and his county solicitor for Cullman county, to Hon. D. W. Speake, judge of the Eighth judicial circuit, for a mandamus to Hon. Robt. I. Burke, judge of the county court of Cullman county, to compel the said judge of the county court to reinstate upon the docket of the county court of Cullman county divers criminal causes for violation of the prohibition laws of this state, particularly mentioned in the petition for mandamus, which are alleged to have been unlawfully nol. pros'd by the said county court, without the consent or request of the circuit or the county solicitor, and over their protest, and to compel the said judge to proceed with the trial of said causes. The circuit court, after several preliminary orders and amendments of pleadings unnecessary to consider, on motion of the respondent, quashed the alternative writ and dismissed the petition, from which judgment and order the petitioners appeal to this court and assign various errors.

It is not only unnecessary, but improper, for us on this appeal to pass upon the merits of the petition or the assignments of error. We know of no law authorizing the solicitor, or any other person or officer, other than the Attorney General of the state, to institute a proceeding like this, in the name or on the relation of the state, or in his own name. It is proper here to say that the petitioners have precedents for such proceedings; but in none of those cases was the question raised or passed upon, and it appears to have here escaped the attention of counsel and of the court. In the one case in which the question was passed upon—which was a case identical with the one at bar—Brickell, C. J., we think properly, held that suits like the one at bar could only be instituted on the relation of the Attorney General. See *Ex parte State* (In re Stephenson) 113 Ala. 85, 21 South. 210. In this case that learned judge said: "Whether the state has an interest in the vacation of the order made in a criminal case by a court of competent jurisdiction, or whether there shall be a prohibition of the exercise of jurisdiction, or any other remedial writ prosecuted by the state, at all times a matter of more or less gravity, the law commits to the judgment and discretion of the Attorney General, and, when he proceeds, he must proceed in the name of the state."

This question was raised in the court below, and is jurisdictional; and although the trial court seems to have based its order upon another ground, yet the judgment and or-

der was correct, and cannot be reversed for that reason.

The judgment is affirmed.

TYSON, C. J., and SIMPSON and DENSON, JJ., concur.

On Rehearing.

PER OURIAM. Section 636 of the Code of 1907, of Alabama authorizes the Attorney General to institute and prosecute, in the name of the state, all suits and other proceedings, at law or in equity, necessary to protect the rights and interests of the state. As stated in the former opinion, we know of no other law authorizing any other person or officer to institute suits or proceedings in the name of the state. The solicitor is not only authorized, but it is made his duty, to prosecute suits in the name of the state; but he is given no such general authority to institute such suits. It is true that the solicitors, in their respective circuits, are authorized to institute certain specified actions to recover certain designated penalties; but the authority in such cases is limited and does not cover the proceeding in question. It is clearly shown to be the policy of the state to prevent and prohibit prosecutions from being instituted in the name of the state by the solicitors. Section 7793 of the Criminal Code makes it a criminal offense for any solicitor to commence a prosecution for any criminal offense by his own affidavit, except where such offense is against his person or property or consists in a violation of a revenue law. The policy of the law is a question exclusively for the Legislature or lawmaking power, and not for the courts. We can only construe, expound, or apply the law.

As was stated in the former opinion in this case, the petitioners had precedent for instituting this prosecution in the manner in which it was done; but the exact question involved in this case has been passed upon but once before by this court, and that was in the case upon which the former opinion was based. In re Stephenson, 113 Ala. 95, 21 South. 210. While the case of *Benners v. State*, 124 Ala. 97, 28 South. 942, does decide that solicitors, being the prosecuting officers of the state, are proper relators in the bringing of an application for mandamus, that opinion, like all others, must, of course, be limited to the case under consideration. That was an application for mandamus to compel a justice of the peace to issue a warrant—to perform a purely ministerial act. The statute at that time in force, and under which the application was brought, made it the duty of a justice of the peace to issue a warrant upon affidavit made as prescribed by law. He had no judicial discretion in the matter. The affiant in that case, being the party interested, might have applied for mandamus to compel the performance of that ministerial duty, as distinguished from a judicial func-

tion. Consequently that case, as well as other cases referred to in the former opinion as precedents, is clearly distinguishable from the case at bar, and from that of *In re Stephenson*, supra, upon which this decision is based.

As stated in the former opinion, the circuit judge may have assigned the wrong reasons; but he reached the correct conclusion, and his action must therefore be affirmed.

The application for a rehearing is overruled.

MEMORANDUM DECISIONS.

ANDERSON v. STATE. (Supreme Court of Alabama. Dec. 17, 1908.) Appeal from Circuit Court, Clarke County; John T. Lackland, Judge. Wilson & Aldridge, for appellant. Alexander M. Garber, Atty. Gen., for the State.

ANDERSON, J. Errors complained of are without merit, and there is no other error in the record, and the judgment is affirmed.

BEMISH & MEYER v. LOUISVILLE & N. R. CO. (Supreme Court of Alabama. Feb. 11, 1909.) Appeal from City Court of Selma; J. W. Mabry, Judge. A. D. Pitts, for appellant. Mallory & Mallory, for appellee.

PER CURIAM. Appeal dismissed by appellant.

BIRMINGHAM RY., LIGHT & POWER CO. v. CHASTAIN. (Supreme Court of Alabama. Dec. 17, 1908.) Appeal from City Court of Birmingham; Charles A. Senn, Judge. Tillman, Grubb, Bradley & Morrow, for appellant. Bowman, Harsh & Beddow, for appellee.

PER CURIAM. Appeal dismissed by agreement of parties.

BIRMINGHAM RY., LIGHT & POWER CO. v. PHILLIPS. (Supreme Court of Alabama. Jan. 21, 1909.) Appeal from City Court of Birmingham; Charles A. Senn, Judge. Tillman, Grubb, Bradley & Morrow, for appellant. Bowman, Harsh & Beddow, for appellee.

PER CURIAM. Dismissed by agreement of counsel in writing on file.

BIRMINGHAM RY., LIGHT & POWER CO. v. VAUGHAN. (Supreme Court of Alabama. Dec. 17, 1908.) Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge. Tillman, Grubb, Bradley & Morrow, for appellant. Gaston & Pettus, for appellee.

PER CURIAM. Appeal dismissed by appellant.

CAMPBELL v. STATE. (Supreme Court of Alabama. Dec. 17, 1908.) Appeal from Circuit Court, Chilton County; W. W. Pearson, Judge. J. O. Middleton, for appellant. Alexander M. Garber, Atty. Gen., for the State.

ANDERSON, J. Under the facts in this case the question of the guilt of defendant should not have been submitted to the jury. Reversed and remanded.

FABIN v. STATE. (Supreme Court of Alabama. Feb. 11, 1909.) Appeal from Circuit Court, Covington County; H. A. Pearce, Judge. Alexander M. Garber, Atty. Gen., for the State.

PER CURIAM. Appeal abated by death of the appellant.

FLETCHER v. RILEY. (Supreme Court of Alabama. Feb. 4, 1909.) Appeal from Circuit Court, Covington County; H. A. Pearce, Judge.

PER CURIAM. Affirmed on certificate.

Ex Parte FRANKLIN & CO. (Supreme Court of Alabama. Jan. 14, 1909.) D. H. Riddle, for petitioner. B. B. Bridges, G. A. Sorrell, and C. C. Whitson, for respondent.

PER CURIAM. Petition for mandamus to Hon. S. L. Brewer, judge of the Fifth judicial circuit, and the circuit court of Coosa county. It is not shown by this application that the judge of the Fifth judicial circuit is in default with respect to the matters alleged in the application, and rule nisi is denied.

GASTON et al. v. SAVAGE et al. Supreme Court of Alabama. Dec. 17, 1908.) Appeal from Chancery Court, Conecuh County; L. D. Gardner, Chancellor. James F. Jones, for appellants. Hamilton & Crumpton, Stallworth & Burnett, and J. A. Stallworth, for appellees.

McCLELLAN, J. Affirmed, upon the authority of *Savage v. Bradley*, 149 Ala. 169, 43 South. 20.

GIBBONS v. WESTERN UNION TELEGRAPH CO. (Supreme Court of Alabama. Feb. 4, 1909. Rehearing denied April 6, 1909.) Appeal from Circuit Court, Autauga County; W. W. Pearson, Judge. Ballard & Thomas, for appellant. Rushton & Coleman, for appellee.

DOWDELL, J. Under the averments and complaint of the proof in this case, plaintiff was entitled to recover only the price paid for the sending of the telegram. Affirmed.

GIBSON v. CITY OF TROY. (Supreme Court of Alabama. Jan. 19, 1909.) Appeal from Circuit Court, Pike County; H. A. Pearce, Judge. D. A. Baker, for appellant.

PER CURIAM. Appeal dismissed on motion of appellee.

GODDARD v. STATE. (Supreme Court of Alabama. Dec. 17, 1908.) Appeal from Criminal Court, Jefferson County; A. C. Howze, Judge. Alexander M. Garber, Atty. Gen., for the State.

TYSON, C. J. There is no bill of exceptions, and no error appearing of record, and the judgment is affirmed.

HAIREL v. GRAVES et al. (Supreme Court of Alabama. Jan. 15, 1909.) Appeal from Probate Court, De Kalb County; James A. Corley, Judge. Howard & Hunt, for appellees.

PER CURIAM. Affirmed on certificate.

HENDERSON v. WILSON. (Supreme Court of Alabama. Jan. 21, 1909.) Appeal from Coffee County Court; H. H. Blackmon, Judge.

PER CURIAM. Affirmed on certificate.

LAWSON v. LAWSON. (Supreme Court of Alabama. Dec. 24, 1908.) Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge. Allan & Bell, for appellant.

PER CURIAM. Appeal dismissed on motion of appellant.

Ex parte McKINLEY. (Supreme Court of Alabama. Feb. 2, 1909.) W. R. Walker, for petitioner. W. H. Simpson, pro se.

PER CURIAM. Petition for mandamus, directed to Hon. W. H. Simpson, chancellor of the Northern division of the state of Alabama. Petition dismissed.

McMILLAN et al. v. CITY OF BIRMINGHAM. (Supreme Court of Alabama. Nov. 26, and Dec. 17, 1908.) Appeal from Criminal Court, Jefferson County; A. C. Howze, Judge. John T. Glover, for appellant.

PER CURIAM. Prosecution for violating a city ordinance. Affirmed, on motion of appellee, for want of assignment of error. Motion to set aside judgment of affirmance denied.

MITCHUM et al. v. BOUTWELL. (Supreme Court of Alabama. Jan. 19, 1909.) Appeal from Circuit Court, Coffee County; H. A. Pearce, Judge. J. F. Sanders, for appellants. Claud Riley, for appellee.

PER CURIAM. Errors confessed, judgment reversed, and cause remanded.

MURDOCK & STANLEY v. MARTIN. (Supreme Court of Alabama. Jan. 14, 1909.) Appeal from Geneva County Court; P. N. Hickman, Judge. W. O. Mulky, for appellant. J. F. Johnson, for appellee.

PER CURIAM. Appellee confesses error, and judgment rendered by consent for defendant.

NORRIS et al. v. NORRIS. (Supreme Court of Alabama. Feb. 9, 1909.) Appeal from City Court of Selma; J. W. Mabry, Judge. Pettus, Jeffries & Pettus, for appellants. Daniel Partidge, Jr., for appellee.

PER CURIAM. Appeal dismissed.

SANFORD v. CLARK. (Supreme Court of Alabama. Dec. 17, 1908.) Appeal from Circuit Court, Autauga County; W. W. Pearson, Judge. C. E. O. Timmerman and Gunter & Gunter, for appellant. Z. Abney and Ballard & Thomas, for appellee.

DOWDELL, J. Action for penalty for failure to enter satisfaction on margin of mortgage record. The only questions presented being those that can be presented by bill of exceptions, and the bill of exceptions not having been signed within the time allowed by law, the judgment is affirmed.

SLOSS-SHEFFIELD STEEL & IRON CO. v. STATE. (Supreme Court of Alabama. Feb. 4, 1909.) Appeal from Circuit Court, Lauderdale County; C. P. Almon, Judge. Tillman, Grubb, Bradley & Moore and George P. Jones, for appellant. Mitchell & Hughston, for the State.

PER CURIAM. Reversed and rendered as per agreement.

SMITH et al. v. TERRY. (Supreme Court of Alabama. Jan. 19, 1909.) Appeal from Chancery Court, Coffee County; W. L. Parks, Chan-

cellor. M. Solle, for appellants. J. F. Sanders, for appellee.

PER CURIAM. Appeal dismissed at cost of appellants.

STATE v. HARDAGE. (Supreme Court of Alabama. Dec. 17, 1908.) Alexander M. Garber, Atty. Gen., for the State. F. B. Bricken and Powell, Hamilton & Lane, for appellee.

DOWDELL, J. The appeal is taken by the state from the order of the chancellor admitting petitioner to bail. We are not prepared to say that the chancellor erred in allowing petitioner to bail. Affirmed.

WALLACE et al. v. JOHN SILVEY & CO. (Supreme Court of Alabama. Jan. 14, 1909.) Appeal from Chancery Court, Cleburne County; W. W. Whiteside, Chancellor.

PER CURIAM. Affirmed on certificate.

WHORTON v. C. C. HENDERSON MACH. CO. (Supreme Court of Alabama. Jan. 21, 1909.) Appeal from Circuit Court, Conecuh County; J. C. Richardson, Judge. Action by the C. C. Henderson Machine Company against W. K. Whorton. From a judgment for plaintiff, defendant appealed. Affirmed. Stallworth & Burnett and James A. Stallworth, for appellant. Hamilton & Crumpton, for appellee.

ANDERSON, J. Waiving consideration of any of the rulings of the court upon the pleading, it appears that the defendant got the benefit of everything that he could have gotten under his special plea 2 and the rejoinder to the defendant's second replication, as all of the evidence excluded by the trial court was either without injury or was not admissible under the pleas or rejoinder. Nor did the trial court err in giving the general charge as to the purchase price of the boiler, and the judgment of the circuit court is affirmed.

TYSON, C. J., and DOWDELL and McCLELLAN, JJ., concur.

WINZERLING et al. v. MATTHEWS. (Supreme Court of Alabama. Jan. 21, 1909.) Appeal from Chancery Court, Mobile County; Thomas H. Smith, Chancellor. Sullivan & Stallworth, for appellants. L. H. & E. W. Faith, for appellee.

ANDERSON, J. Affirmed on the finding of the facts.

BROOME v. STATE. (Supreme Court of Florida. Oct. 6, 1908.) In Banc. Error to Circuit Court, Alachua County; James T. Wills, Judge. W. H. Ellis, Atty. Gen., for the State.

PER CURIAM. This action was brought by the defendant in error against the plaintiff in error. There was judgment for the plaintiff, and the defendant takes writ of error. Writ of error dismissed on motion of the Attorney General, counsel for the defendant in error.

FOGGARTY v. A. E. MASSMAN BROS. & CO. (Supreme Court of Florida. Dec. 19, 1908.) In Banc. Error to Circuit Court, Monroe County; Joseph B. Wall, Judge. W. Hunt Harris, for defendants in error.

PER CURIAM. This action was brought by the defendants in error against the plaintiff in error. There was judgment for the plaintiff, and the defendant takes writ of error. Writ of error dismissed on motion of counsel for the defendants in error.

FOGGARTY v. CORDERO. (Supreme Court of Florida. Dec. 19, 1908.) In Banc. Error to Circuit Court, Monroe County; Joseph B. Wall, Judge. W. Hunt Harris, for defendant in error.

PER CURIAM. This action was brought by the defendant in error against the plaintiff in error. There was judgment for the plaintiff, and the defendant takes writ of error. Writ of error dismissed on motion of counsel for the defendant in error.

FOGGARTY v. CURRY. (Supreme Court of Florida. Dec. 19, 1908.) In Banc. Error to Circuit Court, Monroe County; Joseph B. Wall, Judge. W. Hunt Harris, for defendant in error.

PER CURIAM. This action was brought by the defendant in error against the plaintiff in error. There was judgment for the plaintiff, and the defendant takes writ of error. Writ of error dismissed on motion of counsel for the defendant in error.

FOGGARTY v. TROST BROS. (Supreme Court of Florida. Dec. 19, 1908.) In Banc. Error to Circuit Court, Monroe County; Joseph B. Wall, Judge. W. Hunt Harris, for defendant in error.

PER CURIAM. This action was brought by the defendant in error against the plaintiff in error. There was judgment for the plaintiff, and the defendant takes writ of error. Writ of error dismissed on motion of counsel for the defendant in error.

HOLT, Tax Collector, v. DE LOACH-EDWARDS CO. (Supreme Court of Florida, Division A. Dec. 19, 1908.) Appeal from Circuit Court, Clay County; Rhydom M. Call, Judge. W. H. Baker and G. W. Geiger, for appellant. E. J. L'Engle, for appellee.

PER CURIAM. The bill in this cause was filed by the appellee against the appellant. There was an order for the complainant, and the defendant appeals. Order affirmed, upon the authority of the case of *E. N. Holt as Tax Collector, etc., v. Hillman-Sutherland Company et al.* (decided this day) 47 South. 934.

JOHNSON v. STATE. (Supreme Court of Florida. Jan. 8, 1909.) In Banc. Error to Criminal Court of Record, Escambia County; E. D. Beggs, Judge. W. H. Ellis, Atty. Gen., for the State.

PER CURIAM. This action was brought by the defendant in error against the plaintiff in error. There was judgment for the plaintiff, and the defendant takes writ of error. Writ of error dismissed on motion of the Attorney General, counsel for the defendant in error.

LASSETER et al. v. ZAPP et al. (Supreme Court of Florida. Oct. 6, 1908.) In Banc. Appeal from Circuit Court, Dade County; Minor S. Jones, Judge. M. C. Jordan, for appellees.

PER CURIAM. The bill in this cause was filed by the appellants against the appellees. There was decree for the defendants, and the complainants appeal. Appeal dismissed on motion of counsel for the appellees.

LINDSLEY et al. v. McIVER et al. (Supreme Court of Florida. July 14, 1908.) In Banc. Appeal from Circuit Court, Duval County; Rhydom M. Call, Judge. A. H. King, for appellants. D. H. Doig and Stephen E. Foster, for appellees.

PER CURIAM. The bill in this cause was filed by the appellees against the appellants. There was decree for the complainants, and the defendants appeal. Appeal dismissed on motion of counsel for the appellees. See also 48 South. 628.

LOWE v. STATE. (Supreme Court of Florida. Oct. 6, 1908.) In Banc. Error to Circuit Court, De Soto County; Joseph B. Wall, Judge. W. H. Ellis, Atty. Gen., for the State.

PER CURIAM. This action was brought by the defendant in error against the plaintiff in error. There was judgment for the plaintiff, and the defendant takes writ of error. Writ of error dismissed on motion of the Attorney General, counsel for the defendant in error.

MEARS v. STATE. (Supreme Court of Florida. June 23, 1908.) In Banc. Error to Circuit Court, Dade County; Minor S. Jones, Judge. W. H. Ellis, Atty. Gen., for the State.

PER CURIAM. This action was brought by the defendant in error against the plaintiff in error. There was judgment for the plaintiff, and the defendant takes writ of error. Writ of error dismissed on motion of the Attorney General, counsel for the defendant in error.

MILTON et al. v. McKINNON. (Supreme Court of Florida. Dec. 4, 1908.) In Banc. Error to Circuit Court, Jackson County; J. Emmev Wolfe, Judge. W. B. Farley, for plaintiffs in error.

PER CURIAM. This action was brought by the plaintiffs in error against the defendant in error. There was judgment for the defendant, and the plaintiffs take writ of error. Writ of error dismissed on præcipe of counsel for plaintiffs in error.

OSBORNE v. STATE. (Supreme Court of Florida. July 7, 1908.) In Banc. Error to Circuit Court, Dade County; Minor S. Jones, Judge. W. H. Ellis, Atty. Gen., for the State.

PER CURIAM. This action was brought by the defendant in error against the plaintiff in error. There was judgment for the plaintiff, and the defendant takes writ of error. Writ of error dismissed on motion of the Attorney General, counsel for the defendant in error.

THOMAS v. STATE. (Supreme Court of Florida. Nov. 24, 1908.) In Banc. Error to Circuit Court, Alachua County; James T. Wills, Judge. W. H. Ellis, Atty. Gen., for the State.

PER CURIAM. This action was brought by the defendant in error against the plaintiff in error. There was judgment for the plaintiff, and the defendant takes writ of error. Writ of error dismissed on motion of the Attorney General, counsel for the defendant in error.

(95 Miss. 251)

SLAUGHTER v. MERIDIAN LIGHT & RY. CO. (No. 13,230.)

(Supreme Court of Mississippi. May 10, 1909.)

EMINENT DOMAIN (§ 100*)—STREET RAILROADS—USE OF STREETS—DAMAGES TO ADJUTING OWNER.

A street railway company, constructing and operating a street railway in the center of a 23-foot roadway of a street, and thereby leaving but 2 inches of space between the body of the cars and the hubs of an ordinary standard wagon, destroys the use of the street for all purposes excepting the use for cars, and seriously interferes with the ingress to and egress from abutting property; and one owning substantially a block abutting on the street may recover the special damages sustained, though it be assumed that a street railway in a street does not impose an additional servitude.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 259; Dec. Dig. § 100.*]

Mayes, J., dissenting.

Appeal from Chancery Court, Lauderdale County; J. L. McCaskill, Chancellor.

"To be officially reported."

Suit by Mrs. McKie Slaughter against the Meridian Light & Railway Company. From a decree dismissing the bill, complainant appeals. Reversed and remanded on suggestion of error.

G. Q. Hall, Hall & Jacobson, for appellant. Miller & Baskin, for appellee.

WHITFIELD, C. J. Twelfth avenue, the one involved in this litigation, as shown in the original opinion, is only 40 feet wide from property line to property line. The sidewalk on one side is 8 feet wide, and the sidewalk on the other side is 9 feet wide, leaving a space for the street proper of only 23 feet, down the center of which the railway company laid its line. The electric car occupies a space of 8 feet in the center of the street, leaving a space of about 6 feet 2 inches between the body of the car and the curb. A standard-gauge wagon is shown by the evidence to be about 6 feet from the outer edge of the hubs to the outer edge of the hubs, and thus there is left a space of about only 2 inches between the car and a wagon when passing each other on the street. Mrs. Slaughter owns an entire block abutting on this street, except about 72 feet owned by another party; Mrs. Slaughter's frontage being about 217 feet on this avenue. On the 12th of July, 1906, Mrs. Slaughter filed a bill in the chancery court, seeking to restrain the railway company from operating its road on Twelfth avenue until the company had compensated her for the damage done her property by the street railway, and, further, for damage claimed for certain excavations alleged to have been made by the company. This last claim for damages may be laid out of view, since, according to the testimony, it is not shown that these excavations had actually been made by the electric railway company.

This simple statement, showing there are but 2 inches of space between the body of the car and the hub of an ordinary standard wagon, demonstrates beyond any cavil the fact that the laying of this street railway in this avenue in this manner practically destroys the use of the avenue for all purposes except this street car use, and that consequently the construction of this street railway in this avenue, under the case made by the facts recited above, is a nuisance, seriously interfering with the ingress to and egress from the property of the appellant, inflicting upon her, therefore, special damages, for which she has, under the general principles of the law, a right to recover. The chancellor was in error in holding, on these facts, that the appellant was not entitled to recover these special damages. "*Res ipsa loquitur*." The situation speaks for itself. The distinction to be observed here is between the use of a street and the abuse of it. The construction of this electric street railway in this avenue, leaving but 2 inches of space, destroying in effect all other use of the street than that use the street railway could have, was a grossly improper construction of the said railway. If it should be conceded that the laying of an electric street railway, generally and ordinarily, in the streets of a city, is not the imposition of a new servitude, and is a legitimate use of a street, it does not at all follow from this concession that such a railway may be laid in a street where the consequence is the destruction of all other use of the street, except that by said street railway. The width or narrowness of the street is a very important consideration in determining, in this view, whether an abutter suffers special injury from the construction of such railway; but in the view as to whether, generally and ordinarily, the laying of an electric street railway in the street of a city is a new servitude, the width or narrowness of any street is wholly immaterial. However legitimate a use of the streets of a city by an electric railway may ordinarily be, and however clear it may be that such laying of an electric street railway in the streets of a city ordinarily does not impose any new servitude, it is just as clear that such electric street railway cannot be laid in a street where the result is the absolute destruction of the use of said street by all others than said street railway. In other words, it is plainly, in such case, an abuse of a legitimate use, which, if inflicting special damages, must give a right to recover such damages on the general principles of the law.

We do not think, upon mature reflection, that the question whether the laying of an electric street railway in the streets of a city, ordinarily and as they are generally laid, is the imposition of a new servitude, is presented for decision by this record. The

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

only question properly and necessarily presented for decision in this case is simply whether this appellant has sustained such special damages by serious interference with ingress and egress to and from her lot, by the proper construction of this railway, as entitled her to recover, even if it were granted that the laying of such electric street railway in this street did not impose an additional servitude. Because it may be clear, according to the authorities, that the laying of a street railway in the streets of a city in a proper way, not involving an abuse of the use of the streets, does not impose a new servitude, it does not in any manner follow that the improper laying of a street railway, under circumstances such as are shown in this record, does not constitute an abuse of a legitimate use, amounting to a nuisance, for which the injured abutter may recover such damages as the evidence shows. We are therefore clearly of the opinion, without regard to the question whether the laying of a street railway is ordinarily a new servitude, as to which we now say nothing, since we do not regard it as necessarily presented for decision, that Mrs. Slaughter, the appellant, is entitled to recover special damages in this case.

Wherefore the suggestion of error is sustained to the extent of withdrawing the former opinion (48 South. 6); but the decree of the chancellor is reversed, for the reasons herein indicated above, and the cause remanded.

MAYES, J. (concurring in result only). My view of the law applicable to this case is found in the original opinion. I do not think the suggestion of error ought to be sustained in any particular. The majority opinion makes the same disposition of the particular case as was made by the original opinion, and in so far as it does that I concur in the result, but not in the reason assigned for the reversal. Under section 17 of the Constitution of this state, and adhering to the former construction of this section of the Constitution as announced by this court, it is my view that it must be held that a street railway imposes an additional burden on the streets to the extent of enabling any abutting property owner damaged thereby to recover such damage as he may sustain.

The original opinion (see 48 South. 6) is directed to be set out in the record of this case, containing all authorities I rely on.

(96 Miss. 395)

THOMAS v. YAZOO CITY. (No. 13,705.)

(Supreme Court of Mississippi. May 10, 1909.)

"To be officially reported."

For majority opinion, see 48 South. 821.

WHITFIELD, C. J. (specially concurring). Yazoo City is operating under a special charter granted by the Legislature in 1884 (Laws 1884, p. 566, c. 405). Sections 21 to 30 of that char-

ter show the establishment of a city court, and show the purpose of the Legislature to have been to create within the corporate limits a tribunal, a city court, similar in all respects to justice courts, in the administration of the law. Section 22 of the charter provides: "And the mayor shall have and exercise all the power and jurisdiction of a justice of the peace of said county and also jurisdiction of all causes founded upon the breach or violation of any laws or ordinances of said city. Said mayor, in the exercise of said jurisdiction, shall * * * exercise all power that may be necessary and proper for the performance of his duties, and which a justice of the peace of said county may by law do in like cases." Section 24 provides that all process of the mayor shall be issued and executed in the same manner and subject to the same regulations "that are by law established with regard" to that "of justices of the peace in said county." Section 28 provides that said trials in the mayor's court "shall be conducted according to the practice of the courts of common law, as modified by the statutes of this state." Section 29 provides that any party to a prosecution in the city court may appeal to the circuit court, and "all appeals from said city court to said circuit court shall be subject to the same rules of proceedings, trial and judgment that are by law prescribed in the case of appeals from justices of the peace of said county, to said circuit court." Section 87, Code of 1906, provides: "In all cases of conviction of a criminal offense against the laws of the state, by the judgment of a justice of the peace, or by the mayor or police justice of a city, town, or village, for the violation of an ordinance thereof, an appeal may be taken to the circuit court of the county, which shall stay the judgment appealed from, and the appellant," etc., and, further, that "in the circuit court the case shall be tried anew and disposed of as other cases pending therein."

Notwithstanding these ample provisions, it is insisted by the appellant that section 1762, Code of 1906, can have no application to trials in the city court of Yazoo City, until after a specific ordinance to that end shall have been adopted, even when the case is on trial in the circuit court on appeal from the judgment of the city court. The express provision of section 28 is that trials before the mayor shall be conducted according to the practice of courts of common law, as modified by the statutes of this state, and this provision makes it wholly unnecessary to pass any specific ordinance adopting section 1762, Code of 1906. If that contention be sound, then it would be necessary also to adopt specific ordinances applying each state statute, modifying the practice under the common law, so as to make them available in the mayor's court. This plainly cannot be sound. As shown in the brief of learned counsel for appellee, such a construction as is contended for by learned counsel for appellant in this behalf would require special ordinances adopting a statute permitting a defendant to testify in his own behalf, or the statute permitting a man's wife to testify in his favor, or the statute permitting a witness to be examined touching his conviction of any crime, or the statute limiting prosecutions to two years from date of commencement, and other statutes too numerous to mention. The very purpose of the sections which we have quoted from the charter was to make the practice in the mayor's court just the same as the practice in the courts of common law, modifying such practice from time to time as the statutes of the state modify the practice in the courts of common law. There was no need of any special ordinance adopting section 1762. The charter itself created the court, and itself provided that that court's procedure should be the same as the courts of common law, as modified by the statutes of the state, and this provision as to procedure was ample.

It would be an extremely curious state of the

law if the mayor and council of Yazoo City could regulate the procedure in the circuit court on appeal from the judgments of the mayor's court. There might, in such case, be one mode of procedure provided by the mayor and councilmen, applicable to appeals from the mayor's court, and another set of rules provided by the general law for the trial of cases appealed to the circuit court from the courts of justices of the peace, etc. This confusion was prevented by the provision of section 26, above quoted. Every change in the statute law which modifies the practice in the courts of justices of the peace ipso facto modifies the practice in the city courts, and thus harmony and uniformity of procedure is secured; and this view of the matter seems to have been, from the granting of the charter in 1884, the one which has been practically accepted and acted upon. In McQuillan on Municipal Ordinances, p. 509, par. 326, it is said, citing authorities: "When police justices or municipal judges are invested with the same jurisdiction as justices of the peace or trial justices, the rules of procedure in ordinance cases are the same, unless provision is otherwise made by law."

One of the chief arguments, insisted on with great ability by the learned counsel for appellant, is that section 1762, Code of 1906, cannot be applied to the trial of cases in the mayor's court, because such section creates more than a rule of evidence—in fact, creates a rule of substantive law—and whilst, if it had created a mere rule of evidence, it might, under well-known principles, have been applied to the mayor's court, it cannot be so applied, since it creates a rule of substantive law. In varying forms of expression and with great ingenuity this contention is urged. So far as the procedure in the trial in the mayor's court is concerned, my view is that this section does not create any more than a mere rule of evidence. It is a little difficult to make the meaning of the Legislature clear, since they have most awkwardly added to the body of the section, which relates to nothing but a rule of evidence, matter wholly foreign and alien, to wit, a legislative pardon. In other words, they have, in the most bungling fashion, annexed and tacked onto the body of the statute dealing with the rule of evidence, the last clause of which relates to a legislative pardon, a matter wholly alien to the original purpose and design of the statute, which was merely to provide a rule of evidence. My conception of the purpose of the Legislature can be made plain by supposing section 1762 to be separated into two distinct sections, the first

of which should embrace all but the last clause, and the second of which should embrace the last clause only. Most undoubtedly, then, the first section would create a mere rule of evidence, and the second would create a legislative pardon. In essence they are wholly distinct, the one from the other. Why, then, should the Legislative blunder of putting two things, distinct in essence, in the same section, be held to have the effect of making the statute—undoubtedly one relating to a rule of evidence originally—one creating, not a mere rule of evidence, but a rule of substantive law? My view is that, so far as the conduct of a trial in the mayor's court is concerned, the addition to section 1762 of the last clause about a legislative pardon has no effect whatever in changing the purpose and design of the Legislature, which was plainly to establish a mere rule of evidence. I am therefore of the opinion that section 1762, so far as procedure is concerned, is to be treated as creating a mere rule of evidence, and hence, under well-settled principles, it was applicable to trial in the mayor's court, special charter towns, code chapter towns, and in all courts of justices of the peace, or other courts of the state.

Taking section 28 of the charter of Yazoo City together with section 87, Code of 1906, it is clear that a case appealed from the mayor's court to the circuit court shall be in the circuit court tried just the same as an appeal from the justice of the peace court would have been tried; in other words, the cases from both courts are tried de novo. The contention that section 1762 permits evidence of all sales within the period of the bar of the statute of limitations, merely for the purpose of using other sales than the one on which the party may be convicted as evidence tending to show the guilt of the party as to the sale for which he is convicted, and that this is the whole scope of the section, is unsound. The fact that the section provides a legislative pardon as to all other offenses is a perfect answer to this. The object of the Legislature was to permit the conviction of the defendant on proof of any sale within the bar of the statute, and then, after verdict, since, in the absence of compulsory election on the part of the state, it would be impossible to tell for which sale the defendant had been actually convicted or acquitted, to grant a legislative pardon as to all other sales, so that the defendant might not be twice tried for the same offense.

I have written thus much in order to indicate clearly the view I have in this matter, and of the particular reasons because of which I concur in the judgment of affirmance.

END OF CASES IN VOL. 48.



